

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ASTRO PAINTING &)
CARPENTRY, INC.)
) Docket No. MSBCA 1777
Under DPS&CS Solicitation)
No. 93030-0206)
)

February 18, 1994

Burden of Proof - Contest of an award is a serious matter and Appellant has the burden of proving that the Procurement Officer's award of the contract was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion.

APPEARANCE FOR APPELLANT: Linda A. Zafiriou
President

APPEARANCE FOR RESPONDENT: Alan D. Eason
Asst. Attorney General

APPEARANCE FOR INTERESTED PARTY: Bruce T. Dobson
Chesapeake Court Builder, Inc. President

OPINION BY MR. PRESS

Appellant timely appeals from a Department of Public Safety and Correctional Services (DPS&CS) Procurement Officer's final decision denying Appellant's protest, alleging DPS&CS improperly awarded a contract to Chesapeake Court Builders, Inc. (Chesapeake). Neither party has requested a hearing and this decision is based on the written record.

Findings of Fact

1. On August 18, 1993, the Maryland Correctional Pre-Release System (MCPRS), an institution of the Division of Corrections (DOC) consisting of pre-release facilities, issued an invitation for bids (IFB) for the renovation of the gymnasium floor at the Baltimore City Correctional Center at an estimated cost of \$30,000.00 Bids were due September 21, 1993.
2. Section I - INSTRUCTIONS TO BIDDERS, page I-1, the following is stated:
 1. GENERAL REQUIREMENTS:
 - a. Prior to preparing Bids, Bidders are strongly urged to visit the site and become familiar with all existing conditions which may affect the proposed work.

SECTION IV - DETAILED SPECIFICATION, page S-9, dated June 22, 1993
in pertinent part states:

BALTIMORE CITY CORRECTIONAL CENTER
901 GREENMOUNT AVENUE
BALTIMORE, MARYLAND

GYMNASIUM FLOOR RENOVATION

A. Base Bid:

The Base Bid shall include all labor, material, equipment and services necessary for an incidental to complete the specific work complete in every way to the satisfaction of the Director, Division of Facilities Maintenance (Director), Department of Public Safety and Correctional Services.

B. Scope of Work:

This work shall consist of all that is necessary to install a new playing surface, approximately 4,500 square feet, on the gymnasium floor at the captioned Facility. This work shall consist of but not be limited to.

1. The repair and preparation of the existing floor surface in accordance with the playing surface system manufacturer's specifications, and these specifications.
2. The installation of the selected playing surface system in accordance with the manufacturers specifications and these specifications.
3. The installation of game court markings using the manufacturers set in line marking system. Lines are not to be painted.
4. The cutting of doors as necessary to enable the doors to open without damaging the newly installed playing surface.
5. The installation of transition strips at all door openings.....

SECTION L of the DETAILED SPECIFICATION at page S-12 in addition states in pertinent part:

L. Site Inspection:

Prospective bidders shall visit and inspect the site prior to submitting their proposals for this work and shall thoroughly familiarize themselves with all existing conditions, check drawings and specifications and satisfy themselves as to the accuracy and completeness

of same, and the nature and extent of all work described and shall be prepared to execute a finished job in every detail without extra charge....

3. SECTION III - SUPPLEMENTARY GENERAL CONDITIONS, Part 5, Page S-2 states:

5. APPROVED EQUAL:

a. When any item or material is specified by a proprietary name, trade name or name of a manufacturer, with or without the addition of such expressions as "or an approved equal", the Director shall use his own judgment when determining whether or not to approve any proposed substitute item or material. The decision of the Director shall be final.

