BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Premium Transit Services, Inc.	)	
	)	**Docket No. MSBCA 2530**
Under MTA Bid #04205-Z and 09285-Z, Blanket Contract TT14583	)	

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OPINION BY BOARD MEMBER DEMBROW

This contract dispute concerns the implementation of two (2) Requests for Quotation to establish blanket purchase orders (BPOs) under which the Maryland Transit Administration (MTA) sought to acquire certain replacement parts related to brake components needed for routine maintenance and servicing of its bus inventory.

For the reasons that follow, the Board rules in favor of appellant Premium Transit Services, Inc. (PTS) and determines to award contract damages against MTA for wrongful termination and breach of contract subject to further verification of liquidated damages as more fully set forth herein.

Findings of Fact

1. Brake assemblies for the fleet of buses owned and operated by MTA consist of pairs of curved metal brake tables, also known as cores, ordinarily made of cast iron or fabricated steel, to which brake shoes are affixed by bonding or rivets.
2. Brake shoes are rectangular in shape, curved lengthwise but flat in width dimension, made of a composite table surface material covering the underlying metal brake cores.
3. Brakes function by creating friction between the brake shoes and the bus wheel, thereby slowing or stopping the vehicle when the brake pedal is applied by the driver and the shoes rub against the inside of the bus wheel drum. (Sample illustrations set forth in Appellant's Exhibit 4.)
4. Steel brake shoe tables are ordinarily used once and then discarded, while cast iron brake shoe tables are customarily remanufactured and refit with new shoes and thereby reused many times. (Trial testimony of Carolyn Caldwell, MTA Chief of Materials Management, Tr. 225.)
5. Traditionally the industry standard for replacement of brake shoe assemblies is to re-use cast iron cores through the use of a core exchange program in which used cores are removed, inspected and if suitable, refit with new shoes which are affixed to those cores being reused.
6. At two (2) shoes per wheel, each four-wheeled bus requires eight (8) brake shoes.
7. Historically, MTA provided its brake maintenance services in-house.

8. The procurements here in dispute represent MTA's first attempt to out-source the provision of brake assemblies for its bus fleet.
9. In this procurement MTA initially sought to transfer to a private vendor the obligation of inspecting used brake tables and refitting them with brake shoes. (Trial testimony of Carolyn Caldwell, Tr. 225.)
10. On or about March 29, 2005, MTA issued a certain Request for Quotations to procure bus brake assembly components, for which interested bidders were permitted to provide MTA pricing information by April 20, 2005.
11. The aforesaid Request for Quotation, known as No. 04205-Z, hereinafter referred to as the "first contract invitation," was issued by Ms. Patricia Talley, an MTA Procurement Administrator.
12. The first contract invitation here at issue solicited single per-component pricing for the brake assemblies to be provided, offering a credit to MTA for used assemblies but stating further that the credit offered would not affect MTA's determination of the low bid.
13. It is unclear from the foregoing provision why MTA may have solicited from its prospective vendors a promise to credit MTA for reusing brake cores while simultaneously informing them that the credit offered would not affect MTA's determination of low bid.
14. The Code of Maryland Regulations (COMAR) § 21.04.01.01 defines "specification" as "a clear and accurate description of the functional characteristics or the nature of an item to be procured."
15. The relevant section of the proposed Contract attached to MTA's first contract invitation was entitled "Standard Floor Bus Riveted Brake Block Assembled on Shoes," and stated more fully as follows:

"VIII. USED ASSEMBLIES

The Contractor shall include, as part of the bid package, a price per assembly for used assemblies that shall be credited back to the MTA. Credit offered for used assemblies will not affect determination of the low bid. MTA may accept this offer or scrap the assemblies after use, depending on the best interest of the State. Bid shall be per used assembly (shoe with worn block attached) regardless of rear or front designation or class number but shall be limited to class numbers identified in this contract. Transport cost for pick up from MTA, and delivery to the Contractor's facility, shall be at the Contractor's expense and incorporated into the per-item bid. If accepted MTA will not separate or sort the various assemblies for shipping. MTA will palletize assemblies together regardless of class number or front/rear designation. The pallets shall be at the Monroe St. location. MTA will load into trucks with forklift and pallet jack access from MTA loading dock. MTA reserves the right to stop selling used assemblies if it is determined not to be in the best interest of the State. Payment from the Contractor for used assemblies shall be submitted as a credit. Billing for new assemblies and credits shall be submitted as separate line items." (Respondent's Trial Exhibit No. 3 and 5.)

