

Docket No. 2157	Date of Decision: 2/24/00
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Under Comptroller of the Treasury IFB OC-2000-06	
Appellant/Respondent: Horton & Barber Professional Services, Inc. Comptroller of the Treasury	

Decision Summary:

Reciprocal Preference

Where the Procurement Officer acted diligently and reasonably in investigating whether the District of Columbia applies a preference against out-of-state bidders, his conclusion that a District of Columbia preference exists triggering Maryland's reciprocal preference provision COMAR 21.05.01.04, is sound and has a basis in law. The Board will not disturb an appropriate discretionary act of a procurement officer, and must therefore uphold this decision.

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of :
 :
HORTON & BARBER :
PROFESSIONAL SERVICES, INC. : MSBCA Docket No. 2157
 :
Under Comptroller of the :
Treasury IFB OC-2000-06 :

APPEARANCE FOR APPELLANT Will Purcell, Esq.
Washington, D.C.

APPEARANCES FOR RESPONDENT Gerald Langbaum
John K. Barry
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Annapolis, MD

OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the Appeal of Horton & Barber Professional Services, Inc. (hereinafter "H&B") from the Procurement Officer's final decision denying its bid protest regarding a solicitation issued by the Comptroller of the Treasury ("Comptroller") to obtain temporary personnel services in which the Procurement Officer applied COMAR 21.05.01.04, regarding a reciprocal preference provision set forth in the invitation for bid ("IFB"), so as to remove H&B from the status of low bidder, and prevent the award of the contract to it.

Findings of Fact

1. On September 21, 1999 the Comptroller of the Treasury issued IFB No. OC-2000-06 for Temporary Personnel Services to assist the State with the opening of mail and the processing of tax returns during the peak income tax-filing season. The Comptroller wished to acquire temporary personnel services such as management and

payroll¹ services.

2. On October 14, 1999 bids were received from eight vendors: five Maryland resident businesses, and three resident businesses of the District of Columbia. Appellant Horton & Barber is a resident business of the District of Columbia. H&B's bid was the lowest responsive bid. National Employer's Concepts submitted the lowest bid among those bidders whose principal office is located in Maryland.
3. The solicitation Invitation for Bid (IFB) contained the following language: "The provisions of State Finance and Procurement Article §14-401 and COMAR 21.05.01.04 shall apply to this solicitation."
4. State Finance and Procurement Article §14-401 states:
 - (a)(1) In this section the following words have the meanings as indicated
 - (2) "Preference" Includes:
 - (i) a percentage preference;
 - (ii) an employee residency requirement; or
 - (iii) any other provision that favors a resident over a nonresident.
 - (3) "Resident bidder" means a bidder whose principal office is located in the State.
- (b) When a unit uses competitive sealed bidding to award a procurement contract, the unit may give a preference to the resident bidder who submits the lowest responsive bid from a resident bidder if:
 - (1) the resident bidder is a responsible bidder;
 - (2) a responsible bidder whose principal office is in another state submits the lowest responsive bid;
 - (3) the other state gives preference to its residents; and
 - (4) a preference does not conflict with a federal

¹The State has over the years developed a pool of experienced workers who are willing to work temporarily for several months each year to assist the State with its tax return receipt obligations. Therefore, the focus of the contract is on management of the payroll-type functions, rather than on a hiring function.

law or grant affecting the procurement contract.

(c)(1) A nonresident bidder submitting a proposal for a State project shall attach to the proposal a copy of the current statute, resolution, policy, procedure, or executive order of the resident state of the nonresident bidder that pertains to that state's treatment of nonresident bidders.

(2) A preference under this section shall be identical to the preference that the other state gives to its residents.

5. The Board of Public Works adopted COMAR 21.05.01.04 to implement §14-401. This regulation states:

A. Definitions

- (1) In this regulation, the following terms have the meanings indicated.
- (2) "Preference" means:
 - (a) A percentage preference;
 - (b) An employee residency requirement; or
 - (c) Any other law, policy, or practice that favors a resident over a nonresident.
- (3) "Resident business" means a business whose principal office or principal base of operations is located in the State.

* * *

B. Conditions. A procurement agency may give a preference to a resident business if:

- (1) The resident business is a responsible:
 - (a) Bidder, under a competitive sealed bid,
 - (b) Offeror, under a competitive sealed proposal, or
 - (c) Provider of architectural or engineering services;
- (2) A responsible bidder, offeror, or provider of architectural or engineering services whose principal office or base of operations is in another state, submits the lowest responsive bid, the most advantageous offer, or a qualification

statement or a technical proposal concerning architectural or engineering services;

(3) The other state gives a preference to its residents through law, policy, or practice; and

(4) The preference does not conflict with a federal law or grant affecting the procurement contract.

