

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of )  
STG International, Inc. )  
 ) Docket MSBCA No. 2755  
 )  
Under DPSCS Solicitation No. )  
Q0010020 )

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in MSBCA No. 2751 Pikesville, Maryland  
Hope Health Systems, Inc.

OPINION BY BOARD MEMBER DEMBROW

This bid protest comes before the Maryland State Board of Contract Appeals (Board) for ruling on dispositive cross-motions for Summary Decision. Despite the presence of flaws in the underlying procurement, including the failure to make and maintain complete and accurate records relating to the exercise of the State's option to cancel the subject solicitation, the Board declines to reverse that substantive determination for the reasons set forth below.

### Findings of Fact

1. The Department of Public Safety & Correctional Services (DPSCS) sought to initiate a state procurement by competitive sealed proposal conducted pursuant to §13-104 of the State Finance and Procurement Article (SF&P) of the Annotated Code of Maryland and the Code of Maryland Regulations (COMAR) 21.05.03 through the issuance of a certain Request for Proposals (RFP) on or about January 25, 2010 known as DPSCS Solicitation No. Q0010020. (Tab 1 of appellant's notebook of hearing exhibits.)
2. The foregoing procurement relates to the delivery of mental health services for inmates at state correctional facilities and was one of four (4) separate RFPs for health care services to be provided for DPSCS, the three (3) independent but related procurements pertaining to pharmacy, dental, and general medical services.
3. As a part of the coordinated procurement of health care services for some 26,000 inmates at 26 separate correctional facilities, including the RFP for mental health services here at issue, DPSCS conducted a pre-proposal conference on or about February 19, 2010, which potential bidders were invited to attend.
4. A number of inquires concerning the RFP for mental health care services arose at and following the pre-bid conference, as a result of which DPSCS between February 25 and March 29, 2010 promulgated a series of written questions and answers. (Tab Nos. 3 through 9.)
5. DPSCS issued a March 29, 2010 Addendum to the solicitation for mental health services. (Tab 10.)
6. On or about April 14, 2010, DPSCS began to evaluate the technical submission components of the eight (8) proposals submitted in timely fashion in response to the subject

- solicitation for mental health services, five (5) of which were ultimately deemed by DPSCS to be reasonably susceptible of becoming acceptable for prospective contract award.
7. On or about May 7, 2010, Hope Health Systems, Inc. (Hope Health), a small, minority-owned firm based in Gwynn Oak, Maryland, with a history of significant experience in adolescent but not in adult mental health services in correctional settings, was for that reason deemed unqualified and therefore rejected from further consideration as not reasonably susceptible of being selected for award.
  8. On or about May 14, 2010, Hope Health protested the rejection of its bid and upon reconsideration, DPSCS rescinded its rejection of that bidder.
  9. On or about May 24, 2010, DPSCS opened the financial submissions of the five (5) proposals potentially eligible for contract award.
  10. On the financial element of bid evaluation, Hope Health was ranked first (1<sup>st</sup>) as the lowest bid received, but last in the ranking of technical proposals submitted, with an overall rank of fifth (5<sup>th</sup>) out of the five (5) bids being evaluated.
  11. MHM, Maryland, Inc. (MHM), based in Baltimore, Maryland, the incumbent provider of mental health services in Maryland prisons, was ranked third (3<sup>rd</sup>) on its financial offer and first (1<sup>st</sup>) on its technical offer, with an overall rank of first (1<sup>st</sup>).
  12. Appellant STG International, Inc. (STG), based in Alexandria, Virginia, was ranked second (2<sup>nd</sup>) on its financial offer and second (2<sup>nd</sup>) on its technical offer, with an overall rank of second (2<sup>nd</sup>).
  13. Conmed Healthcare Management, Inc. of Hanover, Maryland was ranked fourth (4<sup>th</sup>) on its financial offer and third (3<sup>rd</sup>) on its technical offer, with an overall rank of third (3<sup>rd</sup>).
  14. Prison Health Services, Inc. of Brentwood, Tennessee was ranked fifth (5<sup>th</sup>) in its financial offer, submitting a price

