

**STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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**SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket No. 2451	Date of Decision: 02/07/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification:	Under DORS Request for Proposals No. R00R4202576
Appellant/Respondent:	TekXtreme, LLC Department of Education

Decision Summary:

Rejection of Bids or Proposals - Rejection of all proposals and cancellation of a solicitation is permissible where the procurement agency reasonably determines that it was fiscally advantageous or otherwise in the best interest of the State to do so.

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**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of TekXtreme,)
 LLC)
)
) Docket No. MSBCA 2451
)
Under DORS Request for)
 Proposal No. R00R4202576)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Dana H. Murray
 Assistant Attorney General
 Baltimore, Maryland**

OPINION BY CHAIRMAN HARRISON

Appellant appeals the denial of its bid protest of the cancellation of the above captioned solicitation.

Findings of Fact¹

1. The Maryland Department of Education, Division of Rehabilitation Services (DORS) offered a Training Program in Information Technology for Individuals with Disabilities at its Workforce and Technology Center under a contract with the Community College of Baltimore County (CCBC) from September 1, 1999 through August 31, 2004.
2. An assistant professor at CCBC was assigned by CCBC as an instructor for the program, and another individual was hired by CCBC as a teaching assistant assigned to the program.
3. In anticipation of the end of this contract, DORS issued the

¹The Findings of Fact are based primarily on the factual assertions in the Agency Report. Because Appellant did not file comment on the Agency Report, and because neither party requested a hearing, such assertions have not been challenged.

above captioned Request for Proposals (RFP) seeking offers from vendors to conduct the training under a new contract.

4. DORS received five bids. However, only three bidders were deemed reasonably susceptible for the award pursuant to COMAR 21.06.02.05B. The technical proposals from these three vendors were submitted to an evaluation committee selected by DORS.
5. The Procurement Officer, after receiving the evaluations, observed and was concerned that the proposal from CCBC, the incumbent contractor, and the proposal from Appellant each offered as key personnel the instructor and teaching assistant mentioned in Finding of Fact No. 2 above.
6. The Procurement Officer was also concerned about the virtual identical evaluations of the proposals of CCBC and Appellant with respect to several evaluation factors. Upon inquiry, he found that the members of the evaluation committee had worked closely with the two aforementioned individuals who were listed as key personnel in both proposals.
7. The Procurement Officer then submitted the proposals of Appellant and CCBC to two additional evaluators for scoring. These evaluators were not familiar with the training program or the two individuals who had been proposed as key personnel in each of these two proposals. These two evaluators scored one of the proposals much higher than the other regarding the factors where the previous evaluators had meted out identical evaluation scores.
8. Based upon what the Procurement Officer believed were irregularities as discussed above in both proposals and the evaluation process, and after consultation with counsel and an Assistant State Superintendent of Schools concerning the RFP, it was determined that it was in the State's best interest that the RFP should be cancelled.

9. Notices of the cancellation were mailed out on August 30, 2004, and the unopened price proposals were returned to the offerors.
10. After further consultation, DORS also decided to extend the existing contract with CCBC until October 31, 2004 and to proceed with entering into a Memorandum of Understanding (MOU) with CCBC to provide the services prior to the new semester and to facilitate greater course flexibility. DORS and CCBC entered into the MOU on November 16, 2004.
11. Appellant filed a protest of the cancellation of the RFP on November 23, 2004.
12. On December 7, 2004, DORS denied the protest on the basis that the cancellation was in the best interest of the State. On December 22, 2004, Appellant filed the instant appeal with the Board.

Decision

The issue for this Board to determine is whether DORS had a rational basis to conclude it was in the State's best interest to cancel the solicitation. The RFP expressly warned bidders that "DORS may cancel this RFP, in whole and in part or reject all proposals submitted if this action is determined to be fiscally advantageous or otherwise in the State's best interest." RFP, Section 5.3. Likewise, COMAR provides for the rejection of all bids or proposals even after the opening of the bids or proposals when the appropriate Department head or designee "determines that this action is fiscally advantageous or otherwise in the State's best interest." COMAR 21.06.02.02.C. *See also Section 13-216 of the State Finance and Procurement Article of the Annotated Code of Maryland.*

This Board has recognized the discretion vested in State

agencies to make a decision to cancel a solicitation:

In making the determination concerning whether the Secretary's decision was otherwise in the best interest of the State, we are mindful that the Board's scope of review of the decision is a narrow one and that we may disturb that decision only upon finding that a decision was not in the best interest of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust.

Automated Health Systems, Inc., MSBCA 1263, 2 MSBCA ¶113 (1985) at pp. 12-13. See also Kennedy Personnel Services, MSBCA 2425, 6 MSBCA _____ (October 15, 2004).

Appellant alleges in its appeal that a "prior relationship" between the Assistant State Superintendent who participated in the determination to cancel the procurement and a Dean at CCBC evidences a bias in favor of CCBC that led to an alleged telephone conversation on or about August 26, 2004 between the Assistant State Superintendent and the Dean in which the decision to cancel the procurement and enter into the MOU was made.

A protestor alleging bias "bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with specific and malicious intent to injure the protestor." Calso Communications, Inc., MSBCA 1377, 2 MSBCA ¶185 (1988) at p. 10 (*citing* The Aeronetics Division of AAR Brooks & Perkins, B-222516, B-222791, August 5, 1986, 86-2 CPD ¶151). "Bias must be demonstrated to exist by substantive hard facts or evidence." Benton & Associates, MSBCA 2196, 5 MSBCA ¶487 (2000) at p. 6. The record is devoid of evidence suggesting that the decision to cancel the RFP was driven by bias for or against Appellant or CCBC. Appellant's allegations about an alleged telephone conversation between the Assistant State Superintendent

and the CCBC Dean that it asserts occurred on or about August 26, 2004 does not provide the "proof" needed to show bias.

The record reflects a rational basis for DORS's decision to cancel, i.e., reject all proposals based on concern that the procurement was flawed as discussed above in Findings of Fact Nos. 5-8, *supra*. The record further reflects that the subsequent determination by DORS to provide the services through an MOU with CCBC also has a rational basis. Accordingly, the appeal is denied.

Wherefore it is Ordered this day of February, 2005 that the appeal is denied.

Dated:

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2451, appeal of TekXtreme, LLC under DORS Request for Proposals No. ROOR4202576.

Dated:

Michael L. Carnahan
Deputy Recorder