16. At the time that the aforementioned first contract invitation was issued, MTA Procurement Administrator Patricia Talley understood MTA to be implementing a core exchange program with a new vendor, obligating MTA to provide to the vendor MTA's used brake tables for the vendor to inspect and remanufacture with new brake shoes. (Trial testimony of Patricia Talley, Tr. 241.)
17. The foregoing contract provision was intended by MTA to create a core exchange program.

18. The foregoing contract provision was reasonably interpreted by appellant as creating a core exchange program.
19. The foregoing contract provision established a core exchange program.
20. MTA concedes that the first contract invitation established a core exchange program. (MTA Reply Brief at pg. 3.)
21. The foregoing contract specifications set forth in Finding of Fact No. 15 above and attached to the Request for Quotation were written not by Procurement Administrator Patricia Talley, who drafted the cover page Request for Quotation, but instead, by MTA's quality assurance representative.
22. Appellant Premium Transit Service (PTS) bid on the contract, as did a competing firm, North American Bus Industries (NABI).
23. PTS is a small, minority-owned business which is incorporated and based in Indiana and provides parts to transit companies in various locations across the country.
24. By e-mail dated May 3, 2005, NABI purported to correct its bid submission by modifying the order of its pricing list to match the part numbers set forth in the bid specifications. (Appellant's Trial Exhibit 9.)
25. By FAX transmission dated May 3, 2005, appellant PTS directed a Memorandum to Ms. Patricia Talley, advising that an independent test of the brake pads and shoes offered to be provided by the competing bidder, NABI, also known as the Rome brake shoe, revealed that that shoe was inconsistent with contract specifications and stating also that PTS would shortly provide to MTA a copy of that independent test as soon as it became available from Quality Associates Metallurgical

Services of Niles, Michigan. (Appellant's Trial Exhibit 1.)

26. By e-mail dated May 11, 2005, appellant directed a follow-up Memorandum to Ms. Patricia Talley which included the independent test results prepared by Quality Associates on Rome brake shoes, documenting failure of those particular brake shoes offered to be provided to MTA by NABI to conform to contract specifications with respect to shoe table flatness. (Appellant's Trial Exhibit 2.)

27. By FAX transmission dated June 2, 2005 appellant directed a Memorandum to Mr. Ronald Etzel, MTA Chief of Purchasing, stating "PTS *WAIVES ITS RIGHT TO PROTEST THE ABOVE PROCUREMENT*." (Emphasis in original.) (Respondent's Trial Exhibit No. 1.)

28. Andrew W. Brown, President of appellant PTS, explained in trial testimony at the hearing that he believed that federal funds were contributed to the subject procurement and that the aforesaid waiver was intended to indicate his intention only to waive appellant's protest rights with respect to appeals to the Federal Transportation Administration (FTA), an agency referenced in the sentence of the June 2, 2005 FAX immediately preceding the waiver reference set forth in Finding of Fact No. 27 above.

29. No vendor was present at the bid opening which occurred on or about June 3, 2005.

30. On or about August 25, 2005, MTA issued a certain similar, but not identical, Request for Quotation for which bids from interested bidders were due by September 28, 2005.

31. This aforesaid second Request for Quotation, known as No. 09285-Z, hereinafter referred to as the "second

contract invitation," was issued by Mr. Edward Gluth, an MTA Procurement Officer.

32. The first sentence set forth in the form Request for Quotation completed by Mr. Gluth was as follows: "BLANKET CONTRACT FOR BRAKE BLOCK AND NEW SHOE ASSEMBLIES TO BE USED ON THE MTA'S FLEET OF FORTY-FOOT LOW FLOOR TRANSIT BUSES THAT HAVE 16.5 INCH DIAMETER BRAKES WITH CAST IRON SHOES." (Respondent's Trial Exhibit 2.)

33. The second contract invitation sought to receive from bidders pricing information for four (4) separate types of brake assemblies, specifically, the front and rear assemblies for MTA's Neoplan buses, and the front and rear assemblies for MTA's New Flyer buses. (Respondent's Trial Exhibit 2.)

34. By repeating part no. "A-3222-H-2296 Meritor" for both the front and rear brake assemblies for the Neoplan bus, MTA's second contract invitation contained a typographical error for designation of the rear brake assemblies for the Neoplan bus, namely, an incorrect part number, which was actually the part number for the front brake assembly for the Neoplan bus, which was referenced twice instead of the correct part number references to distinct and differing part numbers for the front and rear brake assemblies for the Neoplan bus. (Appellant's Trial Exhibit 2.)