- significantly higher than the other four (4) bidders, and fourth (4<sup>th</sup>) in its technical offer, with an overall rank of fourth (4<sup>th</sup>).
15. On or about June 3, 2010, DPSCS requested a best and final offer (BAFO) from each of the five (5) eligible bidders.
  16. Based on the determination of the DPSCS Evaluation Committee and Procurement Officer, on or about August 26, 2010, MHM was recommended by DPSCS for award of the new contract.
  17. By correspondence dated September 17, 2010, all offerors were notified that MHM had been selected for contract award.
  18. On or about September 17, 2010, Hope Health filed a second bid protest with DPSCS, noting that it was initially promised the opportunity of making an oral presentation of its proposal to DPSCS on May 6, 2010, an opportunity that was afforded to other bidders, but which was canceled for Hope Health alone.
  19. The second Hope Health protest was denied by DPSCS final determination dated November 23, 2010 and thereafter appealed to this Board and docketed as Case No. 2751.
  20. During the final stages of contract completion, DPSCS reversed its initial decision and determined to disqualify the top ranked bidder, MHM, from contract award due to deficiencies in required elements of its disadvantaged and minority business enterprise (DMBE) submissions.
  21. On or about December 6, 2010, appellant STG was informed of the tentative DPSCS determination of prospective contract award to STG instead of MHM, because STG was second in line for contract award after MHM, which DPSCS had at that time determined to be disqualified.
  22. Shortly afterwards, DPSCS informally alerted STG of the likelihood of canceling the entire procurement and STG pleaded to DPSCS by e-mail on Saturday, December 11, 2010, "to rebid this procurement will be very unfair, costly, and would invite more protest down the road."

23. By correspondence dated Monday, December 13, 2010, DPSCS formally rejected all proposals and formally notified all bidders in writing of the cancellation of the entirety of the subject procurement. (Tab 15.)
24. The reason stated for the DPSCS determination to reject all bids and cancel the solicitation was the need to make changes to the specifications set forth in the RFP.
25. Specifically, the aforesaid "NOTICE TO OFFERORS" stated DPSCS "has determined that it is in the best interest of the State to reject all proposals...and cancel the RFP due to specification changes."
26. DPSCS confirmed its decision to reject all bids and cancel the solicitation by final determination set forth in correspondence to offerors dated January 21, 2011. (Tab Nos. 18 and 19.)
27. STG noted a timely appeal to the Board on January 28, 2011.
28. On April 20, 2011, appellant filed a Motion for Summary Decision and the following day, DPSCS filed a Motion to Dismiss or for Summary Decision.
29. The two (2) cross-motions for summary disposition were consolidated for hearing and scheduled for status conferences and argument before the Board on the same date as other cases related to this procurement, specifically Hope Health Systems, Inc., MSBCA 2751, and Correct Rx Pharmacy Services, Inc., MSBCA 2747 and 2749.
30. Argument was presented to the Board commencing on May 11, 2011 and concluding by evidentiary proceeding on June 13, 2011, which included the presentation of testimony of two (2) witnesses on behalf of the State.

### **Decision**

The governing authorities pertinent to determination of this protest are rooted in statute as well as implementing regulation. Particularly, COMAR 21.06.02.02(C)(1) states as follows:

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. Reasons for rejection of all bids or proposals include but are not limited to: ... (c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.

Similarly, the Annotated Code of Maryland provides:

If, with the approval of the Board [of Public Works], a unit [of state government] determines that it is fiscally advantageous or otherwise in the best interests of the State, the unit may: (1) cancel an invitation for bids, a request for proposals, or other solicitation; or (2) reject all bids or proposals. (SF&P §13-206.)

As expressly provided above, the State retains broad discretion to decide to cancel any procurement for a myriad of reasons, providing only that such a determination serves the State's best interest. However, this is not to suggest that any procurement may be withdrawn without a *bona fide* reason, especially after competing technical and financial submissions are opened. See "Fair Treatment for Contractors Doing Business with the State of Maryland," 15 U.Balt.L.Rev. 215 (1986).

Indeed, procurement cancellation after bid opening is a highly disfavored practice. This is because prospective vendors of services solicited by the State must expend considerable resources to be competitive for state contract award and to convince state procurement evaluators of the desirability of accepting their offers. When the expenditure of those private resources are wasted without good cause, the State may reasonably expect that fewer vendors will be interested in submitting bids for government contracts, and those that do seek a state procurement may build into their pricing structure the need to recoup the unnecessarily elevated expense of wasted bidding resources. Furthermore, and most importantly, prospective parties to a state contract should not be subjected to the often cited and dreaded "auction scenario"

that regrettably occurs when competing proposers are forced to disclose their bids without a subsequent determination of best value offered to the State and final approval of contract award based on that determination. Williams Construction Co., MSBCA 1639, 4 MSBCA ¶302 (1992).

