

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of ELECTRONIC)
COMMERCE AND CATALOG SERVICES,)
INC.)
)
Under Division of State Documents) Docket No. MSBCA 2100
RFP DSD 97-01)
State Wide Contract for Informa-)
tion System)

APPEARANCE FOR APPELLANT: Scott A. Livingston, Esq.
 Rifkin, Livingston & Silver,
 L.L.C.
 Baltimore, MD

APPEARANCE FOR RESPONDENT: William A. Kahn
 Assistant Attorney General
 Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest that it should have been awarded a contract under the above-captioned solicitation and for other relief.

Findings of Fact¹

1. The Division of State Documents, (DSD) a unit of State government within the Office of the Secretary of State, exists pursuant to statute, Md. State Gov't Ann. Code (Gov't) §7-202, is headed by an Administrator appointed by the Governor, Gov't §7-203(a), and is governed generally by Gov't §§7-201 - 7-222. The Joint Committee on Administrative, Executive, and Legislative Review (AELR) of the Maryland General Assembly exercises certain oversight functions with respect to DSD's activities. See Gov't

¹ Appellant did not request a hearing nor comment on the Agency Report. The Board has relied on the factual assertions made in the Agency Report which are sometimes repeated herein verbatim.

e.g. §§7-205(e), 7-206(a) (2) (xv) and (c), and 7-216(a). DSD's primary activities are the publication of the Code of Maryland Regulations, the Maryland Register, and the Maryland Contract Weekly.

2. Maryland's Procurement Law requires that notices of all State solicitations and awards valued above \$25,000 be published in the Maryland Contract Weekly. Md. State Fin. & Proc. Ann. Code (SF&P) §§ 13-103(c)(3) and (f) and 13-104(c) and (g). Notices of emergency and sole source awards also must be published in the Contract Weekly. SF&P §§13-108(c) and 13-107(c). State agencies also may publish notice in the Contract Weekly of solicitations and awards valued at \$25,000 or less. SF&P §13-103(c)(4). Notices from counties and municipalities regarding solicitations are published on request. Gov't §7-206.1(a) (2) (iii).
3. The captioned Request for Proposals (RFP) was issued on July 22, 1997 seeking proposals for a State-wide Contract Information System. The system was to provide on-line public notice of State solicitations, contract awards and other State and local contract-related information. This RFP stemmed from the report of the Governor's Task Force on Procurement (June 3, 1996); specifically Recommendation #5. ²
4. The requirement was summarized in RFP Section 1.1.1:

² Recommendation No. 5 of the Governor's Task Force On Procurement Final Report at 13 (June 3, 1996) was to "[e]stablish a Working Group to define the State's procurement publishing policy, identify features of a State-wide Contract Information System, and explore the possibilities for joint public\private development and operation of such a system." DSD was to take the lead with respect to implementation of the system for all agencies. Part of the charge to DSD was to "attempt to stimulate vendor interest in development and operating a State-wide information system funded through access charges with minimal or no budgetary outlay by the State."

The State of Maryland through the Division of State Documents (DSD) Office of the Secretary of State wishes to utilize multi-access electronic communications to streamline the way that it authors, tracks and publishes/ advertises its contract opportunities. Multi-access includes but is not limited to Internet intranet telephone and facsimile transmission via dedicated or switched facilities or other transmission mediums. The desired result will be an efficient system for State government units as well as local government units to access and use for the purpose of providing accurate and timely procurement and contracting information to the business community

5. Section 4.1 described sixteen "features" of the Contract Information System. The RFP mandated that an offeror demonstrate in its Proposal how it would achieve all of the features except one. The RFP treated the electronic commerce feature differently; RFP Section 4.1.2B (15) provided:

**(15) Electronic Commerce: Future System
Enhancements or Features**

The State is interested in moving to full electronic commerce. A recent change in State law now permits electronic commerce for small procurements (below \$25,000); for more information about small procurements, see Appendix F. The State's ultimate goal is not only a system that gives electronic notice of procurements and permits contract specifications and other documents to be downloaded/ uploaded but also a system that allows the State to receive electronic bids or proposals from vendors, permits electronic issuance of purchase orders, and makes electronic payment to vendors. As with features of the State-wide contract information system described in this RFP, the fully developed electronic commerce system envisioned by the State must be simple, efficient, quick and easy to operate, and user-friendly for both government agencies and subscriber end-users. Listed below are electronic commerce features in which the State is particularly interested. Although the State does not require that these features be

included in Offeror's proposal in response to this RFP, Offeror is to indicate for each listed feature whether the Offeror has the feature available for immediate implementation, or will have the feature available in the near future (give an approximate date). In addition, if the feature is immediately available, or will be available soon, the Offeror is to discuss briefly how Offeror's solution addresses each of the following electronic commerce issues:

- (a) Submission of electronic bids or offers from vendor subscribers to procurement agencies.
- (b) Security for bids or offers received.
- (c) Issuance of invitations to bid or requests for proposals.
- (d) Issuance of purchase orders.
- (e) Payment of invoices.
- (f) Interactive communications of bid results.

Thus the RFP indicated that the State was interested in a future augmentation of the Contract Information System into a fully developed electronic commerce system but did not contemplate an immediate State commitment to electronic commerce features through this RFP.

6. Addendum No. 2 clarified present intentions with respect to electronic commerce. In that addendum, RFP Section 4.1.2B(15) was replaced with a new section (15) that required an offeror's system to permit submission of bids and proposals for small procurements to the Department of General Services (DGS) and to update vendor profile information. Other than this limited interactive system capability for DGS, new RFP Section 4.1.2B(18) advised that DSD remained interested in offerors' capabilities with respect to

future augmentation of the contract information system into a full electronic commerce system. However, this section (18), like the section it replaced, spoke in terms of future system enhancements or features and noted that the State did not require that these features be included in an offeror's proposal in response to the RFP. While offerors were required to set forth their state of readiness respecting availability and implementation of the various electronic commerce features, no immediate State commitment to electronic commerce other than for DGS was stated.

7. The RFP required that the proposed Contract Information System would be developed and operated without any State funding. RFP Section 1.1.2 provided:

This system will not be funded by the State. Instead Offerors are to propose a system that will be funded through subscription revenues derived from vendor and other subscribers or by other means or by a combination of subscription revenues and other means. These other means may include revenue-producing commercial advertisements carried on the system under guidelines expressed in Appendix B - State-wide Information System: Advertising Guidelines.

8. Moreover, the RFP encouraged offerors to propose sharing of the revenue to be generated by the system, warning that DSD had been instructed by the AELR Committee to "overcome any loss in Maryland Contract Weekly subscription revenue resulting from the sale of contract information in electronic form."³ RFP Section 3.5.1E. This was reinforced by RFP Section 4.1.1 which stated:

It is the objective of this RFP to establish a State-wide contract information system supported

³ This admonition was repeated in Addendum No. 5 to the RFP dated February 4, 1998.

by subscriber access charges, or by such other or additional means as Offerors may propose, with minimal or no budgetary outlay by the State. Take note that no funds are budgeted for this project (see 1.1.2 below). Therefore, Offerors are encouraged to propose creative solutions to the performance functions and objectives expressed in this RFP.

9. The RFP required the successful offeror to submit a performance bond or other acceptable security "in an amount equal to the value of the contract." RFP Section 2.2.2. This security was due before contract award. Id.
10. As amended, the closing date for receipt of proposals was September 8, 1997.⁴ At that time, Appellant and two other offerors submitted proposals. The technical offers were evaluated by a multi-agency evaluation committee. Over the next approximately 10 months, DSD engaged in a number of rounds of requests for clarification and revision of offers. The requests for revision generally were contained in addenda that amended various aspects of the RFP. There were three such addenda during this period: No. 4 on December 12, 1997; No. 5 on February 4, 1998; and No. 6 on June 16, 1998.
11. Addendum No. 4 was prompted by mandatory fee provisions in proposals submitted by Appellant and another offeror. Appellant's original proposal identified as a source of revenue a percentage surcharge or service fee imposed on State and local vendors that was to be assessed on the value of all procurements less than \$25,000. The other offeror had proposed a "transaction fee," also

⁴ Prior to receipt of proposals, DSD issued 3 addenda amending the RFP. Except as discussed above, the provisions of these addenda are not germane to the issues involved in this appeal.