35. Unlike the cover page of the Request for Quotation referenced above, the proposed Contract attached to the Request for Quotation due September 28, 2005 did set forth the correct part number for the rear brake assembly for the Neoplan bus, namely, "Meritor P/N A-3222-F-2294." (Appellant's Trial Exhibit 2.)

36. In addition to the part specification error more fully described above, specifications for both the front and

rear brakes for the New Flyer bus actually identified short table brakes rather than long table brakes.

37. The reason that MTA specifications for brake assemblies wrongly identified the part number for short table brakes instead of the long table brakes that MTA desired is that MTA used the bus manufacturer's parts list, which, unbeknownst to MTA at the time of the issuance of the Requests for Quotations, set forth the part numbers for short table brakes because the bus manufacturer had mistakenly provided MTA with buses equipped with short table brakes.

38. MTA actually desired long table brakes for its bus fleet and believed that it had long table brakes because MTA had specified to the bus manufacturer that its new bus fleet be equipped with long table brakes when it purchased the new New Flyer buses.

39. At the time of the issuance of the contract invitations here in dispute, MTA wrongly believed that its buses were equipped with long table brakes, but the first 80 of MTA's newly purchased New Flyer buses were actually mistakenly equipped by the manufacturer with short table brakes instead.

40. Subsequent deliveries of the New Flyer bus were correctly equipped with long table brakes rather than the short tables that were wrongly provided by the manufacturer on the first 80 New Flyer buses purchased by MTA. (Trial testimony of Ronald Etzel, MTA Chief of Purchasing, Tr. 252 *et seq*.)

41. At the time of the procurement activity here at issue, MTA thought that it had buses with long table brakes, but realized only afterwards that it did not because the new buses MTA had just purchased for which the brakes had not yet received initial inspection and

service came equipped with short table brakes rather than long table brakes as ordered.

42. Long table brakes are believed by MTA and others to be superior to short table brakes both for improved braking function as well as parts longevity reducing the frequency of brake replacement and maintenance.

43. Because MTA's new order of New Flyer buses was delivered to and accepted by MTA with short table brakes, MTA initially did not have long table brake cores to provide to appellant PTS for remanufacture and refitting of brake shoes.

44. Mr. Gordon Garrettson, former Superintendent of Maintenance at MTA, now in charge of MTA's Materials Management, testified that if he had had them in October 2005, he would probably have provided long table brake cores to appellant under the terms of the subject procurement, but he did not have long tables due to the wrongful equipping of the first 80 of the newly purchased New Flyer buses that were discovered to be equipped only with short table brakes. (Tr. 267.)

45. After discovery of the initial delivery of the first 80 of MTA's new New Flyer buses with short table brakes, MTA eventually required the manufacturer to retrofit those buses with the correct long table size of brakes, which was done in the period of December 2005 to January 2006, and the buses delivered after the first 80 purchased by MTA were properly equipped with long table brakes, as MTA had ordered.

46. In comparison to the related provision in the first contract invitation referenced in the foregoing Finding of Fact No. 15, a section of the second contract invitation attached to MTA's "Request for Quotation" was also entitled "Riveted Brake Block Assembled on Shoes," but stated as follows:

"VI. USED ASSEMBLIES

Used assemblies (shoe with worn block attached) shall be returned to the Contractor at the MTA loading dock. Transport cost for pick up from MTA, and delivery to the Contractor's facility shall be at the Contractor's expense and incorporated into the per-item bid. MTA will not separate or sort the various assemblies for shipping. MTA will palletize assemblies together regardless of class number or front/rear designation. The pallets shall be at the 1331 Monroe St. location. MTA will load into trucks with forklift and pallet jack access from MTA loading dock. MTA makes no guarantee that any used shoe will be suitable for reuse." (Appellant's Trial Exhibit Nos. 2 and 5.)

47. The foregoing provision of the Request for Quotation concerning "Used Assemblies" as set forth in the second contract invitation was different from the language contained in the "Used Assemblies" provision in the first contract invitation. (Compare Finding Nos. 15 and 46.)

48. The foregoing contract specifications set forth in Finding of Fact No. 46 above and attached to the second contract invitation were written not by Edward Gluth, who drafted the cover page of MTA's Request for Quotation, but instead, by MTA's quality assurance representative.

49. MTA now contends that its first contract invitation was for a core exchange program but its second contract invitation was not.

50. Notwithstanding MTA's aforesaid contention, the aforementioned language in its second contract invitation is not conditioned upon any provision reserving to MTA the option of not providing brake

cores to the vendor selected to provide to MTA its desired brake assemblies.

51. The aforementioned language does not make it clear that no core exchange program was intended by MTA with respect to its second contract invitation.

