

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
6 St. Paul Street
Suite 601
Baltimore, Maryland 21202-1608
Telephone: (410) 767-8228
Toll Free Telephone: 1-800-827-1135

SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2499	Date of Decision: 12/12/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification:	WIC Investigative Services DHMH-OCPMP-06-8893
Appellant/Respondent:	Stronghold Security, LLC Department of Health and Mental Hygiene

Decision Summary:

Discretion of Agency to Reject All Bids and Cancel Solicitation - State agencies hold great discretion in deciding whether to reject all bids and cancel a solicitation. In such cases, the appellant bears the burden of proof in showing that an agency decision was not in the best interest of the State of Maryland to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust.

Bias - A protestor alleging bias by an agency bears a heavy burden of proof in such cases - it must offer virtually irrefutable proof that an agency acted with specific and malicious intent to injure the protestor.

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designated as the State WIC Agency for Maryland and is responsible for the statewide administration of the Special Supplemental Nutrition Program for Women, Infants, and Children.

3. WIC is a program substantially funded by the United States Government.
4. The purpose of the WIC program is to provide supplemental foods and nutrition education through local agencies at no cost to eligible persons.
5. The State WIC Agency provides these supplemental foods to WIC participants through retail food stores, pharmacies, and combination food store/pharmacies that have received authorization from the State WIC Agency, issuing food instruments for specific types and amounts of foods prescribed for each WIC participant.
6. On June 21, 2005, the Department issued an Invitation for Bids (IFB) titled WIC Investigative Services DHMH OCPMP 06-8893.
7. This IFB was a Small Business Reserve Procurement for which award was to be limited to Certified Small Business Vendors. Only businesses meeting the statutory requirements of State Finance and Procurement Article, Annotated Code of Maryland, §14-501 - 14-505 that were registered with the Department of General Services Small Business Reserve Program were eligible for award of the contract.
8. The purpose of the IFB was to obtain services to monitor and ensure proper use of WIC instruments through a contractor which was to provide compliance

investigative services of, and onsite reviews for, WIC authorized vendors.

9. The IFB defined a one-year base contract term and three one-year option year terms with an anticipated start date of September 1, 2005 and potential continuation through August 31, 2009.
10. The Bid Page for each period consisted of four parts reflecting a financial model for the bids.
11. The first part of each term listed each Maryland county with an estimated number of buys, providing for the bidder to insert its price, and calculate both a county total and a combined Maryland total.
12. The second part dealt with on-site reviews and also provided an estimated number of reviews and required county-by-county pricing, with a combined Maryland total for the on-site reviews.
13. The third part dealt with out-of-state buys and followed the same formula, identifying an estimated number of buys per year for each of several localities in Delaware, Pennsylvania, Virginia, the District of Columbia, and West Virginia. The price was again to be calculated by county with a combined total for out-of-state-buys.
14. The fourth part requested pricing, per hour, for an estimated 24 hours of court appearances regarding possible litigation relating to the results of the conducted investigations.
15. A total bid price for the base contract term and each option was to be calculated combining the total for Maryland compliance buys and on-site reviews with the combined out-of-state and court appearance totals.

16. The IFB provided that the total bid price for the Base Contract Term and all option years would be used only for price evaluation, comparison and selection for recommendation for award - the basis for award being the lowest responsive and responsible bidder.
17. A pre-bid conference was held on June 29, 2005. Several potential vendors, including Appellant Stronghold Security, LLP (Appellant) were in attendance along with several Department staff persons.
18. Several questions were raised at the pre-bid conference regarding the requirement for out-of-state licensing, with potential bidders indicating that they did not have such licenses and inquiring as to how to deal with this issue.
19. In response to another question regarding the caseload, the Department indicated that it varies between 10-15 per month, with a floor of 7 cases.
20. A \$99,044.00 price that was also given in response to a question was later clarified in an attachment to Addendum #2 as applying to the entire three years of the previous contract.
21. As a result of the questions at the pre-bid conference and subsequent review, an Addendum was issued on July 6, 2005, deleting the requirements relating to out-of-state licensing and directing that any reference to out-of-state buys in the IFB should be disregarded.
22. A second Addendum was issued on July 25, 2005, extending the bid submission date to August 5, 2005.