- imposed on the vendor based upon "the total purchase order amount."
12. The Office of the Attorney General advised DSD that these mandatory percentage fee arrangements would violate Maryland's constitutional prohibition against the imposition of any charge, tax, or fee without the consent of the General Assembly. Declaration of Rights, Art. 14. However, the Office of the Attorney General also suggested that amounts voluntarily paid would not be impermissible.
 13. Because of legal advice that the mandatory fee aspect of these proposals rendered them unacceptable, Addendum No. 4 was issued amending the RFP to allow a voluntarily paid "special service charge" as a self-funding mechanism and permitting offerors to submit revised proposals.
 14. Appellant submitted a revised proposal dated January 9, 1998, based on fees voluntarily paid to Appellant. Appellant did not assert, in its revised proposal or otherwise, that the RFP had been amended in an inappropriate manner or that DSD had incorporated into the RFP Appellant's "idea" for self-funding.
 15. Addendum No. 5 grew out of the RFP's performance bond requirement and Appellant's projection of revenue for the first four years of the contract that appeared to be in excess of \$40 million. This prompted a letter of December 4, 1997 from DSD to Appellant requesting "assurance from [Appellant's] intended surety that a Performance Bond in an amount equal to the value you have assigned to the contract will be furnished."
 16. Subsequently on January 9 1998, in its response to Addendum No. 4, Appellant also responded to DSD's request for assurance regarding an adequate performance bond requesting that the State reconsider the bond provision. As an alternate, Appellant proposed

a substantially reduced performance bond in the amount of \$400,000, 1% of the estimated \$40,000,000 contract value, coupled with a usufruct⁵ effective only in case of a default.

17. As a consequence of Appellant's proposed revision to its proposal regarding a reduced performance bond, DSD issued Addendum No. 5, which amended the RFP to prescribe a \$1 million performance bond and introduced a usufruct provision. The provisions of Addendum No. 5 may be viewed as an accommodation to Appellant since only Appellant had complained about the original performance bond requirement.
18. Appellant responded to Addendum No. 5 in a letter dated February 20, 1998. Appellant did not assert, in its response or otherwise, that DSD had amended the RFP in an inappropriate manner or that DSD had incorporated into the RFP Appellant's "idea" for a usufruct.
19. In a letter to Appellant dated April 29, 1998, the Procurement Officer admonished Appellant that the thrust of the RFP was not electronic commerce, but rather a contract information system, and advised Appellant that it could revise its technical or financial plan accordingly.
20. Appellant met with the State's proposal evaluation committee on July 10, 1998. At that time, Appellant was the only remaining offeror since, although not disclosed by DSD, the other two offerors had withdrawn prior to the time of this meeting. During the discussion that took place Appellant was asked to submit a best and final offer and the text of any additional provisions for an ensuing contract. Appellant was told that the evaluation committee was interested in bringing the process to a conclusion

⁵ A usufruct is a right in one person to use the object of the usufruct, the ownership of the object being in another person.

and making a selection but that any recommendation for award would not be made to the Board of Public Works until September 1998.

21. On July 29, 1998 Appellant responded to the request for its best and final offer. The best and final offer that it submitted was not firm. Rather, it was described as a "working document" or "draft" to which DSD was expected to have "some counter comments." In this submission (Appellant's best and final offer) Appellant required a State commitment to proceed to a full, State-wide electronic commerce system.
22. Appellant's best and final offer required the State to agree to work with [Appellant] to transform current procurement procedures and operations into a fully electronic system.
23. Upon review of Appellant's best and final offer the Procurement Officer concluded that the State should not proceed further with this procurement process.
24. Accordingly, on September 9, 1998 DSD canceled the RFP, rejecting all proposals. In his letter to Appellant the Procurement Office stated:

It has been determined that the State does not wish to establish the contract information system under a self-funding arrangement with an independent third party and that it is in the State's best interest to seek funds to develop and manage internally a State-wide contract information system.

I have also recommended that the State pursue electronic commerce as a separate undertaking. The Department of General Services will be the lead agency in directing steps toward electronic commerce.

