

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of BFI WASTE)
SYSTEMS OF NORTH AMERICA)
) Docket No. MSBCA 2115
Under Maryland Port Administration)
Request for Bid No. 199009-S1)
)

April 21, 1999

Bid Protest - Notice to Bidders - Standing - A prospective bidder who does not submit a bid, even where it did not actually receive notice of the solicitation, lacks standing to protest award to a contractor who actually submits a bid, where the public notice requirements of COMAR 21.05.02.04 are satisfied.

APPEARANCE FOR APPELLANT: Leslie W. Gawlik, Esq.
Mason, Ketterman & Morgan, P.A.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Margaret Witherup Tindall
Assistant Attorney General
Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

BFI Waste Systems of North America (BFI) timely appeals from the Maryland Port Administration (MPA) Procurement Officer's final decision denying its protest that although it was the apparent low bidder on a previous solicitation in which the MPA rejected all bids it never received a copy of the subsequent solicitation and therefore did not resubmit a bid.

Findings of Fact

1. On October 16, 1998, the MPA let Request for Bid No. 199009-S for competitive sealed bids to provide trash and waste tire removal service for the MPA at the Dundalk Marine Terminal, Seagirt Marine Terminal, and the Intermodal Container Transfer Facility.
2. A copy of the solicitation was mailed to Appellant at the address listed on MPA's bidder list for Appellant's predecessor, Browning-Ferris, Inc., at P.O. Box 72059, 68th Street and Pulaski Highway, Baltimore, Maryland 21237. Although Appellant's corporate headquarters had notified Maryland State units with which Browning-Ferris, Inc. had contracts that Appellant was the successor to Browning-Ferris, Inc., Browning-Ferris, Inc. had no contracts with MPA and so MPA was not notified of the change.

3. Notice of the solicitation was published in the Maryland Contract Weekly on October 20, 1998 and was posted on the MPA's bid board at 2310 Broening Highway, Baltimore, Maryland 21237. At approximately the same time a copy of the solicitation was sent to approximately 27 vendors.
4. The MPA received three bids, which were opened publicly on November 13, 1998.
5. Appellant was the apparent low bidder with a total bid price of \$38,053.60.
6. After the bids were opened but before any contract had been awarded on Request for Bid No. 199009-S, the MPA decided to reject all bids on the grounds that rejection of all bids was fiscally advantageous and otherwise in the best interest of the State.
7. By letter dated November 19, 1998 to Mr. Alphonso L. Riddick, Jr., a BFI bid specialist, the MPA advised Appellant of this decision and informed Mr. Riddick that a new solicitation was being prepared and would be sent to his attention. The letter was sent to Mr. Riddick at 260 W. Dickman Street, Baltimore, Maryland 21230 which is the business address listed on the business card Mr. Riddick had provided MPA.
8. On November 23, 1998, a new Request for Bid No. 199009-S1, was let for the same trash and waste tire removal services at the Dundalk Marine Terminal, Seagirt Marine Terminal, and the Intermodal Container Transfer Facility.
9. A copy of the new solicitation was allegedly mailed to BFI at the address listed on the MPA bidder's list for Browning-Ferris, Inc. on the original Request for Bid No. 199009-S, i.e., P.O. Box 72059, 68th Street and Pulaski Highway, Baltimore, Maryland 21237.¹ The Board cannot determine from the record if a copy of the new solicitation was in fact mailed to such address. Appellant has not used such address since 1996.
10. Notice of the new solicitation was also published in the *Maryland Contract Weekly* on December 1, 1998, and was posted on the MPA's bid board.
11. A copy of this second solicitation was also sent to approximately twenty-seven (27) vendors.
12. Appellant did not submit a bid in response to the second solicitation, and the bids were publicly opened on December 22, 1998. The MPA again received three bids, including two bidders from the original solicitation and one new bidder. The apparent low bid was submitted by York Waste Disposal, Inc., d.b.a. Area Container.
13. Appellant filed the protest which is the subject of this appeal on January 12, 1999.
14. By a Procurement Officer's final decision letter dated January 25, 1999, the MPA's Procurement Manager, Daniel A. Coleman, denied Appellant's bid protest. The Procurement Manager found that on November 23, 1998, a bid packet was addressed and mailed to Appellant at P.O. Box 72059, 68th Street and Pulaski Highway, Baltimore, Maryland 21237. The Procurement Manager observed that this was the same address to which Request for Bids No. 199009-S was sent just over one month previously on October 16, 1998, and to which Appellant responded. Under these circumstances, the Procurement Manager found no basis for Appellant's protest.
15. Appellant filed a notice of appeal from such decision with this Board on January 27, 1999 "[b]ased on the fact that the MPA had Appellant's correct address. . . and that Appellant never received the second bid."