Notwithstanding these reasons for the strong desire not to cancel a solicitation after bid opening, and to minimize such occurrences, the burden of proof for an appellant to overturn the State's justification for such a decision is extremely high. As the Board stated in Automated Health Systems, Inc., MSBCA 1883, 2 MSBCA ¶113 (1985):

In making the determination concerning whether the Secretary's decision was otherwise in the best interest of the State, we are mindful that the Board's scope of review is a narrow one and that we may disturb that decision only upon a finding that a decision was not in the best interest of the State to such an extent that it was *fraudulent or so arbitrary as to constitute a breach of trust.*" (Emphasis supplied.)

Learned counsel for appellant concedes the great difficulty of overcoming the hurdle that must be reached for the Board to reverse the broad exercise of discretion enjoyed by the State in the sole discretion of the issuing agency to determine to reject all bids and cancel a solicitation, namely, "fraud" or "breach of trust," as stated above. See also Hanna v. Bd. of Education, 200 Md. 49, 54-55 (1952). But both counsel also agree that prior decisions of the Board as well as appellate authority support the legal conclusion that cancellation of a solicitation after bid opening may be so arbitrary as to be unlawful. As stated in the Board's principal precedent on this point, Megaco, Inc., MSBCA 1924, 5 MSBCA ¶385 (1985), "there may be factual scenarios where prejudice to bidders and harm to the competitive process outweighs the agency's interest in resolicitation."

Here, appellant contends that the stated bases of the need and intention to amend the specifications set forth in the initial and amended RFP are not sufficiently "substantial and material" to

support the decision to cancel and re-issue the solicitation, as required by longstanding Board precedent. Consol. Standard Elevator Co., MSBCA 1267, 2 MSBCA ¶120 (1986); Inner Harbor Paper Supply Co., MSBCA 1064, 1 MSBCA ¶24 (1982). It is first incumbent upon the Board, therefore, to analyze the particular amendments proffered by the State as the reason that the initial solicitation here was rescinded so that specifications could be modified, as DPSCS alleges to be good cause for its decision. Or to phrase the question with more specificity, are the proposed specification changes substantial and material?

The Board begins this analysis by citing *verbatim* the explanation of the need to cancel the solicitation as set forth in the Notice to Offerors dated December 13, 2010, which stated that DPSCS "has determined that it is in the best interest of the State to reject all proposals received for the above-referenced procurement and cancel the RFP *due to specification changes.*" (Emphasis supplied.) The foregoing notice is mandated by COMAR 21.06.02.02(D), and a record of bid cancellation is also required to be included in the Procurement Agency Activity Report (PAAR) to the Board of Public Works (BPW) pursuant to COMAR 21.02.02.05(B)(2)(b). Yet, to appellant's great frustration, not a single writing appears to exist to document any communications whatsoever regarding the decision ultimately to cancel the solicitation in order to permit changes to the RFP specifications.

Communications of some nature surely occurred and are claimed to have been made by telephone or face-to-face conversation, but the Board finds it extremely odd to say the least that DPSCS has not a single memo, letter, e-mail, or note of any sort reflecting the considerations made predicate to the significant decision to cancel this major procurement solicitation for which DPSCS representatives were heavily engaged over a long period of time, with oversight by DBM as the control agency for the procurement. More importantly, the absence of records constitutes a violation of COMAR requirements for record-making and record-keeping. Because



of the absence of virtually any memorialization of the basis of the cancellation determination, neither appellant nor anyone else outside of State government knew the nature of the alleged specification changes needed to correct this procurement prior to the State's proffer at the initial Motions hearing in this matter on May 11, 2011. Although the Board understands why DPSCS would seek not to divulge privately to a single prospective future bidder the anticipated components of any upcoming RFP, the Board is unsympathetic to the State's attempt to claim that it canceled this solicitation because of needed changes to contract specifications, but it refuses to disclose what those needed changes may be. Anyone interested in this procurement has access to whatever information may be revealed in this proceeding and representatives of several firms have participated in or monitored this appeal.