25. On September 17, 1998, Appellant protested the cancellation. For relief it requested that the RFP be reinstated and that DSD award a contract to Appellant. In the alternative, Appellant

requested compensation "for not less than \$65,000 reasonably incurred by it." Appellant's ground for the protest was that DSD disclosed Appellant's "ideas" to competitors who had responded to the RFP. In particular, it claimed that DSD borrowed Appellant's "idea" of a usufruct provision by amending the RFP to incorporate a usufruct and that DSD disclosed Appellant's self-funding mechanism to the competitors. As an alternate ground, Appellant asserted that there was a continuing need for an electronic commerce system which Appellant should provide, and thus the cancellation was inappropriate.

26. The DSD Procurement Officer rejected the protest. First he decided that the alleged disclosures ["of ideas"] were obvious to Appellant when they occurred and, because Appellant had waited to complain about them until long afterward, the protest was untimely. Second, he decided that the "ideas" disclosed did not "belong" to Appellant. As to the usufruct the "idea" was a matter of public record for many years and Appellant itself had appropriated the "idea" from the Maryland Lottery. The "idea" of a mandatory fee, impermissible under Maryland law, also had been suggested by another offeror and had been borrowed by Appellant from the federal government. Third, the Procurement Officer determined that the ground of the protest, disclosure of Appellant's "ideas," did not relate to whether the cancellation was not in the State's interest. Finally, the Procurement Officer rejected Appellant's assertion that a continuing need for an electronic commerce system made cancellation of the procurement inappropriate.
27. Appellant noted its appeal from this decision on November 2, 1998 and requested that the Board place the appeal in suspense. The State opposed the request that the appeal be placed in suspense.

The Board declined to place the appeal in suspense. As noted, the Appellant did not comment on the Agency Report (filed on December 14, 1998) nor request a hearing.

Decision

Appellant protests that DSD made two disclosures of Appellant's "ideas," contained in its proposal or in supplemental correspondence, and these disclosures rendered DSD's cancellation decision improper. Both disclosures were made in amendments to the RFP that were sent the offerors, including Appellant.

Addendum No. 4, which allowed a voluntary "special service charge," was issued on December 12, 1997. Appellant, without complaint, submitted, in response to Addendum No. 4, a revised proposal on January 9, 1998.

Addendum No. 5, which prescribed a usufruct provision was issued on February 4, 1998. Appellant responded, again without complaint, in a letter dated February 20, 1998, submitted on February 23, 1998.

The Procurement Officer determined that Appellant's protest concerning these disclosures filed on September 17, 1998 was not timely filed.

COMAR 21.10.02.03 provides:

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in §A, protests shall be filed not later than 7 days

after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in §A or §B means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest received by the procurement officer after the time limits prescribed in §A or §B may not be considered.

A protest must be filed within the applicable time specified in this regulation. These timeliness requirements are substantive and may not be waived by a procurement officer. Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 40(1984). ATI Systems and Federal Signal Corp., MSBCA 1911 et al., 5 MSBCA ¶387 (1995) at p.3 (alleged improprieties in request for proposals must be protested before time for receipt of initial proposals); Merjo Advertising & Sales Promotion Co., MSBCA 1948, 5 MSBCA ¶396 (1996) at p. 4 (alleged defect in invitation for bid must be protested before time for receipt of bids).

The Appellant's protest is based upon supposedly inappropriate disclosures of "ideas" which Appellant claimed as its own, disclosures made by DSD in Addendum Nos. 4 and 5. Appellant's protest on its face demonstrated that the alleged improprieties were apparent from the addenda themselves. Instead of complaining, Appellant submitted revised proposals in response to each addendum by the dates specified and participated thereafter in further dialog with DSD, including a meeting and submission of a best and final offer in July, 1998. However, no protest was made until September, 1998, after the solicitation was canceled.

