

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

In The Appeal of)
McChesney Associates, Inc.)
)
) Docket No. MSBCA 2907
)
Under MVA Solicitation)
No. V-MUL-15001-M)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Dore J. Lebowitz
Assistant Attorney General
Glen Burnie, Maryland**

OPINION BY BOARD MEMBER DEMBROW

The issue presented in this bid protest is whether, after bid opening but prior to contract award, the State may release all bidders from their offers and request that new bids be submitted and further, allow new bids for work not previously included in initial bids. For the procedural and substantive reasons set forth below, including that all bidders were treated the same, this appeal must be denied.

Findings of Fact

1. On July 9, 2014 the Maryland Motor Vehicle Administration (MVA) promulgated on eMarylandmarketplace.com a certain work solicitation known as Solicitation No. MDJ0431010086, Contract No. V-MUL-15001-M, for snow and ice removal at fourteen (14) MVA facilities located around the State.
2. Appellant McChesney Associates, Inc. (McChesney) initially submitted bids for the MVA facilities in Waldorf and

Westminster, while interested party Capital Transmission, Inc. (Capital) initially submitted bids for the MVA facilities in Annapolis, Beltsville, Cumberland, Frederick, Gaithersburg, Hagerstown, Largo, Westminster, and White Oak, but not Waldorf. (Agency Report, Tab B.)

3. Bids were due, evaluated and posted on August 7, 2013.
4. Of the six (6) bidders that submitted bids in response to this solicitation, only McChesney bid on the Waldorf job. (*Id.*)
5. On August 7, 2013, MVA became aware that, of the fourteen (14) identified locations of MVA facilities, eight (8) of them received only a single bid price from a single bidder and two (2) of them received no bid at all. (*Id.*)
6. On August 11, 2014, the procurement officer notified all bidders it was necessary for them to file revised Bid Worksheets because the original Worksheet provided by MVA contained deficient language as a result of which MVA was unable to determine the true and correct fixed prices offered for the services specified. (Agency Report, Tab C.)
7. The specific deficiencies determined by MVA include incorrect designation of one cost item as a price per application instead of price per hour of application time, as well as failure to provide spaces for bidders to tabulate total costs based upon unit costs and also a grand total of all costs. (Agency Report, Tab D.)
8. As a result of MVA's late discovery of the foregoing deficiencies, all bidders were notified that they were not bound by their initially submitted bid prices and instead, were requested to submit replacement bids in place of their original bids. (Agency Report, Tab C.)
9. At the same time, noting the absence of any bid at all for the MVA facilities in Belair and Easton, MVA notified bidders, "We encourage you, if feasible, to consider

- submitting a bid at the other locations." (*Id.*)
10. In response to MVA's invitation for new bids, both McChesney and Capital submitted to MVA revised bids including the addition of bids for work at new locations not offered by their original bids. McChesney's revised bid was enlarged to include the MVA facility in Belair while Capital's revised bid was enlarged to include the MVA facilities in Belair and Easton, for which no one had bid, as well as the MVA facilities in Glen Burnie and Waldorf, for which only a single bidder had previously made an offer. (Agency Report, Tabs C, E.)
 11. For the MVA facility at Waldorf, McChesney revised its initial bid of \$4,426 to a new price of \$11,045, while Capital offered a bid price of \$5,195. (*Id.*)
 12. Immediately following the ranking of bidders on August 14, 2014, McChesney protested MVA's proposed award of the contract for the Waldorf location to Capital, stating as the basis of its protest that Capital did not initially submit any price at all for the Waldorf location and that McChesney was thereby prejudiced by disclosure of its bid to Capital. (Agency Report, Tab F.)
 13. Implicit in McChesney's protest is that MVA's August 11, 2014 request for new bids permitted bidders to submit prices for Belair and Easton, but not other locations for which a bidder did not previously submit an initial bid.
 14. On October 8, 2014, MVA denied McChesney's protest dated August 18, 2014. (Agency Report, Tab G.)
 15. On October 16, 2014, MVA filed its appeal with the Maryland State Board of Contract Appeals (Board).
 16. On November 14, 2014, MVA filed its Agency Report.
 17. Subsequent to the filing of the Agency Report no additional pleadings were filed nor did either party request a hearing.