SECTION IV - DETAILED SPECIFICATION, Page S-10, Section

E. Playing Surfaced System:

The playing surface system shall be 12 in x 12 in x 1/2 in interlocking high impact Polypropylene Copolymer modules with the following physical properties:

Property	Unit of Measure	Method	Result
Tensile Strength	psi	ASTM D 638	3700
Elongation @ Yield	%	ASTM D 638	18
Flexural Modulus	psi	ASTM D 790B	14,500
IZOD, Notched 73.4of	ft-lbs/in	ASTM D 256	2.3
IZOD, Unnotched - 40F	ft-lbs/in	ASTM D 256	20
Gardner Impact - 4 F	in-lbs	STP 2223	215
Rockwell Hardness	Of	ASTM D 785	80
Heat Deflection @ 66 psi	Of	ASTM D 648	185
Melting Point Isotatic	Of	ASTM D 2117	329-406
Auto-ignition temperature	Of		1050
Vicat Softening Point	Of		286
Low Temperature Brittleness	F o		8 6 -6
Coefficient of Expansion	in/in/ F	ASTM D 696	38-53 x 10

The playing surface shall be "Duragrid" as manufactured by Sports

Courts Inc. 1075 South 700 West, Salt Lake City, Utah, or as approved.

4. Appellant, by letter dated September 21, 1993, filed a protest challenging the requirement of Section IV. F (Detailed Specification) of the IFB. Appellant complained of the requirement, that the installer of the new floor have "a documented history of successful installations of offered product in the Maryland Area."
5. On September 27, 1993, MCPRS issued Addendum I to the IFB. This Addendum provided answers to two questions raised at the pre-bid conference and furnished amended pages S-9 and S-11 to the IFB to incorporate the answers. Additionally, the Addendum included a modified page S-10 to the IFB. This modified page deleted from Section IV. F the requirement that the selected installer have a history of successful installation in the Maryland Area. Addendum I, also extended the bid due date to October 11, 1993. Appellant in response to the Addendum withdrew its protest by letter dated September 29, 1993. Addendum 2 issued on October 4, 1993 extended the bid due date to October 12, 1993.
6. Timely bids were submitted by Chesapeake and Appellant. Chesapeake's bid was \$17,928.00 and Appellant's bid was \$37,350.00. Appellant on October 18, 1993, sent a letter of protest to Helen Manning, Procurement Officer for MCPRS protesting award to Chesapeake. The October 18, 1993, protest letter was supplemented by a letter dated October 22, 1993, to Ulysses Rose, Assistant Director of Procurement Services for DPS&CS.
7. Appellant's protest letter of October 18, 1993 and amplified in its supplement state the following:

"The owner of Chesapeake Court Builders, Bruce Dobson, was personally involved in writing the specification for this project. He is a dealer for the manufacturer of the floor tiles that were specified to be used in the renovation and he is the only dealer who can supply the floor tiles

since this product is not available through any other source. It is unusual that a dealer would submit a bid under these circumstances.

The specification appeared to have been written in such a manner that it would place bidders, other than Mr. Dobson, at a disadvantage. On September 21, 1993, we filed a protest in regards to the specification, specifically Section F which pertained to the experience requirement of the installer. (Please refer to our correspondence.) After you issued an amendment to this requirement, we withdrew our protest.

We proceeded to prepare our bid based on cost information provided to us by both Mr. Dobson and the manufacturer of the floor tiles, Sports Courts, Inc. The cost quoted for the floor tiles alone was approximately \$4.00 a square foot. This cost did not include the tile accessories, game lines, floor preparation, door alterations, concrete repairs, tax, freight, or the cost of labor to install the floor tiles.

We submitted a bid of \$37,350.00 based on all labor and materials necessary to complete the floor renovation. Mr. Dobson, of Chesapeake Court Builders, submitted a bid of \$17,000.00. If the cost he quoted us for the floor tile alone was \$18,000.00, how is it possible that he could submit a bid of \$17,000.00 for the entire project?

We are assuming that he has an agreement with the manufacturer that allows him to purchase the floor tiles at a special low price, however, he and the manufacturer are providing others with much higher prices for the same product. We are enclosing a price list to confirm this information.

We feel very strongly that Mr. Dobson has participated in a form of collusion in an attempt to obtain this contract. Furthermore, we feel that he should be debarred from future government contracts in Maryland."