52. The aforementioned language was reasonably interpreted by appellant as creating a core exchange program, just as was intended and done by MTA by its first contract invitation.

53. The aforementioned contract provision established a core exchange program.

54. Appellant Premium Transit Service (PTS) bid on the contract, quoting a price of $125 per set for Neoplan front brake assemblies, $250 per set for Neoplan rear brake assemblies, $300 per set for New Flyer front assemblies, and $175 per set for New Flyer rear assemblies. (Appellant's Trial Exhibit 3 at Tab 4.)

55. Another bidder, MCI Service Parts, Inc. of Schaumburg, Illinois (MCI), also bid on a portion of the contract, quoting a price of $325.16 for the Neoplan front brake assembly and $352.66 for the Neoplan back brake assembly, but declining to offer to fill orders for brake assemblies for MTA's fleet of New Flyer buses. (Appellant's Trial Exhibit 7.)

56. MCI's response to MTA's second contract invitation included the following hand-written notation in advance of MCI's hand-written price quotes: "Per Ed[ward Gluth] – Requirement is for <u>new</u> shoes and <u>block</u>." (Emphasis in original.) (Appellant's Exhibit 7.)

57. The foregoing notation evidences the occurrence of a unilateral discussion between MTA and MCI clarifying only for MCI that MTA sought new brake assemblies, in contrast to remanufactured brake assemblies using a core exchange program.

58. There is no evidence to support a finding that appellant sought clarification of whether acquisition of new or used brake assemblies were contemplated by this procurement nor was any such clarification offered to or shared with appellant notwithstanding such notification being made to a competing vendor.

59. COMAR § 21.05.03.03C(3)(a) provides:

> General. Qualified offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals. The procurement officer shall establish procedures and schedules for conducting discussions. If discussions indicate a need for substantive clarification of or change in the request for proposals, the procurement officer shall amend the request to incorporate the clarification or change…[D]isclosure to a competing offeror of any information derived from a proposal of, or from discussions with, another offeror is prohibited. Any oral clarifications of substance of a proposal shall be confirmed in writing by the offeror.

60. In this instance in light of evident clarifying discussions with a competing bidder as more specifically set forth in Finding of Fact No. 56 above, MTA should have specifically notified PTS that it was bidding on a program without a core exchange commitment on the part of MTA, or at least that MTA expected PTS to provide new shoes and blocks, just as MTA made this clarification and notice to competing bidder MCI.

61. On or about September 28, 2005, MTA opened bids on its second contract invitation for brake assemblies.

62. MTA procurement records reflect with respect to the second contract invitation that MTA affirmatively solicited quotes from twelve (12) vendors, of which six

(6) provided no response, four (4) responded but provided no price quote, and two (2) submitted prices, namely, appellant PTS, which bid on all four (4) brake assemblies, and MCI, which bid on only two (2) of the four (4) brake assemblies for which MTA solicited purchases. (Appellant's Exhibit 3 at tab 5.)

63. Ordinarily new brake cores and shoes are more expensive than remanufactured assemblies made by refitting used cores because the vendor must pay for and supply new brake cores rather than reusing cores provided by the purchaser.

64. As more specifically set forth in the foregoing Finding of Fact Nos. 54 and 55, there was a substantial price difference between the prices quoted by the two (2) firms submitting prices in response to MTA's Request for Quotation, e.g., $125 v. $325 per set for the Neoplan front brake assembly, representing a cost differential of more than 250%.

65. It should have been evident at the time that MTA received bids from the two competing that MCI understood that it was required to provide new cores while PTS believed it could provide used cores.

66. COMAR 21.05.02.12C provides:

> "Confirmation of Bid. If the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted…"

67. Pursuant to the terms of the second contract invitation, on or about September 29, 2005, MTA awarded the blanket order contract to appellant PTS, providing

a Notice of Award to appellant via eMaryland Marketplace. (Appellant's Exhibit 3 and Tab 6.)

68. The commencement date of the two-year contract was October 3, 2005, with the reservation of a two-year right of renewal at the election of MTA.

69. The terms of the first blanket purchase order contract required delivery no later than three (3) weeks following the initial order and no later than two (2) weeks following each subsequent order, while the terms of the second blanket purchase order contract required delivery no later than two (2) weeks following placement of the order.

70. On or about October 14, 2005, MTA issued its first purchase order requesting a total of 72 brake shoes, consisting of 12 front brake shoes and 60 rear brake shoes, which were due for delivery no later than three (3) weeks later.