23. Four bids were received and publicly opened on August 5, 2005 (a fifth bid was subsequently received and opened - the bid having arrived in an acceptable and timely fashion). The four bids were initially ranked on the bid tabulation form based on the base term price for the combined Maryland buys.
24. Appellant's price was the second highest received of the five bids.
25. Upon initial review, it appeared that of the bids which were lower priced than Appellant's, two were non-responsive as having failed to follow the bid requirements as amended by Addendum #1, including pricing for out-of-state services despite the deletion of such services by Addendum #1 (this was also true of the later-received bid which was higher than Appellant's). The third lower-priced bid was also reviewed and was preliminarily concluded to be nonresponsive given the total bid price.
26. It initially appeared that Appellant was the low bidder and it was notified of this fact - with the caveat that this finding was not yet official.
27. Upon review by the program and procurement staff, however, it was determined that all of the bids received, including Appellant's, were well above the expected costs for the contract.
28. Analysis determined that the number of transactions (compliance buys and on-site reviews) had been significantly overestimated in the IFB. The question response in the pre-bid conference had suggested 10-15 buys per month, or up to 180 per year, while the estimated transactions in the bid pages were a total

of 559 transactions (385 compliance buys and 174 on-site reviews).

29. Further investigation revealed that the actual buys during 2004 actually numbered 102 (34 cases averaging 3 buys each), with an estimate for 2005-06 of 175.
30. The result was that all of the bid prices, including Appellant's, were determined by the Department to be well over the previous year's actual expenditures and also exceeded the estimated costs and authorized expenditure levels for the anticipated contract.
31. Based upon this finding of a significant inaccuracy in the numbers used in the model quantities on the bid pages in the IFB, the Department concluded that it was in the best interest of the State for the solicitation to be reissued with corrected estimated transaction numbers which would more accurately reflect the anticipated requirements under the contract.
32. No official action was taken regarding the rank or status of any of the initial bidders to the IFB.
33. Letters were sent to all of the bidders on August 24, 2005, advising them that "due to unanticipated specification changes, all bids submitted as a result of the [IFB] are officially rejected." Bidders were also advised that a new solicitation would be issued.
34. Appellant received its letter regarding the rejection of all bids on September 1, 2005 and filed a timely protest which was received by the Procurement Officer, Sharon R. Gambrill (Procurement Officer), on September 6, 2005.

35. In its protest, Appellant alleged that it had been "treated unfairly" and objected to the manner of the evaluation. Secondly, Appellant took issue with the need to respond to a resolicitation alleging that Appellant would suffer an unfair penalty having invested time and materials and believing that its "initial bid was outstanding".
36. The Procurement Officer denied Appellant's protest by a letter dated September 6, 2005. In that letter, the Procurement Officer indicated the specific reason that all the bids had been rejected - i.e. that "the number of visits were estimated too high and as a result all bids were too high." She further advised that the bids were rejected in accordance with the requirements of Maryland procurement regulations, specifically citing the provisions of the Code of Maryland Regulations (COMAR) section permitting the rejection of all bids in situations where "proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable", and where "all otherwise acceptable bids or proposals received are at unreasonable prices".
37. The Procurement Officer further advised Appellant that there had been no unfair or unequal treatment of any bidder.
38. Appellant timely appealed the denial of its protest by the Procurement Officer to the Maryland State Board of Contract Appeals (Board) on September 15, 2005.
39. The appeal was heard by the Board on November 2, 2005. Testifying for the Appellant was Mr. Gary R. Williams, President of Appellant. Testifying for

Respondent were Mr. James A. Butler, Chief of Compliance for the Office of the Maryland WIC Program, and the Procurement Officer.

DECISION

Appellant contends that it should have "been given a chance to perform the contract, having been considered the lowest bidder." Hearing Transcript at p.4. Respondent argues that the case centers on whether the Department "made a rational decision to reject all the bids in this Invitation for Bids." Hearing Transcript at p.5.

The issue is whether the Department properly exercised its discretion to determine that concluding the initial procurement and resoliciting was fiscally advantageous to - or otherwise in the best interests of - the State of Maryland. Appellant argues that it was treated unfairly and takes issue with the cancellation and resolicitation of the contract.