DPSCS now identifies five (5) separate modifications likely to be included in the reissued solicitation but absent from the one issued January 25, 2010. They are: (1) deletion of any reference to the RFP as an incentive contract, (2) correction of the inconsistent language in the RFP concerning whether the technical or financial aspect of a proposal will be given greater weight in agency evaluation, (3) reduction of the 100% objective of contract compliance as grounds for the imposition of liquidated damages, (4) changing the method of verification of contractor employee presence on the job, and (5) modifying the obligation and process of data entry into electronic medical records (EMR).

According to the testimony of the DPSCS Health Care Administrator who will serve post-award as Department Manager for the contract, namely, Thomas Sullivan (Sullivan), each of these items may be included in the new solicitation; but his testimony was much less firm and convincing as advancing these comparatively modest modifications as the cause of the need to cancel and re-issue the entire solicitation. Instead, Sullivan stated that he was asked by his superior, Phil Pie, DPSCS Deputy Secretary of Programs and Services and designee of the Department head for this

procurement, to identify what changes Sullivan would like to propose if given the opportunity to make changes, not whether the need for changes required cancellation of the solicitation.

Specifically addressing the five (5) grounds *seriatim*, the Board has already indicated on the record in these proceedings that there is no evidence whatsoever that anyone interpreted the subject RFP as an incentive contract, which DPSCS initially raised as the primary cause of the need to cancel the solicitation. None of the eight (8) bidders who submitted proposals in response to the RFP misunderstood that aspect of this contract opportunity, which clearly offered a fixed price contract. The agreement to be finalized by the completion of this solicitation was undisputedly a fixed price contract. Indeed, it was impossible to bid the job as an incentive contract without violating the conditions of submission of the financial proposal. The innocent but incorrect classification of the contract type as a "fixed price plus incentive" contract (RFP §1.3, Tab 10, Pg. 8) was certainly an error and should be corrected; but because no one was actually misled or confused by that solitary false reference in the RFP, that defect cannot be fairly advanced as just cause for canceling and reissuing the entire solicitation. Or to put it another way: no harm, no foul.

Of much greater concern and consequence in the Board's review of the subject RFP is the discrepancy between whether price or technical would carry the greater weight in agency evaluation of proposals. RFP §5.1 states, "technical factors will receive greater weight than price factors" but RFP §5.7 appearing on the next page states, "price factors will be given greater weight than technical factors." (Tab 10, Pgs. 66-67.) Inexplicably, no one apparently caught this blatant error prior to RFP issuance, or bid opening, or for the following year. In fact, the inconsistency was first raised by counsel to DPSCS at the first hearing in this matter before the Board. Despite multiple vendor inquiries concerning the procurement, no one asked the most fundamental

evaluation question, namely, how the disparate factors of technical vs. financial would be weighed in DPSCS evaluation considerations.

Despite its severity, however, this mistake in the RFP cannot be advanced as a reason for needing to cancel and reissue the solicitation, because it was not discovered until long after that decision was made. As COMAR and this Board's prior decision-making precedent make clear, "the reasonableness of the procurement agency's determination to reject all bids shall be assessed as of the date the decision is made." Megasco, op cit., pg. 3. Though it was noted by the Board prior to hearing in this matter, the error was not included in any pleading or raised as an issue in this proceeding, possibly because it was never the subject of any consideration on the part of DPSCS procurement officers. The first reference by either party to this significant defect and potential cause for bidder confusion was made by counsel for DPSCS during oral argument on May 11, 2011 and therefore cannot be asserted now as a reason for a determination made on December 13, 2010.