8. On November 15, 1993, Mr. Rose issued a Procurement Officer's final decision denying the protest and finding the protest without merit. The Procurement Officer's decision in relevant part states:

Although Mr. Dobson provided information on the Duragrid floor tiles, MCPRS wrote the specifications expecting the estimated cost to be \$30,000. MCPRS adhered to the Code of Maryland Regulations (COMAR) 21.04.01.02 which states, "Brand name or equal means a specification that uses one or more manufacturer's names or catalog numbers to describe the standard of quality, performance and other characteristics needed to meet the procurement agency's requirements, and which provides for the submission of equivalent products. Salient characteristics of the brand name item shall be set forth in the specification". The specifications for solicitation #93030-0206 gave vendors an opportunity to submit an equivalent product meeting salient characteristics.

9. On November 22, 1993, Appellant appealed to this Board, contending the Procurement Officer ignored certain facts presented in the protest and supplement to the protest. Attached to the appeal letter, the Board received a facsimile transmission dated September 16, 1993, previously provided to Appellant by Chesapeake. This facsimile is a pricing sheet for gymnasium flooring and descriptive literature of Sports Court products.

The descriptive literature reveals that "floor" and "deck" products are identified as appropriate for gymnasiums. Furthermore, the pricing sheet reveals for the quantity needed for the project that the deck tile price was \$3.15 per square foot as opposed to \$3.90 per square foot for the floor tile.

10. After the appeal was filed this Board received from Chesapeake a letter dated December 1, 1993. Chesapeake contends that its bid is legitimate and Appellant's bid was poorly prepared. In pertinent part Chesapeake's letter provides:

...."First of all, our bid price for the BCCC Gym Renovation is consistent with the pricing for our previous "Deck Tile" installations (after accounting for the diverse surface preparation requirements for each project).

· Maryland House of Correction, Jessup, MD; (installed 11/91) - required substantial surface preparation
12,284 square feet - \$42,995.75 = \$3.50 per square foot

· Parkville Church of the Nazarene, Parkville, MD; (installed 3/93) - required minimal surface preparation
3,767 square feet - \$13,410.00 = \$3.56 per square foot

· Beth Tfiloh Community School, Pikesville, MD; (to be installed 12/9/93) - requires minimal surface preparation
7,056 square feet - \$24,900.00 = \$3.53 per square foot

· BCCC Gymnasium Renovation Project - requires substantial surface preparation
4,000 square feet - \$17,000.00 = \$4.25 per square foot

(Note: The unit cost for this project is higher than that of the 1991 Maryland House of Correction project due to increased material costs and the substantially smaller size of the BCCC installation.)

I firmly believe that if Astro had completely researched the BCCC project, it would not have bid as high as it did, and would realize that it did not have any reason for a protest. Astro stated in its letter of October 18, 1993 that it used the pricing of the Sport Court "Floor Tile" product (\$4.00 per square foot) for this project, for an installation of an assumed area of 4,500 square feet (to produce its claim of \$18,000 in base material costs).

I shall list the essential features of Solicitation #93030-0206 that Astro overlooked in its bid:

· Astro used an inaccurate measurement of the BCCC Gym.

Astro assumed that the Pre-Release System's measurement of 4,500 square feet was accurate, while our own on-site measurements found that the gym was actually only 4,000 square feet (a substantial difference of 500 square feet). Astro's oversight raises the question of whether Astro actually visited the BCCC gym. Additionally, your records will show that Astro did not attend the Pre-Bid conference held on September 7, 1993.

· Astro bid the wrong Sport Court product. Sport Court, Inc. manufactures six different sports surfacing products, in order to address the various uses of recreational facilities.

For gymnasiums, Sport Court, Inc. offers two different products.

"Floor Tile": for sports arenas that are to be used exclusively for athletic events;

"Deck Tile": For 'multi-use' gymnasiums that are to be used for non-sports activities, as well as for athletic events.

The 1991, officials from the Maryland House of Correction carefully examined both products for their own gymnasium renovation, and determined that the "Deck Tile" was best-suited for their needs. The "Deck Tile" product was selected because it could handle the rigors of prison use, it was easier to maintain, and it cost less to install. The success of the Maryland House of Correction project (installed in November 1991) led the Pre-Release System to specify the "Deck Tile" for the BCCC Gymnasium Renovation Project.