C. Application. A preference under this regulation shall be identical to the preference that the other state, through law, policy, or practice, gives to its residents.

6. The District of Columbia has a preference law: D.C. Law 12-268, D.C. Code §1-1153.3 (enacted April 27, 1999) as follows:

(b)(1) The Mayor shall include among these programs a bid preference mechanism for local business enterprises and disadvantaged business enterprises and a two-tier small business set-aside program at the contract level, which shall include a separate set-aside program for small business enterprises with gross revenue of \$1,000,000 for 2 consecutive years, and a separate set-aside program for all small business enterprises, and for local and disadvantaged business enterprises at the subcontracting level. In evaluating bids and proposals, agencies shall award preferences, in the form of points, in the case of proposals, or a percentage reduction in price, in the case of bids, as follows:

(A) Five points or 5% for local business enterprises;

(B) Five points or 5% for disadvantaged business enterprises; and

(C) Two points or 2% for businesses located in enterprise zones.

7. Although application of Maryland's preference law can in some circumstances be discretionary, Section II(L) of the instant Invitation for Bid required that the preference formula set forth

in §14-401 and COMAR 21.05.01.04 be applied. Thus, a Procurement Officer is authorized to award preference points for a resident bidder if a lower bidder is a resident of a state that awards preference points "to its residents through law, policy, or practice" COMAR 21.05.01.04B(3).

8. Since the lowest responsive bidder had its principal place of business in the District of Columbia, the Procurement Officer investigated whether or not the District had a preference provision. Determining that the District of Columbia preference provisions remain in effect and are being enforced as a matter of policy and practice by agencies of the D.C. government, the Procurement Officer applied reciprocally D.C.'s preference provision by allotting 5% for local bidder and 5% for disadvantaged bidder, or a 10% increase in the price of the low bidder, Appellant. Application of the preference resulted in National Employer's Concepts, not Appellant, becoming the lowest responsive bidder.²
9. On November 3, 1999 the Procurement Officer notified Appellant that it was not being selected for award because, after application of the D.C. preference, it was no longer the lowest bidder. On November 10, Appellant timely protested the Procurement Officer's decision, and that protest was denied on November 18, 1999. Appellant timely appealed that final decision to this Board.

²H&B's total weighted bid price was \$7.56. NEC's was \$7.74. Affording NEC a 10 percent reduction, the reciprocal application of the reduction provided to a D.C. resident business in the D.C. Act, reduces NEC's bid to \$6.97, a figure lower than H&B's. In fact, Mr. Smith applied D.C.'s preference in error, by increasing H&B's (and those of the other two D.C. Bidders) bid by 10 percent, rather than reducing NEC's bid by 10%. However, the result was the same: NEC became the lowest responsive bidder.

Decision

Appellant disputes that the District of Columbia currently enforces its preference towards District of Columbia bidders. It argues therefore, that a preference should not have been applied against it, and it should have been awarded this contract.

Appellant first argues that the Procurement Officer's decision that the District of Columbia gives a preference which under COMAR 21.05.01.04 should be reciprocally applied against a District of Columbia bidder is erroneous because the District of Columbia is not a State. In fact, the District of Columbia is a State for the purpose of the Maryland General Procurement Law. State Finance and Procurement Article §11-101(u)(2), specifically applicable to procurements including the preference provision at §14-401, defines "state" to include the District of Columbia.

Appellant next argues that in 1995, the District of Columbia was declared by the United States Congress to be in a "state of emergency", whereupon Congress exercised its authority to legislate in and for the District of Columbia and created the D.C. Financial Responsibility and Management Assistance Authority [hereinafter "the Control Board"] to manage and regulate the laws and affairs of the District of Columbia. (Pub. L. 104-8). The U.S. Congress, which enacted the legislation to establish the Control Board, Appellant therefore argues, "has the exclusive authority to legislate in and for the District of Columbia", including procurement preferences. This is erroneous. While the U.S. Congress has overriding authority, that authority is not exclusive, and the people of the District of Columbia have not been completely disenfranchised. The District of Columbia has a Mayor and a City Council with legislative authority which produced the Local Small and Disadvantaged Business Enterprise Act of 1998 (the D.C. law providing preferences to local businesses in District of Columbia procurements).