The Board also notes that the obvious mistake in this section of the RFP was a patent error for which bidders had the obligation to raise a question or request for correction prior to the bid submission date. It is firmly established and well understood that "a protest based upon alleged improprieties in a solicitation that are apparent before bid opening shall be filed with the Procurement Officer before bid opening." FMB Laundry, Inc., MSBCA 2136 (1999), 5 MSBCA ¶467 at pg. 3 (1999). See also Harford Alarm Company, MSBCA 2371, 6 MSBCA ¶539 (2003); Bruce D. Royster, MSBCA 1968, 1969, 5 MSBCA ¶406 (1996); Merjo Advertising & Sales Promotion Co., MSBCA 1948, 5 MSBCA ¶396 (1996); ATI Systems, et al., MSBCA 1911, 1913, 1918; 5 MSBCA ¶387 (1995). No one questioned the discrepancy in evaluation factors even though DPSCS went to the trouble and effort of issuing seven (7) sets of clarifications to the RFP by responding to questions raised between the pre-bid conference and bid opening. Because no bidder ever posed any inquiry or objection regarding this point, and the State did not recognize or consider

this defect until well after the decision to cancel the solicitation, that defect is barred from being raised as a ground for cancellation of the solicitation.

Turning to the third point proffered as justification for RFP rescission, DPSCS claims that savings could potentially be realized if the RFP did not demand a standard of perfect 100% compliance in 16 of the 20 itemized categories identified as cause for the potential imposition of liquidated damages. (Tab 2.) Testimony indicated that such a high rate of compliance may have been initially imposed by DPSCS because the State is subject to a Consent Decree with the United States Department of Justice (DOJ) to provide certain improved levels of service at the Baltimore Detention and Booking Centers; but after further DPSCS reflection on the matter in an effort to reduce costs, DPSCS concluded that a lower compliance rate before liquidated damages could be assessed against a vendor might be acceptable for certain deficient levels of statewide performance of contract obligations, and the presence of such relaxed standards could cause some bids to be somewhat lower. The Board accepts this logic as justifying a useful improvement in a reissued RFP, but does not deem that small change as sufficiently material and substantial to warrant the decision to cancel the original version of the solicitation. That modification could and should have easily been made prior to issuance of the RFP or afterwards at any time prior to bid opening, or even BAFO. There is insufficient evidence that such a minor change was the true cause of the determination made on December 13, 2010 to rescind the RFP.

The Board notes further on this point that imposition of liquidated damages is not mandatory, but only an option of the State in the event of failure of perfection in a contractor's ability to meet all of the 16 specified contract obligations for which 100% compliance is set forth as a requirement. (RFP §3.36.) Clarification of the State's actual intentions with respect to imposing liquidated damages could have been made and thereby

incorporated into the terms of the contract without formal addendum to the RFP, and in any event, no non-speculative analysis is possible to determine what savings, if any, could actually result from such a change. Furthermore, to the extent that changes are ultimately determined to be needed with respect to when liquidated damages may be imposed for nonperformance of elements of this contract, the testimony made it clear that even today no decision has been made at DPSCS about what the new specifications might entail. Such a nebulous and speculative possibility of some savings arising from this modest modification can hardly withstand scrutiny as the basis for cancellation of a major solicitation for which vigorous competition occurred.

With respect to the fourth basis asserted by the State as justification for rescinding and reissuing the RFP, testimony of the designated DPSCS representative was that at the present time, employees of contractors providing health services in Maryland correctional facilities may be required manually to sign in using a paper form or hard copy logbook as evidence of work attendance, possibly also to enter their identity into a computer record, and usually also to show proof of identification to obtain access to secure institutions. However, this method of verifying employee appearance on the job site was criticized as lax in a legislative audit released in November 2010. As a result, DPSCS sought to convert to a biometric system like fingerprint identification to authorize and confirm employee attendance on the job. While this change may well constitute an improvement over existing means of assuring promised contractor presence at correctional facilities, again, it was not advanced by any witness as the reason that this minor change to RFP §3.16 justified the need to cancel and reissue the solicitation. The Director of Procurement for DBM stated specifically that the contract specifications were not deficient with respect to the adequacy of the method of monitoring contract employee attendance, though certainly there was some late cause for concern based upon the November audit. But in this proceeding no

evidence was adduced regarding the cost of such a system nor how DPSCS intended that cost would be borne, and it appears that such a change could likely be adopted by DPSCS mandate under the terms of the original RFP without necessitating cancellation of the solicitation.