Astro assumed in error that the more expensive "Floor Tile" was specified, even after being informed that two gymnasium flooring products were manufactured by Sport Court, Inc. (Your file should contain my 9/16/93 facsimile transmission to Astro, responding to their request for gymnasium flooring pricing and literature.) My firm and Sport Court, Inc. were never contacted afterward by Astro for clarification of the two gymnasium flooring products.

· Astro was not familiar with the preparation and installation costs associated with the Sport Court system.

Even after accounting for the estimating mistakes detailed above, Astro's high bid also reflected its ignorance of the Sport Court system's relatively inexpensive preparation and installation requirements...."

Decision

Appellant contends DPS&CS selection of Chesapeake, as the successful bidder for award was improper. Contest of an award is a serious matter and Appellant has the burden of proving that the Procurement Officer's award of the contract was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an

abuse of discretion. Xerox Corporation, MSBCA 1111, 1 MICPEL ¶48(1983).

Appellant argues that Bruce Dobson of Chesapeake "wrote the specifications for the project" and that the flooring product could only be purchased through Chesapeake, there being no comparable product available. However, Appellant from our review of this record has not provided any probative evidence Appellant was unfairly denied an equal opportunity to compete for award of the contract. Id.

The specification for the flooring project was prepared by MCPRS with Bruce Dobson's assistance. Mr. Dobson provided information to MCPRS regarding salient characteristics of duragrid floor tiles which were incorporated as part of "brand name or equal" specification.

The Procurement Officer's decision points out that COMAR 21.04.01.02 provides for the designation of a brand name product, so long as a bidder may submit equivalent products. Salient characteristics of the brand name product must be identified. In this procurement, we find the table of characteristics of the IFB established numerous performance characteristics of the flooring system which was to be offered by bidders. The characteristics set forth in the IFB are not proprietary, but deal with common flooring properties such as hardness and tensile strength. Therefore, we conclude Appellant has not shown that the specifications are unduly restrictive and accordingly, the protest as to irregularities in the preparation of the specifications was properly denied by the Procurement Officer.

Turning to Appellant's allegation of "collusion" again we find no probative evidence within this record to support such an assertion. Appellant's allegation that Chesapeake was able to secure from Sport Courts more favorable pricing through its distributorship than was available to purchasers such as Appellant, even if true, is not a basis for this Board to find collusion between MCPRS and Chesapeake. Accordingly, Appellant's protest is without merit.

We find from the information that has been supplied to this Board that the pronounced variation in the two bids submitted was a result of Appellant's failure to properly bid the project rather than discriminatory pricing of the flooring product.

Chesapeake in its letter to this Board asserts that Appellant in its bid, offered the Sports Court "floor tile" product and erroneously assumed an area of 4500 square feet rather than 4000 square feet for installation. Chesapeake further pointed out in its letter, that "deck tile" is a product manufactured by Sports Courts which is also consistent with the IFB specifications, and therefore, both flooring products are suitable for gymnasiums.

Also, we note the IFB urged that bidders visit the site and become familiar with the conditions at the site. Bidders were informed that they are responsible for inspecting the project site, acquire knowledge about all factors bearing on performance and verifying all dimensions as part of the general conditions of the contract.

In addition, the record reflects that Appellant's bid was high because Appellant over-estimated the amount of labor involved in the installation of the flooring.

We conclude that Appellant has failed to demonstrate impropriety in the specification and that the specifications properly provides for brand name or equal. There is no evidence of "collusion" in violation of State procurement law or regulation. The discrepancy in the bids was due to Appellant's using the more expensive flooring product and over-estimating square footage and labor costs for installation of the flooring.

Appellant has failed to show that the Procurement Officer acted contrary to law or otherwise improperly reached a determination to award the instant contract to Chesapeake in violation of IFB requirements.

Therefore, it is this ~~18th~~ day of February, 1994 ORDERED that the appeal is denied.

Dated: February 18, 1994 Sheldon H. Press
Sheldon H. Press
Board Member

I concur:
Robert B. Harrison, III Neal E. Malone
Robert B. Harrison, III Neal E. Malone
Chairman 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 1777, appeal of ASTRO PAINTING & CARPENTRY, INC., Under DPS&CS Solicitation No. 93030-0206

Dated: February 18, 1994 Mary F. Priscilla
Mary F. Priscilla
Recorder