Under COMAR 21.10.02.03A, protest concerning "alleged improprieties that did not exist in the initial [request for proposals] but which are subsequently incorporated in the [request for proposals]

shall be filed not later than the next closing date for receipt of proposals following the incorporation." Applied to the circumstances here, complaints concerning the allegedly improper disclosures made in or apparent from the faces of Addendum Nos. 4 and 5 were required to be filed before the dates set for receipt of revised proposals. Appellant's protests were filed after those dates and are untimely and thus, under COMAR 21.10.02.03C, could not be considered. Accordingly, this Board lacks jurisdiction to hear the appeal. See ISmart, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997), *affd.*, Maryland State Board of Contract Appeals v. ISmart, LLC, No. C-97-034415 (Cir. Ct. How. Co., March 17, 1998); PTC Corporation and Ion Track Instruments, Inc., MSBCA 2027, 5 MSBCA ¶430 (1998) at p. 6; JVC, Inc., MSBCA 2067, 5 MSBCA ¶445 (1998).

As noted, the Procurement Officer was obligated to dismiss Appellant's protest as untimely. COMAR 21.10.02.03C. The defect in Appellant's protest being jurisdictional, this Board must dismiss the instant appeal as far as it deals with the alleged improper disclosure of "ideas." Accordingly, the appeal on such ground is dismissed with prejudice.

Appellant also protested on grounds that the cancellation of the solicitation was improper because there is a continuing need for an electronic commerce system. We find this ground of Appellant's September 17, 1998 protest to be timely. However, the protest on such ground was properly rejected on the merits and thus the appeal on such ground is denied.

A solicitation may be canceled and all proposals rejected if it is fiscally advantageous or otherwise in the State's best interests. SF&P §13-206(b); COMAR 21.06.02.02C. A decision to cancel a solicitation and reject all offers may not be disturbed unless it is shown that the decision was not fiscally advantageous or otherwise not in the State's best interest to such an extent that it was fraudulent

or so arbitrary as to constitute a breach of trust. Megaco, Inc., MSBCA 1924, 5 MSBCA ¶385 (1995) at p. 5. Thus it is incumbent upon the protester to come forward with a ground that demonstrates that the State's cancellation decision was legally improper. We first note that there is no legal prohibition that has been brought to the Board's attention that would make it inappropriate for the Department of General Services, rather than DSD, to pursue the solicitation of a provider of electronic commerce services Statewide. In its protest Appellant stated that, although it had responded to a request for a best and final offer, it was never invited in for further negotiation and that the RFP was canceled with no warning. Nothing in these contentions states a reason why DSD's decision to cancel was improper.

The Procurement Officer's written determination to cancel the RFP demonstrates there were valid reasons for that decision. After efforts to bring proposals (initially reasonably susceptible to being made acceptable) to acceptable levels, DSD was left with a single offeror; i.e., Appellant. Through the various rounds of proposal revisions Appellant had not produced an acceptable proposal to create the Contract Information System that the RFP called for without coupling it to a State-wide electronic commerce system that would produce transaction-based revenue not called for by the RFP. Recommendation No. 5 of the Task Force Report is broad enough to authorize an RFP for both contract information and electronic commerce. While it is clear the State intends to pursue electronic commerce through further procurements, the captioned RFP and its various amendments limit the object of this procurement to provision of contract information services and a limited interactive system capability for DGS (small procurements; vendors profile information). When asked to give the State a best and final offer, Appellant took its earlier proposal and inserted requirements and terms regarding an electronic commerce system that rendered

it unacceptable. The Procurement Officer was not obligated to re-open discussions with the proponent of an unacceptable proposal. This procurement was bound by constraints that the contract information system involve minimal or no budgetary outlay by the State and that no State funds were budgeted for its purposes. Appellant has not demonstrated that the reasons set forth in the Procurement Officer's written determination to cancel the procurement were not in the State's best interest or fairly within the ambit of COMAR 21.06.02.02.C.

Accordingly, the appeal on grounds that the cancellation was inappropriate is denied.

Wherefore, it is Ordered this day of January, 1999 that the appeal is denied as to the cancellation ground and dismissed with prejudice as to the alleged improper disclosure grounds.

Dated:

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
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 2100, appeal of Electronic Commerce and Catalog Services, Inc., Under Division of State Documents RFP DSD 97-01, State-Wide Contract for Information System.

Dated:

Mary F. Priscilla
Recorder