D.C. Code §1-1153.3 (1999).

Appellant further argues that the Control Board is not bound by the laws set forth in the D.C. Code, including those governing city contracts and procurement and the preference law, D.C. Code §1-1153.3, and that thus, in its oversight capacity, it does not apply the preferences set out in the D.C. Code.

The Procurement Officer researched the question of the authority of the D.C. Control Board and found that while the Control Board has oversight authority, such that it reviews D.C. government agencies' procurements and has the right to reject them, most procurements are made in the first instance by the D.C. government agencies pursuant to the D.C. Code. He also found that in practice the Control Board has not overturned agencies' decisions to apply the preference in their procurements. While the Control Board also has its own procurements which are not subject to the D.C. Code Procurement Practices Act, the District of Columbia continues to procure goods and services through its agencies, albeit subject to Control Board oversight, and those agencies by law, policy and practice continue to provide a system of preference points to resident bidders. The subject matter of the instant solicitation would have been handled by a D.C. agency, not the Control Board.

Next the Appellant argues that the Procurement Officer improperly applied Maryland's reciprocal preference provision, State Finance & Procurement Article §14-401, because the D.C. preference statute "was not established to advantage D.C. based businesses over nonresident bidders." The Board disagrees, since a review of the D.C. Act shows that it grants preference points in three enumerated categories, i.e., assistance programs for local business enterprise contractors, disadvantaged business enterprise contractors, and small business

enterprise contractors, as a "bid preference mechanism." Appellant's Chief Executive Officer, Mr. Barber, testified that Appellant is a resident business in the District of Columbia, and it would qualify for both the 5% "local business" preference as well as the 5% disadvantaged business preference.

In the course of his investigation, the Procurement Officer received an email message from Elliot Branch, Director of the Office of Contracting and Procurement for the District of Columbia which stated, "All Government of the District of Columbia agencies that conduct procurements in accordance with the Procurement Practices Act of 1985 (D.C. Code §1-1181.1 et seq.) are required to comply with our local preference law in awarding contracts. D.C. Council Law 12-268."

The Procurement Officer confirmed this information through conversations with Robert Bausch, Legal Counsel to the D.C. Office of Contracts and Procurements, with Jacquelyn Flowers, Director of the D.C. Department of Human Rights and Local Business Development, and with D.C. Assistant Corporation Counsel James Stanford, all of whom assured him that the preference law is in effect, is to be followed by all agencies of the District of Columbia, and is being very aggressively enforced.

Thus, in his decision the Procurement Officer found that:

The District of Columbia has a price preference provision set forth under D.C. Code 1-1153.3. It is clear to me that this section of the D.C. Code is in effect and is being applied by D.C. agencies. Because it is provided for by law and implemented by both policy and practice in the District of Columbia, Maryland's reciprocal provision applies. When the reciprocal preference provisions are applied, your client is not the low bidder. Therefore I am denying your protest.

While we have not previously addressed the District of Columbia preference provision, we have had occasion to previously examine the

Maryland reciprocal preference provision in Environmental Growth Chambers, MSBCA 1952, 5 MSBCA ¶398 (1996). In that appeal, the Board considered whether or not the Procurement Officer had properly determined to apply Maryland's reciprocal preference provision against an Ohio bidder in the face of an Ohio statute that allowed a price preference in favor of certain Ohio bidders versus non-Ohio bidders. We observed that the Procurement Officer made a determination that Ohio would have allowed its resident a preference. We then held that

[t]he record does not reflect that this determination by the procurement officer was unreasonable. The Board will not disturb a discretionary act of a procurement officer unless such act is taken in bad faith or is arbitrary.

Likewise, The investigation conducted by the Comptroller's Office was proper³, and conducted in good faith. The Procurement Officer acted diligently and reasonably and his decision was not taken in bad faith or arbitrarily. His conclusion is sound and has a basis in law. The Board will not disturb an appropriate discretionary act of a procurement officer, and must therefore uphold this Procurement Officer's decision.

For the foregoing reasons the appeal is denied. Wherefore, it is Ordered this 24th day of February, 2000 that the appeal is denied.

Dated:

Candida S. Steel
Board Member

³Except for the error noted in footnote 2, supra, which the Board finds did not affect the outcome of the determination.

I concur:

Robert B. Harrison III
Chairman

Randolph B. Rosencrantz
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 2157, Horton & Barber Professional Services, Inc., Under Comptroller of the Treasury IFB OC-2000-06.

Dated:

Mary F. Priscilla
Recorder