71. On or about October 21, 2005, PTS requested that MTA make available to it the brake table cores which it understood MTA sought to be reconditioned and equipped with new shoes, or in the alternative, grant to PTS a price adjustment, if in the alternative, MTA expected PTS to provide brand new tables in the absence of MTA's ability to provide used cores for remanufacture.

72. On or about October 24, 2005 at the invitation of MTA, Andrew W. Brown, President of PTS, traveled from Indiana to Maryland for the purpose of assisting MTA in locating the brake shoe cores which Mr. Brown suspected were in storage somewhere at MTA's maintenance warehouse facility located at 1331 Monroe Street in Baltimore, as set forth in contract documents, but due to MTA's failure to communicate this plan to MTA personnel present at the warehouse, upon arrival from

Indiana, Mr. Brown was not permitted to search the warehouse for the cores.

73. As reflected by MTA's e-mail communication dated October 27, 2005 referencing two (2) phone calls with NABI "concerning the cast iron shoe bid," during this time frame MTA was engaged in unilateral discussions with NABI for MTA's potential future purchase of brake assemblies. (Appellant's Trial Exhibit 6.)

74. The substance of the foregoing discussions with NABI was not shared with PTS.

75. By correspondence dated November 2, 2005, PTS complained to MTA about the award of the first contract invitation, Request for Quotation No. 04205-Z, to NABI. (Appellant's Exhibit 3 at Tab 8.)

76. By FAX dated November 2, 2005 to Mr. Ronald Etzel, MTA's Chief of Purchasing, PTS also complained to MTA about MTA's failure to provide brake cores under the terms of MTA's second contract invitation, Request for Quotation No. 09285-Z, for which appellant was then attempting to secure cores. (Appellant's Exhibit 3 at Tab 8.)

77. By telephone conference and e-mail dated November 17, 2005 MTA notified PTS that the cores from the brake assemblies removed from the new fleet of New Flyer buses purchased by MTA could not be re-used by PTS because the first 80 of the newly purchased New Flyer buses had been wrongfully equipped by the manufacturer with short table brake assemblies even though MTA desired and had ordered and paid for long table brake shoes. (Appellant's Trial Exhibit 5.)

78. During the aforementioned communications, MTA offered to allow PTS to assume possession and ownership of the short table cores not wanted by MTA, but appellant had no customers using short tables at that time, so PTS

had no use for the short tables offered to appellant by MTA, and PTS therefore did not receive or accept them.

79. There is no indication or evidence of record that MTA at this time sought to have the bus manufacturer provide to PTS the long table brake cores that MTA desired and had paid for but which were mistakenly not provided by the manufacturer upon initial delivery of the first 80 of MTA's new bus fleet.

80. On or about November 23, 2005, MTA issued its second purchase order to PTS.

81. Through the month of November 2005 appellant PTS continued communications in an attempt to resolve the question of the missing long table cores which PTS desired so that it could fill MTA's order of brake shoe assemblies, including as evidenced by e-mails dated November 28 and 29, 2005 reflecting appellant's increasing frustration over the lack of progress in resolving the problem prior to a face-to-face meeting planned for November 30, 2005. (Appellant's Exhibit 3 at Tab 8.)

82. During this time frame, MTA continued to demand that appellant PTS perform under MTA's interpretation of the terms of the contract between MTA and PTS by delivering the long table brake assemblies sought by MTA even though MTA had not delivered to PTS nor otherwise made available for PTS to pick up any of the long table brake cores PTS needed to remanufacture the assemblies.

83. Finally, in the absence of any long table used brake cores which PTS understood were to have been supplied by MTA, PTS purchased new long table brakes for MTA.

84. On or about December 2, 2005, appellant delivered to MTA certain brake assemblies requested via the first purchase order, including 11 of the 12 long table front brake assemblies and 30 long table rear brake

assemblies, followed by a second delivery of an additional 30 long table rear brake assemblies, thus substantially completing MTA's October 14, 2005 initial order for a total of 72 brake assemblies.

85. At the same time as the initial delivery, appellant PTS also directed to MTA a formal letter of dispute seeking in part a price adjustment due to MTA's failure to provide brake cores. (Appellant's Exhibit 3 at Tab 9.)

86. On or about December 2, 2005 PTS invoiced MTA the sum of $4,330 for the delivered brake assemblies as calculated using appellant's price quotations, plus an additional $35,150 in cost overruns occasioned by PTS having to provide to MTA new brake tables instead of being able to re-use brake cores provided by MTA, as anticipated by PTS when it submitted its price quote. (Appellant's Exhibit 3 at Tab 10.)