¹ MPA was apparently confused concerning the fact that BFI was the successor to Browning-Ferris, Inc. and both appear on the bidders list for the original Request for Bids No. 199009-S. Neither appears on the second bidders list for the second Request for Bids No. 199009-S1.

Decision

Appellant's appeal must be denied even though we find Appellant did not have actual notice of the second solicitation. We reach this conclusion because (1) the MPA did not deliberately exclude Appellant from participating in the second solicitation and (2) Appellant had constructive notice of the second solicitation by virtue of the MPA's publication for the second solicitation in the *Contract Weekly* on December 1, 1998.

Appellant did not submit a bid in response to the MPA's second solicitation. We have previously held that where the public notice requirements of COMAR are satisfied, a prospective bidder who does not submit a bid even where it did not actually receive the notice lacks standing to protest award to a contractor who submits a bid or otherwise challenge the procurement. Tab's Assocs., Inc., MSBCA 1624, 3 MSBCA ¶295 (1992); H & N Janitorial Service, MSBCA 1401, 2 MSBCA ¶191 (1988). In Tab's Assocs., Inc., the Board, while noting that an incumbent contractor is entitled to no better treatment than a non incumbent, did describe a possible exception to the general public notice rule for an incumbent contractor who had been successfully performing similar services under a previous contract and was on the State's vendor list. However, absent a deliberate attempt to preclude a non incumbent vendor such as Appellant² from participating in a procurement, the fact that a vendor has been omitted from the agency mailing list or otherwise not sent notice of the solicitation by the agency will not invalidate an otherwise valid procurement where the public notice requirements of Maryland law are met.

COMAR 21.05.02.04 establishes the public notice requirements for procurements by competitive sealed bidding.

- A. Distribution. Invitation for bids or notices of the availability of invitations for bids shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition.
...
- B. Publication. Notice of an invitation for bids for which the bid amount is reasonably expected to exceed \$25,000 shall be published in the Maryland Register unless the resulting contract is reasonably expected to be performed entirely outside this State or the District of Columbia. Publication shall be at least 20 days before the bid submission date. . . .

In this appeal the record reflects that the MPA either failed to mail Appellant a solicitation for Solicitation No. 199009-S1 or mailed a solicitation to the wrong address. The persons responsible for this mailing or lack thereof testified at the hearing and from their testimony and the record as a whole it is apparent that there was no deliberate attempt to exclude Appellant, who offered the low bid in the first solicitation, from participating in the second solicitation.

² The record does not reflect whom the incumbent contractor for the services at issue was and whether such contractor received actual notice. Any such issue is not before us.

With the possible exception of an incumbent vendor who may have been successfully performing the required services under a previous contract, the MPA had no obligation to personally contact any particular potential bidder, including Appellant. In this particular appeal the MPA's obligation (as regards Appellant and other non incumbent vendors) was to furnish a sufficient number of prospective bidders with the solicitation or notice thereof to ensure competition and to publish notice of such solicitation as provided in COMAR 21.05.02.04. MPA complied with such obligation herein. It is regrettable that Appellant was not actually sent a copy of the second solicitation at its Dickman Street address as Appellant was advised it would be in MPA's letter to Mr. Riddick of November 19, 1998 rejecting all bids in the first solicitation. However, such failure may not alter our decision herein.

Even though Appellant did not have actual notice of Solicitation No. 19900-S1, it must be charged with constructive notice thereof because the second solicitation was published in the *Contract Weekly* on December 1, 1998. The MPA complied with both section A and section B of COMAR 21.05.02.04 for both Request for Bid Nos. 199009-S and 199009-S1. In each case, the MPA mailed solicitations to approximately 27 potential bidders from the MPA's bidder's list and advertised the solicitation on the MPA's bid board. The MPA also published notices of the invitation for bids in the *Contract Weekly* more than 20 days prior to the dates set for bid opening. In the case of the second solicitation, Request for Bid No. 199009-S1, notice of the solicitation was published on December 1, 1998, and specifically informed prospective bidders that bids must be submitted no later than December 22, 1998. Under COMAR 21.05.02.04, Appellant is deemed as a matter of law to have had constructive notice of Request for Bid No. 199009-S1. Appellant did not submit a bid in response to that solicitation.

In these circumstances, where the record reflects that MPA has not deliberately attempted to exclude Appellant from participating in the procurement and Appellant did not submit a bid in response to Request for Bid No. 199009-S1 despite having constructive notice of the solicitation, Appellant does not have standing to challenge the award of a contract to another vendor who submitted a bid. Accordingly, the appeal is denied.

Wherefore, it is Ordered this 21st day of April, 1999 that the appeal is denied.

Dated: April 21, 1999

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 2115, appeal of BFI Waste Systems of North America under Maryland Port Administration's Request for Bid No. 199009-S1.

Dated: April 21, 1999

Mary F. Priscilla
Recorder

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