Finally, with respect to EMR data entry, DPSCS currently uses a custom proprietary software program known as NexGen for the purpose of recording and tracking the delivery of health services to individual inmates, including those incarcerated in the State's three (3) specialized psychiatric units, for which the delivery of mental health services and associated record-keeping may be fairly presumed to be more significant and complex than for the ordinary incarcerated population. DPSCS claims that in the future it may wish to upgrade its software in a comprehensive fashion, with appropriate access for all institutional health care providers and consolidated software training to be offered at a single location for instruction on how to use its next generation of EMR. That potential, however, is already permissible in accordance with the terms of RFP §3.32. The absence of any reference to the prospective future version of EMR capability at DPSCS is therefore irrelevant to the determination of the need to cancel the subject solicitation.

Having determined as more fully set forth above the inadequacy of each of the asserted bases of the need to cancel the RFP in order to make specification changes, the Board further concludes that even considered collectively, the reasons for having to amend the RFP asserted by DPSCS are not "of such a magnitude that a new solicitation is desirable," as required by COMAR 21.06.02.02(C)(1), nor even in the aggregate do they constitute such significant or necessary material modifications as would ordinarily be required to justify cancellation of a procurement after bid opening. The most telling evidence to support this conclusion is the simple fact that a similarly flawed contract for dental services was finalized, approved, and is now in effect. (Tab 17.) It is apparent to the

Board that the reasons asserted by DPSCS to explain cancellation of the solicitation are disingenuous *post hoc* justifications.

It is the Board's view based upon the evidence adduced that the real reason for the decision to cancel and reissue this solicitation was not the need to change contract specifications, as claimed, but instead, simply an unfortunate byproduct of the legitimate and reasonable exercise of the chain of command in the administration of state government services and the awkward position in which DPSCS was placed by virtue of a multiplicity of errors that caused the reversals of decisions which led to the bid protests that arose in the course of this procurement.

The State freely admits that the instant procurement was flawed in many respects, as appellant avers. Some of those flaws were initially missed or overlooked by DPSCS procurement officials but later caught by DBM procurement officials acting in their oversight capacity as representatives of the control agency for the subject procurement. Other problems were either missed by DBM or unavoidable. As exemplified by the testimony of one of DBM's top ranking procurement officials, the longstanding and highly experienced Chief of Procurement, Joel Lieberknight, DBM is very exacting and the Board fairly assumes that it was likely equally so for this large, visible, and sought-after contract award. Lieberknight was candid and persuasive in disclosing his repeated aggravation with the problems encountered by DPSCS with this procurement, resulting in multiple bid protests deemed by DBM as likely to be successful, but not even disclosed by DPSCS to DBM in timely fashion on two (2) separate occasions.

This was especially troubling to DBM in the face of critical questions being raised by vendor representatives as well as members of the Board of Public Works (BPW). Moreover, Lieberknight testified that he did not believe that a majority of at least two (2) of the votes of the three (3) members of BPW would be cast for approval of the contract award to appellant STG. While such testimony was claimed by appellant to constitute hearsay, the Board

as an independent administrative agency is not constrained by the formal rules of evidence and even if it were, it appears to the Board that that particular testimony would be exempt from classification as excludable hearsay because it was not offered by Lieberknight to prove the truth of the matter asserted, but instead, was offered as a reason why DBM did not wish the STG contract award to be placed on the BPW Agenda. Rule 5-801, Maryland Rules of Evidence. With critical questions coming from several sources and answers to those questions appearing to be inadequate, the contract award was simply not permitted to proceed. As Lieberknight summarized his position, "we don't award bad procurements." Instead, the decision was made to cancel and reissue the solicitation, at which time STG, other protestors, and anyone else interested in this procurement will stand on equal footing to re-submit bids. That determination was not unreasonable given the tortuous circumstances of this procurement. BPW cannot be forced to approve a state contract. The anticipated failure of a majority of the members of BPW to approve a contested and controversial contract is adequate grounds for DBM to determine not to request placement of a proposed award on the BPW Agenda. DPSCS acts under the direction of DBM and DBM acts under the direction of the Governor, who is only one of the three (3) BPW votes needed to approve a contract. This Board may analyze the lawful exercise of procurement authority by those entities, but does not supplant its judgment for that of the controlling authorities, and will not in this appeal.

In light of all of these circumstances, the Board cannot fairly come to the conclusion that the decision to cancel this solicitation was fraudulent or a breach of public trust. Quite the contrary; it was perfectly understandable. At the same time, the Board does conclude, as appellant asserts, that DPSCS violated COMAR with respect to the obligation of making and maintaining complete, true, and accurate written records reflecting the reasons for procurement decisions, but that is different than criticizing



the resulting decision itself. Moreover, appellant claims that this procurement was flawed; the State concedes as much; and the Board concurs, but does not find any evidence of fraud or breach of public trust, which is the high standard required to be met in order to reverse the State's determination to cancel a procurement.