Decision

Violation of the Code of Maryland Regulations (COMAR) 21.05.02.12D is the single basis cited by appellant in support of its appeal. That provision pertains expressly to "Mistakes Discovered After Award." Here the mistakes in the Bid Worksheet that gave rise to MVA's allowance of revised and enlarged bids were discovered at or after the time of bid opening but prior to contract award. Therefore this section of COMAR is inapplicable.

MVA seeks to justify its handling of this solicitation by reliance in part upon COMAR 21.05.02.08B, which empowers the procurement officer to amend the solicitation by publicly announcing and providing a revised Bid Worksheet, though ordinarily, an Amendment to a solicitation is promulgated prior to the bid due date. Here it was not. The State also relies upon COMAR 21.05.02.12A which provides, "Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so." Neither party offers any argument regarding the correctness of classifying the initially provided defective Bid Worksheet as a technicality or minor irregularity which would authorize the State to allow bidders to cure such a deficiency. In any event, that provision of COMAR appears intended to apply to irregularities contained in a particular bid, rather than those arising in all bids occasioned by an error or deficiency in the State's work solicitation. Here, all bidders were directed to submit new bids after bid opening.

Instead of COMAR 21.05.02.12D, 21.05.02.08B, or 21.06.02.04, the Board finds guidance in COMAR 21.06.02.02C, which states,

"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 interest." There is no indication in the record whether the Department head or designee approved MVA's August 11, 2014 determination to reject all bids and request new bids to be provided on a revised Bid Worksheet.

It is said that absence of evidence is not evidence of absence. The State is entitled to a *prima facie* presumption that its decisions are supported by all lawful requirements. In order to invalidate the State's determination to reject all bids and request new ones, appellant bears the burden of proof that MVA's decision was made without the requisite "approval of the appropriate Department head or designee." Because appellant's proof is lacking in this regard, the State's decision remains presumed to be valid and must stand. Moreover, the Board is without authority to reverse the determination made.

The foregoing *dicta* is not intended to criticize any aspect of the procurement officer's handling of this solicitation. It is important to recognize that all bidders were treated equally on the same playing field when all were relieved from being bound by their initial bids and requested to submit new bids. Both appellant and the interested party were permitted to expand their bids to include new MVA locations for which they elected not to submit an initial bid. Both did so, though the Board is somewhat sympathetic to appellant's prospective position that it assumed that new bids were to be allowed only for the two locations for which no initial bid was submitted by anyone, namely, Belair and Easton, and that that assumption was implied by MVA's August 11, 2014 request for new bids. While the Board understands why appellant feels aggrieved to have lost the Waldorf job to a

competitor who did not initially submit a bid for that work, such bids were never forbidden by MVA. In fact, they were invited. Most importantly, all bidders were treated the same. That is to say that in the second round of bidding, if McChesney had submitted bids for MVA locations besides Waldorf, Westminster, Easton and Belair, the State would have been mandated to evaluate those bids, just as it evaluated Capital's bids for previously bid as well as newly bid locations.

It is also important to note again that in the initial round of bidding, McChesney was the only bidder for the Waldorf job. Hopefully appellant would not seek to argue that it is therefore the only bidder allowed to do that job, and further, that it is incumbent upon MVA to pay McChesney whatever appellant decides to impose as its new price as shown on the revised Bid Worksheet. Even McChesney must recognize the necessity for the State to have allowed all bidders to submit new bids for any of the locations for which MVA seeks snow removal services. That's all that was done here, and none of the terms of the initial or new solicitation prohibited that course of action nor the second round outcome based upon the competition induced by allowing every bidder the same opportunity to bid.

Finally, the Board notes that appellant initiated and then apparently abandoned this appeal without the benefit of professional legal counsel as required by COMAR 21.10.05.03, a requirement of which McChesney received specific express notice from the Board on October 20, 2014. On many prior occasions the Board has denied other unrelated appeals based upon the failure of an appellant to retain an attorney. See Visions America Community Development Corp., MSBCA 2701 (May 2010); Pipes & Wire Svcs, Inc., MSBCA 2709 (June 2010), Del. Elevator, Inc., MSBCA 2774 (Sept. 2011); Mercy Family Care Ctr., Inc., MSBCA 2855 (Aug. 2013); Sovereign Consulting, Inc., MSBCA 2857 (Nov. 2013).

For all of the foregoing reasons, this appeal shall be and hereby is DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
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 2907, appeal of McChesney Associates, Inc. Under MVA Solicitation No. V-MUL-15001-M.

Dated:

Michael L. Carnahan
Deputy Clerk