

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AMDAHL CORPORATION)
)
Under DPS & CS Invitation For) Docket No.
Bid Number 90001) MSBCA 1475

November 28, 1989

Procurement Methods - Burden of Proof - A protestor bears the burden of proof to demonstrate that an agency's determination to utilize a particular procurement method was fraudulent or so arbitrary as to constitute a breach of trust.

APPEARANCE FOR APPELLANT: Stephen David Dix, Esq.
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APPEARANCE FOR RESPONDENT: Alan D. Eason
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest involving the procurement of a replacement central processing unit (CPU) and associated maintenance and support services.

Findings of Fact

1. This appeal arises out of a procurement undertaken by the Data Services Division ("DSD") of the Department of Public Safety and Correctional Services (DPS&CS) for the purchase of a replacement CPU and associated maintenance and support services for its computer system used to operate Maryland's Criminal Justice Information System ("CJIS") for approximately 150 law enforcement, prison, parole and probation, court, and other government entities.
2. The system, which operates twenty-four hours a day, seven days per week, is intended to provide access to criminal justice information in a timely and reliable manner to ensure the safety of law enforcement officers and of the public.
3. DSD performed forecasts of the demands on the CJIS in 1988. These forecasts indicated that the system would be overused in calendar year 1989, resulting in erratic or poor response time during peak periods of use. For this reason, the DSD determined that it would be appropriate to upgrade the CPU to

improve the capabilities of the system, thereby reducing delays. Accordingly, the DSD prepared an invitation for bids ("IFB") which was issued August 4, 1989 and provided to approximately 35 entities.

4. Bids were due on August 31, 1989.

By letter dated August 30, 1989, and delivered immediately before the time bids were due, Appellant filed a bid protest asserting that the procurement was "noncompetitive" because of the IFB requirements that: (1) any equipment bid be capable of running the IBM configured MVS/ESA operating system;¹ and (2) that equipment so configured be operating at two customer sites as of the closing date for receipt of bids. Appellant claimed that only IBM could fulfill these requirements and that the Department did not justify its choice of the IBM configured MVS/ESA. As relief, Appellant requested that the specifications be rewritten to allow other vendors to meet the agency's requirements or, alternatively, that DSD justify a sole source award to IBM.

5. At bid opening only one bid, from IBM Corporation, was received in response to the IFB.²

6. Appellant's protest was denied by final decision dated September 28, 1989, and Appellant appealed to this Board on October 11, 1989.

7. On October 25, 1989, the Board of Public Works approved an award of the contract to IBM and also made a determination that execution of the contract pending this Board's decision in this appeal was necessary under COMAR 21.10.02.11A(1).

8. Following the filing of the Agency Report on November 8, 1989, and the Appellant's comments thereon on November 21, 1989, the only issue left for consideration (Appellant having abandoned its request that the IFB be reissued with revised specifications) is whether DSD should have followed sole source procedures in award of the contract to IBM.

Decision

Appellant asserts that the procurement was structured to ensure award to IBM and yet make it appear that the procurement was competitive. Specifically,

¹ The IBM configured MVS/ESA (Multiple Virtual Storage/Enterprise System Architecture) is an operating system (i.e. software) for mainframe computers.

² By letter dated August 31, 1989, Appellant declined to submit a bid on grounds that only IBM could allegedly meet the specifications.

Appellant argues in its comments on the Agency Report that:

The Agency would have the Board believe there were many potential bidders; but, the specification required the Equipment be new and unused, (Section III.B, paragraph 2, at page 10 of the invitation for Bid and Section III.C.1 at page 11 of the invitation for Bid) and the successful vendor had to provide maintenance services on the Equipment including having its own supply of parts, etc., (Section III.G at page 14 of the Invitation for bid). Other than the three manufacturers (IBM, NAS [National Advanced Systems], and Amdahl), the remaining vendors who received copies of the Invitation for Bid are dealers in used Equipment or are systems integrators who do not provide their own maintenance services. Accordingly, in spite of the apparently large number of potential bidders, only three could qualify, assuming there were no other restrictive provisions. As Amdahl has amply stated in its previous filings, DSD knew only IBM could comply with the requirements for the MVS/ESA operating system offering as of the bid opening date.

Based on these allegations, Appellant requests the Board to find that the General Procurement Law required that the procurement be undertaken as a sole source procurement with appropriate justification of a sole source award to IBM. This we must decline to do. Assuming arguendo that there were in fact no vendors capable of complying with the complained of specifications, Appellant has failed to demonstrate that the agency in fact knew this to be the case or reasonably should have known this to be the case when it issued the IFB or upon receipt of Appellant's protest immediately prior to bid opening. Indeed, based on the record before this Board it would appear reasonable for DSD to have concluded that at least one other vendor (National Advanced Systems) could have responded to a competitive procurement even if the agency should have concluded that Appellant could not. Thus Appellant has failed to demonstrate as it must to prevail that the determination of DSD to engage in a competitive procurement was fraudulent or so arbitrary as to constitute a breach of trust. See cases and authorities cited at p. 14 of the Board's opinion in Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10 (1982). Accordingly the appeal is denied.

