

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Brawner Builders,)
Inc.)
) Docket No. MSBCA 2950
)
Under)
SHA IFB No. AX0977414)

APPEARANCE FOR APPELLANT: Paul Sugar
 Ober, Kaler, Grimes & Shriver
 Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Lance Young
 Assistant Attorney General
 Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: None

OPINION BY BOARD MEMBER DOORY

The Appeal is denied because the decision of the Procurement Officer to reject all bids was in the best interest of the State and it was not fraudulent or so arbitrary as to constitute a breach of trust.

Findings of Fact

1. On June 16, 2015 the State Highway Administration ("SHA") issued an Invitation for Bids ("IFB") soliciting bids for District 4 to qualified firms to provide on call roadway structure repair services at various locations in Baltimore and Harford counties. The contract was to run for a two-year term. (Appellant Ex. 1).
2. SHA opened bids for the contract on July 23, 2015.
3. Brawner Builders, Inc. ("Brawner") submitted the apparent low bid of \$1,351,151.00. PDI-Sheetz Construction Corp.

("PDI-Sheetz") submitted the apparent second low bid of \$1,409,157.74. Allied Contractors, Inc. submitted the apparent third lowest bid of \$1,414,822.00. (Appellant Ex. 2).

4. A review of bids revealed to the Procurement Officer that all bidders submitted bids with inflated material prices (Tr., Marciszewski, p. 118 l. 17-18). In the Procurement Officer's opinion, the bidders inflated material line items in their bids by bidding only a penny or dollar for labor line items in the contract. (Tr., Marciszewski, p. 118 l. 8-12).
5. SHA notified bidders of its determination to reject all bids in a letter dated August 26, 2015. The rejection letter stated, "It has been determined that it is in the best interest of the State of Maryland to reject all bids on the above-reference project." This action is in accordance with the Code of Maryland Regulations ("COMAR") 21.06.02.02(C)(1), Rejection of All Bids. (Appellant Ex. 3).
6. On September 2, 2015 Brawner submitted a timely bid protest to the Procurement Officer requesting an explanation of "why our bid along with all the others were rejected...". (Appellant Ex. 4).
7. On September 14, 2015, after reviewing all the relevant contract documents, all correspondence associated with the protest and consulting with the Office of the Attorney General, SHA issued a Procurement Officer's Final Decision ("POFD") denying Brawner's bid protest. (Appellant Ex. 5).
8. Brawner appealed the POFD by a Notice of Appeal to the Maryland State Board of Contract Appeals ("MSBCA") on September 24, 2015. The appeal is docketed as MSBCA No. 2950.

9. The Board convened a hearing on February 3, 2016. Post Hearing Briefs were requested by March 4, 2016.

Decision

The authority to cancel a solicitation or reject a bid or proposal is found in Section 13-206 of the State Finance and Procurement Article of the Maryland Annotated Code. The law provides procuring agencies the authority to reject all bids if "it is fiscally advantageous or otherwise in the best interest of the State." COMAR 21.06.02.02(C)(1) similarly provides procuring agencies the discretion to reject all bids as stated:

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.

This Board's standard for reviewing a rejection of all bids is to determine if the decision was fraudulent or so arbitrary as to constitute a breach of trust. *Browner Bldrs., Inc.*, MSBCA 2770 & 2771, MSBCA (2011); *STG Int'l., Inc.*, MSBCA 2755, MSBCA (2011); *Automated Health Sys., Inc.*, MSBCA 1883, 2 MSBCA ¶113 (1985). "The burden of proof for an appellant to overturn the State's justification for such a decision is extremely high." *STG Int'l., Inc.*, MSBCA 2755.

The SHA decided to reject all bids because the IFB failed to include minimum unit prices for labor categories. The POFD stated:

District 4 included, in many of the line items, either minimum or maximum thresholds for the unit prices submitted by the contractor. This is done to minimize the potential of an offeror submitting a

mathematically unbalanced bid which in turn could potentially lead to a materially unbalanced bid. After reviewing the schedule of prices for this contract, it was found that the District inadvertently included maximum thresholds for the labor items in the schedule of prices. (Line items 4027-4031). Normally, minimum thresholds would be used, which closely correspond to existing prevailing wages rates...

The POFD further explained that failure to include minimum wage unit prices likely affected the bids in a way that was detrimental to the State. (Appellant Ex. 5).

In reviewing the bids upon bid opening the three lowest bids provided prices for labor categories that were beneath Living Wage requirements and created the potential for unbalanced bids. Brawner bid a penny for the hourly rate of a bridge repair foreman. The second and third low bidders, respectively, bid one dollar (Appellant Ex. 6, line item 4027). Brawner also bid a penny for the hourly rate of concrete finishers. PDI-Sheetz bid one dollar. Allied bid \$46. (Appellant Ex. 6, line item 4028). Brawner bid a penny for unskilled labor. Allied bid a dollar. PDI-Sheetz bid \$11. (Appellant Ex. 6, line item 4031).

By bidding such absurdly low labor prices the SHA was put in a detrimental and uncertain position of having to figure out the strategic bidding process of each bidder. In other words, where are the mark-ups in other categories, what is the real cost the State is paying for certain items, and who is really the lowest bidder? SHA was faced with potentially unbalanced bids.