87. The $35,150 price adjustment requested by appellant includes $2,448 as the cost of the 12 new front tables purchased by PTS and provided to MTA, $14,100 as the cost of the 60 new rear tables purchased by appellant and provided to MTA, and $18,602 representing the cost of appellant's field expenses such as overhead and travel and hotel costs allegedly incurred by appellant but not further itemized or supported by testimony beyond a single line item in appellant's December 2, 2005 invoice. (Appellant's Exhibit 3 at Tab 10.)

88. During the course of testimony at the hearing before this Board, PTS provided no itemization, receipts, or other verification of expenditure of the claimed $18,602 in "field hours" set forth in that line item of the December 2, 2005 invoice for price adjustment.

89. Appellant offered no testimony at the hearing to support the truthfulness, reasonableness or itemization of the alleged expenditure of the line item for $18,602

in the December 2, 2005 invoice for price adjustment, other than the language on the invoice itself, which states: "FORMAL PROTEST/DISPUTE EXPENSES, TRANSIT AUTHORITY ON-SITE RESOLUTION 'FIELD HOURS', OFFICE MATERIALS COST, HOTEL, OTHER STANDARD TRAVEL EXPENSES, AND SALES MARGIN ON ABOVE PARTS."

90. Appellant's Proof of Costs filed January 16, 2007 includes eleven (11) pages of itemization of PTS costs totaling $438,269.71.

91. In the aforesaid itemization, PTS charges an hourly billing rate of $325.00 for government consulting.

92. No evidence was adduced concerning the fairness or reasonableness of any billing rate.

93. MTA never supplied to appellant any of the brake cores which appellant requested under the terms of the blanket purchase order contracts here at issue, but PTS nevertheless provided to MTA the brake assemblies set forth in MTA's first order.

94. After filling MTA's initial order, PTS failed to supply any brake assemblies pursuant to any subsequent MTA order, including MTA's second purchase order under MTA's blanket purchase order contract with PTS.

95. On or about March 16, 2006, MTA directed correspondence to PTS which constituted final agency action, rejecting appellant's claim for price adjustment and advising PTS that "[t]he contract does not provide for a core exchange program." (Respondent's Trial Exhibit 4.)

96. By correspondence dated March 21, 2006, appellant complained to the Offices of the Attorney General and Maryland Transit Administrator. (Appellant's Trial Exhibit 3 at Tab 3.)

97. On or about March 24, 2006, appellant initiated the instant formal appeal with the Maryland State Board of Contract Appeals (Board).

98. On or about March 27, 2006, MTA terminated for cause its contract with appellant PTS, citing in its letter of termination the ground of "repeated failure to deliver in timely fashion" under Article V of the contract. (Appellant's Exhibit No. 3 at Tab 2.)
99. On or about May 16, 2006, PTS retained out-of-state counsel to represent appellant in the instant contract dispute, such counsel being replaced by Maryland counsel on or about July 3, 2006 in accordance with the requirement of the Board's Order of June 16, 2006.
100. Full evidentiary hearing in this matter was conducted before the Board on May 2 and 3, 2007, following which counsel for both parties were allowed the opportunity of submitting legal briefs in support of their respective arguments.
101. Due to MTA's dilatory filing, both post-hearing briefs were not received in this proceeding until on or about September 13, 2007.
102. PTS seeks damages in the total sum of $802,000.
103. MTA denies any liability.
104. COMAR 21.10.06.32 permits the Board in certain circumstances to award to appellants the reasonable costs of filing and pursuing claims, including attorney fees, but only in contracts for construction, thereby precluding PTS from recovering more than its actual proven contract costs and losses, exclusive of costs related to pursuing its claim against MTA.

Decision

Appellant's initial Complaint includes six (6) counts captioned as follows: (1) Unjustified Termination of Contract, (2) Violation of Procurement Procedures, (3) Conspiracy to Terminate Contract, (4) Public Information Act

Violation, (5) Due Process Violations, and (6) Title VI Violation (referring to the federal Civil Rights Act of 1964). In response to the State's Motion to Dismiss all extra-jurisdictional allegations raised before the Maryland State Board of Contract Appeals (specifically, Count Nos. 4, 5 and 6), as a preliminary matter at the commencement of the hearing, PTS acknowledged its understanding that no federal dollars were expended in the procurement which is the subject of this complaint as well as its recognition of other jurisdictional limitations of the Board. As a result, PTS stipulated to the dismissal of all claims related to federal procurement regulations and deferred to the Board's dismissal of all of appellant's civil rights claims. (Tr. 9 and 10.)

