

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Kennedy Services, LLC

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Under

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**Maryland State Board of Elections
RFP No. D38B7400012**

Docket No. MSBCA 3064

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OPINION AND SECOND AMENDED ORDER

On December 28, 2017, this Board issued its Opinion and Order, which was amended the following day. In response thereto, Respondent filed a Motion for Clarification, contending that this Board, through its Amended Order, purported to do what it does not have jurisdiction to do: namely, to direct Respondent to award the contract to a particular party. On January 4, 2018, Appellant filed a timely Response to the Motion.

Respondent is mistaken in its interpretation of this Board’s Amended Order. The Amended Order does not direct the Procurement Officer (“PO”) to award the contract *to any particular party*. Rather, it remands the matter back to the PO with instructions to act in accordance with the law. MD CODE ANN., STATE FIN. & PROC. (“SF&P”), §13-104(f) dictates the manner in which a PO must act when awarding a procurement contract:

After obtaining any approval required by law, the procurement officer **shall** award the procurement contract to the responsible offeror who submits the proposal or best and final offer determined to be the most advantageous to the State considering the evaluation factors set forth in the request for proposals. (emphasis added).

The Amended Order provides that “this case is remanded to the Procurement Officer for award of the contract to the remaining responsible offeror whose Proposal is determined to be the most advantageous to the State considering the evaluation factors set forth in the RFP.” The language of the Amended Order is clear, consistent with, and nearly identical to the language set forth in SF&P §13-104(f).

Quite simply, this Board's Amended Order directs the PO to act in a manner that it should have acted when initially selecting the proposed awardee of the contract. As we previously determined, the PO failed to do so and acted unlawfully and unreasonably in determining that ISN was eligible for being selected for award. The ISN Proposal should not have been considered for award; the proposed awardee should have been selected from the remaining responsible and responsive offerors in compliance with SF&P §13-104(f). This Board's Amended Order does nothing more than direct the PO to do what should have been done from the beginning, which is to comply with Maryland procurement law.

Respondent relies on our previous decision in *Substation Test Company*, MSBCA Nos. 2016 & 2023, 5 MSBCA ¶429 (1997), wherein we acknowledged that our jurisdiction is limited to only that authority that is conferred by statute, and that the Board is not authorized "to direct award of a contract to a particular party upon a determination that an appeal be sustained because of a violation of statute or regulation during the procurement process." Respondent's reliance on *Substation* is misplaced not only for the reasons previously stated, but also because the facts in *Substation* are distinguishable and nothing in our Amended Order in this case contradicts our opinion in *Substation*.¹

Although the facts in *Substation* are somewhat similar to the facts in this case, the distinguishing facts are significant, and the decision is instructive. In *Substation*, Westinghouse was initially determined to be the apparent low bidder for a contract under the Department of

¹ Respondent appears to rely upon language in *Substation* that addresses and purports to support the *Substation* Board's explanation of the limits of authority and that Board's refusal to direct award of a contract to a particular party. As previously stated, we do not dispute that our authority is so limited. Specifically, the *Substation* Board referenced SF&P §11-204, which relates to the voidability of contracts by the Board of Public Works ("BPW") when a procurement or contract violates the law. That statute, however, relates to relief that is available to a contractor, depending on whether the contract is void or determined by BPW to be voidable, *after* a contract has been awarded. As such, it does not apply in this case because a contract has not yet been awarded. To the extent our decision here is inconsistent with or contradicts the *Substation* decision, then *Substation* is overturned by our decision here on that basis alone.

General Services (“DGS”). The remaining two bidders protested the proposed award of the contract to Westinghouse, contending that Westinghouse was not eligible for award. The PO was ultimately convinced that the Westinghouse bid was nonresponsive and sustained the protests. However, rather than award the contract to one of the two remaining bidders, the PO rejected all remaining bids, and a new solicitation was issued. In response to the second solicitation, Westinghouse was again selected as the proposed awardee of the contract and, once again, Substation protested. This time, the PO denied the protest and Substation appealed.

The Board determined that Westinghouse was again a non-responsive bidder and should not have been considered for award. At this point, however, DGS made a policy decision to have the work that had been included in the solicitations (i) performed by its general construction contractors, and (ii) subsumed in its individual construction contracts with these providers. Accordingly, the PO, rather than award the contract to one of the remaining responsible and responsive bidders, again rejected all bids, a decision which was then protested by Substation.

Substation contended that DGS so strongly wished to award the contract to Westinghouse that, rather than award the contract to another bidder, DGS cancelled the procurements. Relying on this Board’s decision in *Solon Automated Services, Inc.*, MSBCA 1046, 1 MSBCA ¶10 (1982), rev’d on other grounds by the Baltimore County Circuit Court, Substation also argued that:

The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without an award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance.... Harm to the procurement system especially in grievous where, as here, the resolicitation is for the same services originally sought. Under such circumstances, an auction atmosphere is created.... Since principles and policies set forth in Maryland’s procurement law underscore a strong public interest in fostering competition through the fair and equitable treatment of bidders, the rejection of all bids clearly was inconsistent with the State’s interest.

Substation at p. 9 (citing *Solon* at p. 15). As a remedy, *Substation* requested that this Board direct DGS to award the contract to *Substation*.

The Board refused to grant the specific relief requested by *Substation*, concluding that rejection of the bids by the PO was done in good faith and that the policy change was responsible, arrived at independently, and was taken coincidental to and not as a means of circumventing *Substation*'s protest and appeal.²

Here, we are not faced with a situation in which Respondent has rejected all bids on the grounds of a change in its policy for hiring temporary staffing services. Respondent has offered no facts suggesting that this work can now be performed by other existing contractors, or that this work is no longer needed. Quite the contrary—it is readily apparent from the undisputed facts that the work (*i.e.*, temporary staffing services) is not only necessary, but also that award of the contract is time-critical and could not lawfully be procured through the emergency procurement procedures.³ As such, there are no allegations or any facts presented to suggest that award of the contract to one of the remaining responsive and responsible contractors (whose proposal is determined to be the most advantageous to the State considering the evaluation factors set forth in the RFP) would be inappropriate, unreasonable, fiscally disadvantageous, not in the State's best interest, or otherwise contrary to law.⁴

We maintain our opinion that our jurisdiction is limited to only that which is conferred by statute and that we do not have the authority to direct award of a contract to a particular party. We

² The basis for the *Substation* Board's decision did not rest on the grounds that this Board did not have the authority to remand the matter back to the PO for award of the contract to one of the responsive and responsible bidders whose bid was determined to be the most advantageous to the State considering the evaluation factors set forth in the solicitation. Rather, the basis for the Board's decision in *Substation* rested on the grounds that the PO's decision to reject all bids was lawful and done in good faith. *Substation* simply did not address the issue presented here.

³ The undisputed facts do not reflect that this is a matter of avoiding or mitigating serious damage to public health, safety, or welfare, as required under the emergency procurement procedures set forth in MD. CODE ANN., SF&P, §13-108.

⁴ To the extent that any such facts exist, they have not been brought to our attention.

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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Second Amended Order in MSBCA No. 3064, Appeal of Kennedy Business Services, LLC, under Maryland State Board of Elections Request for Proposals No. D38B7400012.

Dated: January 5, 2018

_____/s/
Ruth W. Foy
Deputy Clerk