An unbalanced bid offers "unreasonably low prices on some items and compensates for them by unreasonably high prices on

other items." P. Schnitzer, Government Contracting Bidding at 11-19 11-20 (3rd ed. 1992).

The Procurement Officer's reason for rejecting all bids is that SHA believed it was in the State's best interest to re-solicit the contract with minimum rates for labor categories in a new solicitation. The Procurement Officer did not consider it in the best interest of the State to accept a contract with inflated material rates and a re-solicitation would be fairer to bidders.

SHA is charged to determine whether the acceptance of an unbalanced bid would violate the requirement that "a contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria..." COMAR 21.05.02.13., Pile Foundation Construction Co., Inc., MSBCA 2238, 5 MSBCA ¶503 p. 5 (Dec. 7, 2001).

In Pile, the Board made a distinction between mathematically unbalanced bids and materially unbalanced bids:

A distinction may be made between (1) a bid that only is "mathematically" unbalanced, i.e., the bid, although unbalanced, will result in the lowest price to the governmental body, and (2) a bid, that is "materially" unbalanced, i.e., there is substantial doubt that the bid represents the lowest price.

Because of the nature of the contract, where quantities are not fixed, the Procurement Officer could not determine whether bids were materially unbalanced or merely mathematically unbalanced. In any case it is not in the best interests of the State to accept a bid with inflated material rates because if the contract needs more materials than estimated to do the job, the funds will be consumed sooner than the contract authority allows. SHA will have to request additional funds from the

Board of Public Works or rebid a new contract. The uncertainties created by not having minimum labor rates would be solved by doing what the Procurement Officer decided to do, which was to reject the bids and re-solicit an IFB with minimum labor rates.

The Appellant argues that SHA has awarded other flawed contracts for highway maintenance services, specifically, SHA contracts AX0557414 and AX0557714. There is a difference because some of the mark-ups were on materials that were bid upon items. These contracts had more categories of biddable items with less opportunity to use strategic bidding which when employed can cause uncertainty and unbalanced bids.

Further, Appellant's argument that SHA has done it before would prevent the SHA from being able to change IFBs for roadwork services because other appellants may fall back and argue that SHA had awarded a contract a certain way so SHA should always do it this way. The result of that thinking would render SHA unable to change its method of structuring these roadway contracts to get more reliable bids.

SHA has been given guidance from the Board of Public Works' staff to tighten up bid structures with more biddable item costs with material, labor and equipment categories in an effort to stay within a contract authority timeline. Regarding the biddable and non-biddable items, Mr. Marciszewski testified, "Over the past four years there has been guidance received from the staff at the Board of Public Works on contracts of this nature. Contracts they're seeing as far as what they will not accept within the contract." (Tr., Marciszewski, p.113 l. 23-25, p. 114 l. 1-2). Mr. Marciszewski continued, "Guidance we received from the Board of Public Works has told us very clearly that non-biddable items, allowance items ... can be no more than 10 percent of the total contract value." (Tr., Marciszewski,

p.114 l. 17-20). That is the reason why there is a need for a minimum labor rate. Going forward SHA will need to change the methodology of formulating roadway maintenance service IFBs.

The Appellant relies on STG International, Inc., MSBCA No. 2755 (June 2011) and argues the State's decision to reject all bids is not limitless and that if the State did not reject bids on similar contracts it should not reject on this contract.

Unlike the case at hand, which is for on call roadway structure repair services, STG was a contract for mental health services for inmates. The STG decision was the result of a torturous procurement process. The case language reflected frustration with that process. STG facts and the facts before us are extremely different. Proper communication channels were consulted here. In STG there was a lack of agencies management coordination and proper chain of command communication. In this case there was really only one flaw, the lack of a minimum for labor rates. In STG there were many flaws in the underlying procurement.

Ultimately, STG holds that the State can reject a bid and re-issue a new solicitation. STG states, "... 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." It continues, "... it cannot be 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 resoliciting the bids." The Board upheld the State's decision to rebid the contract in STG because it was in the best interest of the State and there was no showing of fraud or breach of trust.

The final argument is that a re-solicitation would be prejudicial to the Appellant. The Board has great admiration

and respect for the many business firms that respond to the State agencies' RFPs and IFBs. The Board is mindful of the time and expense involved in submitting bids. However, there is a heavy burden for an appellant when a bid protest is filed.

Nevertheless the State has the legal authority to reject bids that are not in its best interest. Hopefully a re-solicitation will afford another opportunity to bid for the contract. Appellant did not prove SHA's action was fraudulent or so arbitrary as to constitute a breach of trust.

The appeal is therefore denied.

WHEREFORE, it is, by the Board, this 5th day of April, 2016, ORDERED that this appeal is DENIED.

Dated: April 5, 2016

Ann Marie Doory
Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
Michael J. Collins
Chairman

Bethamy N. Beam
Bethamy N. Beam
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 2950, appeal of Brawner Builders, Inc. Under SHA IFB No. AX09774144.

Dated: *April 5, 2016*



Ruth W. Foy
Deputy Clerk