Faced with an imperfect procurement as more fully described above, it is easy to recognize in hindsight that DPSCS should have been much more thorough in making and maintaining a procurement file, and also that it should have been more forthright to bidders concerning the true reason for the ultimate decision to cancel the solicitation, rather than relying on the ruse of unspecified "changes in specifications." But the more productive question at this relatively late juncture in the process is what should be done about these shortfalls, or more particularly, what this Board can and should do in the nature of affording relief. Appellant seeks a declaratory order from the Board commanding the award of the contract for mental health services to STG, but issuance of such an order would be beyond the statutory authority of the Board.

The Board directly confronted this question early in its history when an appellant similarly requested the Board to order a state agency to award to it a certain state contract. In Solon Automated Services, MSBCA 1046, 1 MSBCA ¶10 (1982), the Board stated that although it was not empowered directly to award a contract, it did have the power to issue a declaratory ruling compelling a state agency to do so, and contract award was dictated by the Board to the State agency in that fashion. That decision led to the agency's refusal to abide by the declaratory ruling, and a petition for judicial review also ensued under the State Administrative Procedure Act (APA). (Annotated Code of Maryland, State Government Article (SG) §10-101, *et seq.*)

The Board continues to recognize with certainty that it is not empowered with the ability to award contracts. That authority, at least for contracts over the \$25,000 threshold, is vested solely in BPW and its elected members, namely, the Governor, Comptroller, and

State Treasurer. This Board is powerless to compel BPW action in any fashion and will not pretend nor attempt to exercise or usurp BPW final authority. Whether this Board has authority, by issuing a declaratory ruling after proof of egregious circumstances, to Order a state agency to request the placement of a particular contract approval on the agenda of BPW is an open question which may one day be determined by the Maryland Court of Appeals, but that is not this case. Even if the Board did have the vastly inflated power to demand that a state agency enter into a certain contract, as the appellant here prays for relief, the Board would not do so based upon the proofs in this appeal, and by the same reasoning the Board will not seek to compel the appropriate state agencies in charge of this procurement to schedule a formal vote on this contract by BPW. The agency decision to defer this contract by canceling and re-bidding the solicitation is within the legitimate exercise of discretion on the part of DPSCS and DBM.

Under the circumstances extant here, the Board concludes that the preferred and proper action for DPSCS to pursue is precisely what was ultimately decided, namely, what might be referred to in a schoolyard playground as a "do-over." This procurement was flawed. There is no dispute between the parties about that. That is part of the reason that it has given rise to multiple bid protests, and may yet give rise to additional protests. But rather than prolonging and adding to the complexity of an admittedly flawed process further down a very bumpy road, it is not unreasonable for BPW, DBM, and DPSCS to embark upon a new path to the same destination, that destination being the timely award of a contract to the successful bidder that offers best value to the State for the delivery of mental health services to Maryland inmates, whether that vendor is ultimately determined to be MHM, STG, Hope Health, or some other entity now known or unknown. From the foregoing analogy or otherwise, surely it cannot be accurately said that it was fraudulent or a breach of trust for DPSCS to decide to take a turn onto what may be a smoother road ahead, by canceling the

original RFP and re-soliciting bids. In addition, that course correction affords appellant every right to bid again just as it did before, while also allowing the State to make certain minor but desired specification changes which may hopefully result in not only a fair, but a superior procurement, with all prospective bidders placed on equal footing and the significance of prior pricing disclosures minimized by virtue of whatever specification changes may be forthcoming in the newly issued RFP anticipated for release by DPSCS in the imminent future.

For all of these reasons, the determination to cancel and reissue this solicitation is affirmed and the instant appeal is hereby DISMISSED.

Wherefore it is Ordered this \_\_\_\_\_ day of June, 2011 that the above-captioned appeal be and hereby is DISMISSED.

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 2755, appeal of STG International, Inc. under DPSCS Solicitation No. Q0010020.

Dated:

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Michael L. Carnahan  
Deputy Clerk