

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ADELL FOOD)
SERVICE CO., INC.)
) Docket No. MSBCA 1802
Under DGS Contract)
No. BPB&G 94/002S)

May 17, 1994

Interested Party - Standing - Potential private contractor is not an "interested party" and thus does not have standing to protest contract award to sheltered workshop select pursuant to Title 14, Subsection 1, of the State Finance and Procurement Article.

APPEARANCE FOR APPELLANT: Andre R. Weitzman, Esq.
8 East Mulberry Street
Baltimore, MD 21202

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General

APPEARANCE FOR
INTERESTED PARTY: David H. Greenberg, Esq.
Spahn, Harvis, Greenberg
and Broida
Columbia, MD

OPINION BY MEMBER CANDIDA S. STEEL

Appellant timely appeals the denial by the Department of General Services (DGS) of its bid protest that the Department wrongfully awarded the contract in question to a sheltered workshop, The Chimes, Inc. (Chimes), under Subtitle I of Title 14 of the State Finance and Procurement Article (Code) without competitive bidding and without demonstration that the contractor was responsible to perform as required by §11-101(q) of the Code.

Findings of Fact

1. The Contract at issue is for the provision of food services to the public and state employees in the cafeteria located in the State Office Building operated by DGS at 301 West Preston Street, Baltimore, Maryland.
2. Appellant is the current contractor, having secured the contract by competitive bid. Appellant's contract has been

extended on a monthly basis since the expiration of its contract on December 31, 1993, pending this protest and appeal.

3. In anticipation of the expiration of the current contract, on October 1, 1993, and pursuant to §§14-102 et seq. of the Code, DGS inquired of the Maryland Rehabilitation and Employment Association, Inc. (REA/Maryland Works), the agency designated by law as a coordinator for the distribution of procurement contracts among sheltered workshops, whether any sheltered workshop would be interested in operating the cafeteria.
4. In response, REA/Maryland Works requested that the cafeteria contract be "set aside for completion through the Preference Purchase Program for Rehabilitation and Employment Service Providers" in accordance with §§14-102 through 14-108 of the Code, and thereafter identified The Chimes, Inc. as a prequalified sheltered workshop capable of providing the services required.
5. After independently determining that Chimes had the ability to perform the contract, the DGS Procurement Officer secured approval for the award of a contract to Chimes, and so notified the Appellant by letter dated February 15, 1994. On February 25, 1994, the Appellant filed a protest with DGS which was denied by the Procurement Officer on March 14, 1994. This Appeal follows.

Decision

Does a potential private contractor with the State have standing as an interested party to protest a contract award to a sheltered workshop pursuant to §§14-101 et. seq. of the Code?

Only an interested party may file a protest. COMAR 21.10.02.02. An "interested party" is "an actual or prospective bidder, offeror or contractor that may be aggrieved by the solicitation or award of a contract..." COMAR 21.10.02.01B.

It is clear by testimony and the fact that appellant is the incumbent contractor that appellant would, if this contract were let for competitive bid, be a prospective bidder. However, that does not make the Appellant "aggrieved" under the statute. If a party is not affected competitively by the actions of a procurement officer, it has no standing, i.e., right, to protest. RGS Enterprises, Inc., MSBCA 1106, 11 MICPEL ¶45 (1983). Whether a party is affected competitively involves consideration of the party's status in relation to the procurement and the nature of the issues involved. Erik K. Straub, Inc., MSBCA 1193, 1 MICPEL ¶83 (1984).

Appellant is a private contractor, not a sheltered workshop, and by its very nature, this procurement was not offered to private contractors.¹ Here, Chimes, having been prequalified as a shelter workshop, and having been determined as capable of operating the cafeteria, DGS was required by law to award the contract to Chimes, and precluded by law from offering the contract to ordinary private businesses. SF §§14-102 and 14-103.

In order to file a protest the protestor must be an interested party, i.e., in line for the award if successful in disqualifying the selected contractor's bid. Capitol Dental Supply, Inc., MSBCA 1351, 2 MICPEL ¶161 (1987). In this case, Appellant is not only not "in line" for the award, as a private contractor it is not even eligible to bid for the award.

Since there is no guarantee that the contractor would be let for competitive bidding were The Chimes not the selected sheltered workshop (another sheltered workshop might be chosen), Appellant is therefore "not an actual or prospective bidder, offeror or officer affecting its competitive position," Id., and is thus not an interested party having standing to bring this appeal.

As its primary argument, Appellant submits that The Chimes is not responsible, and would not be able to perform the contract awarded, and that therefore the contract should be set aside.

¹In fact, counsel for Appellant appears not to question the State's obligation to first explore award to a preferred contractor under Title 14 (transcript page 26). It is note that pursuant to §14-102 (a) which provides that "notwithstanding any other provision of this Division II, the State shall buy supplies and services in accordance with this subtitle," this Board may lack jurisdiction to hear any appeal involving a Title 14, Subtitle 1 preference award.

In a parallel circumstance, where, under §13-108 of the Code, the legislature allows an agency to determine that for emergency reasons a contract must be awarded on a sole-source basis, see The Chesapeake and Potomac Telephone Company of Maryland, MSBCA 1194, 1 MICPEL ¶78 (1984), review of the decision is limited to ascertaining whether the decision of the procurement officials had a reasonable basis. "Our judgment cannot be substituted for that of the agency officials charged with decision-making responsibility of this type." Id. Following review of the documentary evidence and testimony, we cannot find that the decision to seek the services from a sheltered workshop, or the decision to award the contract to The Chimes did not have a reasonable basis.

Therefore the Board finds that Appellant lacks standing and the appeal must be dismissed.

It is therefore Ordered this 17th day of May, 1994 that the appeal is dismissed.

Dated: 5/17/94

Candida Steel
Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Robert B. Harrison III
Chairman

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 1802, appeal of Adell Food Service Co., Inc., under DGS Contract No. BPB&G 94/002S.

Dated:

5/17/94

Mary F. Priscilla
Mary F. Priscilla
Recorder

SECRET

1. The purpose of this document is to provide information regarding the activities of the organization and its members.

2. The information contained herein is classified as SECRET and is intended for the eyes of authorized personnel only.

3. This document is to be read in conjunction with the other documents in this series and should be read in the order in which they are numbered.

4. The information contained herein is to be kept confidential and is not to be disseminated to unauthorized personnel.

5. This document is to be read in conjunction with the other documents in this series and should be read in the order in which they are numbered.

[Handwritten signature]
[Illegible text]

SECRET