For the reasons that follow, the Board finds in favor of the Respondent and will deny Appellant's Appeal.

The Code of Maryland Regulations (COMAR) provides in 21.06.02.02C. that:

C. Rejection of All Bids or Proposals.

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interests. Reasons for the rejection of all bids or proposals include but are not limited to:

(a) The absence of a continued need for the procurement;

(b) The State agency no longer can reasonably expect to fund the procurement;

(c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;

(d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

(e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;

(f) Bids received indicate that the needs of the State Agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or

(g) All otherwise acceptable bids or proposals received are at unreasonable prices.

This Board has consistently and repeatedly held that this language gives wide discretion to State agencies to reject all bids and 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 a 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 No. 1883, 2 MSBCA ¶113 (1985) at pp. 12-13.

The Procurement Officer determined that there were significant flaws in this IFB solicitation. For example, there was a finding that there was a significant overestimation of the volume of work to be involved in performing the contract. The Procurement Officer found that

the use of a model including far more buys than could be expected to occur was unfair to bidders as it could well mislead potential bidders as to the extent of the work involved and could, therefore, impact their bid pricing. The resulting not-to-exceed amount would have been far more dollars than were available for certification of funding for the contract.

The Procurement Officer concluded that these differences amounted to substantial and significant changes to the requirements of the IFB. She found that the proposed amendments to the solicitation would be of such magnitude that a new solicitation was in order. She found that a new solicitation would be fiscally advantageous to the State, and/or otherwise in the State's best interest.

The Procurement Officer considered the estimates included in the IFB and considered information regarding the actual number of transactions in the past calendar year as well as those anticipated in future years. She took into account the difference in the anticipated costs of the contract in view of the bid amounts, and concluded that it was in the best interest of the State (in procuring the desired services at a fair price within the funding available) to cancel the IFB and resolicit the contract with corrected transaction numbers.

As a review of the Statement of Facts, the testimony at the Hearing, and the entire record of this case makes clear, those findings are completely rational and reasonable. Appellant did not produce any evidence that those findings were in any way arbitrary or capricious, let alone so arbitrary and/or capricious as to constitute a "breach of trust."

As the party seeking to disturb the Procurement Officer's decision to resolicit, Appellant bears the burden of proof in this appeal and we note, for the record, that this is not a burden that is easily met.

This Board has expressed well-founded reluctance to substitute its judgment for that of an agency, in part because it is the procuring agency that will have to "live with the results" of its decision. Klein's of Aberdeen, MSBCA 1773, 4 MSBCA ¶ 354 (1994) at p. 7.

Appellant contends that the decision to cancel this IFB and reject all bids was unfair and/or biased against the Appellant.

As the Board noted in Kennedy Personnel Services, MSBCA No. 2415, MSBCA (2004) at pp. 9-10.:

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. "Bias must be demonstrated to exist by substantive hard facts or evidence." (citations omitted).

There is no evidence that the evaluation, conclusions and results reached by the Procurement Officer or any other State officials in this matter were in any way biased for or against the Appellant (or any other bidder).

In fact, during her testimony at the hearing on this Appeal, the Procurement Officer stated that she was not biased for or against Appellant and that she felt a resolicitation would be "fair to everybody". Hearing Transcript pp.45-47.

The Procurement Officer's decision that it was in the State's best interest to issue a new IFB based on numbers more in line with those actually anticipated to be expected had a clear rational basis and did not reflect any unfairness toward, or bias against, the Appellant.

Appellant's unhappiness with the Procurement officer's decision to resolicit is understandable, but it is not actionable.

Appellant's appeal is, therefore, denied.

Wherefore, it is Ordered this _____ day of December, 2005 that the appeal of Stronghold Security, LLC in the above captioned matter is denied.

Dated:

Michael W. Burns
Board Member

I Concur:

Robert B. Harrison III
Chairman

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 2499, appeal of Stronghold Security, LLC under WIC Investigative Services DHMH-OCPMP-06-8893.

Dated:

Michael L. Carnahan
Deputy Recorder