It further appearing from appellant's opening statement that PTS sought to consolidate dual claims for bid protest and contract dispute, the Board bifurcated appellant's claim and allowed PTS first to proceed only with evidence in support of its bid protest. Both statute and regulation require the Board to follow separate rules of procedure for resolving bid protests as compared to contract disputes. Compare State Finance and Procurement Article of the Maryland Annotated Code §15-220(b)(1) to §15-220(b)(2). Compare also COMAR 21.10.02 to COMAR 21.10.04, *et seq*. At the close of evidence in support of appellant's bid protest, the Board granted the State's Motion to Dismiss, allowing appellant then to proceed solely in support of its state contract claims. (Tr. 59.) This Opinion sets forth the basis of the Board's determination in favor of appellant in those claims.

Naturally, when state contract specifications are well written and unambiguous, private vendors often perform as anticipated without necessity of appellate intervention and interpretation by this Board. By contrast, this Board is

accustomed to reviewing state contract formation that is occasionally sufficiently flawed as to invite complaint. As intimated at the hearing in this matter, the MTA Requests for Quotation at issue in the instant appeal are examples of the latter.

That MTA's Requests for Quotation referenced multiple incorrect part numbers is immaterial to this dispute in comparison to several much more significant failures in MTA's design of a blanket purchase order for its bus brake replacement program here under examination. First, and most important, is the question of whether or not this contract established a core exchange program. If it did, then it was incumbent upon MTA to provide to its vendor the brake tables which the vendor was to be able to use for the purpose of remanufacturing brake shoe assemblies and returning usable cast iron cores refitted with new shoes. MTA did not do this. As a direct result, PTS had no cores to refit with new shoes. While PTS floundered in frustration without meaningful MTA support to secure the cores that it needed in order to remanufacture MTA's brake shoe assemblies, MTA simply continued to demand performance from PTS while simultaneously engaging in unilateral communications with two business competitors.

Addressing first this critical question at the heart of the instant dispute, it is clear to this Board that MTA's blanket purchase order did create a core exchange program. This is the standard in the industry, namely, that cast iron shoes are not discarded after one use but are refitted with new shoes as long as they are suitable for re-use. If MTA desired not to implement a core exchange program, it was MTA's responsibility plainly to say so. This is particularly true when, as here, MTA claims to have desired a core exchange program in June of 2005 by way of its first contract invitation but not in August of the same year in

its second contract invitation. The burden of informing all vendors that MTA desired only new rather than remanufactured brake assemblies is enhanced by virtue of MTA's documented admission that it gave this vital information to a competing vendor, but not to PTS. Maryland procurement regulations required the same disclosure to PTS as was provided to MCI.

Furthermore, the extraordinary difference between price quotes provided by PTS and MCI put MTA on constructive notice of an ambiguity in its contract and the need for clarification of vendors' responsibilities and confirmation of bid prices. New equipment costs more than remanufactured brake assemblies. MTA cannot lawfully induce one vendor to establish its bid price based on the vendor's reasonable belief that it can provide remanufactured equipment and then demand that that vendor provide brand new equipment at the same price.

Revising its initial position as recently as the filing of its reply brief, MTA now asserts that its first contract invitation was indeed intended as a core exchange program; only its second contract invitation was not. If this is the case, then surely MTA bore the burden of clearly notifying vendors that MTA expected to receive only new equipment rather than remanufactured assemblies. Assuming the validity of MTA's current argument, MTA had already established a nearly identical blanket purchase order with PTS under a core exchange program detailed in part by a contract provision entitled "Used Assemblies." The second contract invitation also included a contract provision entitled "Used Assemblies" which began with the following assurance: "Used assemblies (shoe with worn block attached) shall be returned to the Contractor at the MTA loading dock." Under the circumstances, the suggestion implied by MTA's current contention that PTS should have known that it would not be receiving the used cores is not only rejected

by the Board, the allegation is illogical and unsupportable as well.

It is plain to the Board what very likely occurred in this scenario. MTA simply discovered late in the process that its fleet of new buses did not have long table brake shoes, as MTA desired, paid for, and believed it had received when it accepted delivery of its new bus fleet. It was not until the initially equipped brake shoes on the new fleet began to wear thin and were scheduled for replacement that MTA became aware that its new buses had never been equipped with the long table brake shoes that MTA thought it had in its inventory. As a result, MTA was unable to provide to PTS any used long table brake shoe assemblies that it earlier expected to be able to provide.

Even MTA representatives admitted at the hearing that the entire new out-sourcing option to service the brakes on the new bus fleet was initially intended as a core exchange program for which MTA would have provided to PTS long table cores if it had had them. But it didn't provide any of the proper sized cores to PTS because it didn't have them. Acting in response to its late discovery of this deficit and justifiably concerned over the need for timely replacement of brake shoes for properly functioning brakes on its buses, MTA demanded that PTS provide shoes as expeditiously as possible, while setting up an alternative provider as a back-up option. As understandable as MTA's concern may have been however, its conduct in response to the problem was in breach of its contract with PTS.

MTA owes a debt of gratitude to PTS for providing the brake shoe assemblies PTS eventually delivered despite MTA's failure to give PTS access to used cores, as MTA's contract provisions expressly promised it would do. Thanks to PTS, MTA was able to maintain its new bus fleet safely on the street. Furthermore, when MTA aggressively solicited fully

a dozen vendors to supply the brake parts that it needed, PTS was the only firm that bid on every component. Again, PTS earned and should have received MTA's heartfelt thanks. Instead, PTS was denied its requested price adjustment.

When MTA discovered that it did not have the long table brakes that MTA thought it had (and assuming that MTA opted not at that time to direct its bus manufacturer to provide long tables to PTS, an obvious request for which there is no evidence of record), MTA should have promptly paid a reasonable price adjustment for the extra materials and service provided to it by PTS having to purchase and provide its own long table cores. Why MTA did not agree and to this day has not agreed to a fair price adjustment is perplexing to the Board. Reading the words of the contract documents, any reasonable person familiar with practices in the industry would likely have come to the same conclusion as did the highly experienced bus parts representative and President of PTS, namely, that MTA sought to establish a core exchange program. Even some MTA procurement representatives thought that this was MTA's intent. Irrespective of MTA's unwritten intent, the words set forth by MTA in its contract language belie MTA's denial that the second contract invitation was a core exchange program. MTA's contract and blanket purchase order did create a core exchange program and thus, an obligation on the part of MTA to provide to PTS the brake cores sought to be remanufactured and returned with new shoes. MTA failed to perform that obligation and thus breached its contract with PTS for which PTS is entitled to recover damages.

Based upon the findings of fact and for the reasons set forth above, the Board finds in favor of appellant. A determination of the liquidated amount due appellant shall be held *sub curia* for a period of fifteen (15) business days from the date of this decision. During that period of

time, counsel are invited to submit to the Board, should they desire, a statement of verified costs claimed or admitted to be due and owing. The Board recognizes that in light of the instant Opinion MTA may elect to stipulate to a liability of only $6,920.50 as the compensable cost of the cores provided to MTA by PTS, an unitemized amount referenced in MTA's Reply Brief. PTS on the other hand seeks a total of $802,000.00 based in part on appellant's claimed expenses itemized in the amount of $438,259.71 in its Proof of Costs and alternatively supported by testimony at the hearing to the extent of $35,150.00, though the actual out-of-pocket expenses incurred by PTS as the cost of purchasing long table brake cores was said to be in the sum of $2,448.00 for the front tables and $18,602.00 for the rear tables, for a total of $21,050.00.

The parties are aware that the presentation of evidence in this matter was closed months ago and the Board does not intend to reopen the hearing even though the Board at this late juncture does not have sufficient sworn and authenticated evidence to sustain appellant's claim in its entirety in either the sum of $802,000.00 or $438,259.71. In addition, Mr. Brown's claimed consulting rate of $325.00 per hour is not supported by any sworn or other properly supported evidence that such a rate is fair or reasonable, and the Board deems that such a rate is neither. Finally, notwithstanding ruling in favor of appellant, the Board is without authority to award costs in this appeal and will not approve of any award of damages that are disallowed, unproven, inflated or unjustified.

Based on the Findings of Fact set forth herein and the above analysis by way of the Board's Decision, it is hereby ordered that judgment shall be and is entered in favor of appellant, subject only to the entry of a further Final Order in which liquidated damages are calculated and

specified. The parties shall have fifteen (15) business days from the date of this Order within which they may elect to submit to the Board a supplementary verification or objection to this Board's determination of quantum. The record in this matter shall remain open in this proceeding only for that purpose and will thereafter be closed upon filing of the Board's final Order establishing liquidated damages owed by MTA to appellant for all costs and damages incurred by PTS in the course of its contract performance but not in the course of pursuing its claim against MTA.

Wherefore, it is Ordered this day of October, 2007 that the above-captioned appeal is granted, subject to future final Order setting forth a quantum calculation of liquidated damages to which appellant is entitled.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael W. Burns
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 2530, appeal of Premium Transit Services, Inc. under MTA Bid #04205-Z and 09285-Z, Blanket Contract TT14583.

Dated:

Michael L. Carnahan
Deputy Clerk