

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of COLONIAL DETECTIVE AGENCY,)
INC.)
Under DGS Contract No. SSC-0001-FY88) Docket No. MSBCA 1354

December 1, 1987

Small Business Set-Aside - Since the procurement was neither designated as a small business set-aside by the Secretary (DGS) nor identified as a small business set-aside in the IFB, the fact that Appellant may have been a small business was immaterial and could not have been considered in awarding the contract.

Minority Business Enterprise - The fact that Appellant was a minority business enterprise did not entitle it to any price adjustment preference in bidding under Section 11-148, Division II, State Finance and Procurement Article and COMAR 21.11.03.

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APPEARANCE FOR RESPONDENT: John H. Thornton
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that it was entitled to have its second low bid adjusted downward by a 5% small business enterprise price adjustment or otherwise sufficiently adjusted due to minority business enterprise (MBE) status to make it the low bidder.

Findings of Fact

1. The Department of General Services (DGS) issued an "Invitation to Submit a Bid" (IFB) on June 26, 1987, for provision of uniformed guard service for a term of one year at the Saratoga State Center, 310 W. Saratoga Street, Baltimore, Maryland. Bid opening was scheduled for August 17, 1987 at 2:00 p.m. Addendum Number Two to the IFB dated August 12, 1987 stated that the contract would be awarded to the contractor bidding the lowest sum of the non-overtime hourly rates for unarmed guards and armed guards. Bids were solicited directly from lists of minority businesses given to the DGS procurement officer by the Minority Business Enterprise Liaison Officer of DGS and by the Department of Economic and Community Development.

2. Although bids were solicited from minority businesses qualified as MBEs, the procurement was not designated by the Secretary of DGS or identified by the IFB (1) as having an MBE participation goal under Section 11-148, Division II, State Finance and Procurement Article¹ and COMAR 21.11.03, (2) as a small business set-aside under Section 11-140, Division II, State Finance and Procurement Article and COMAR 21.11.01.01, or (3) as having any special consideration, preferences, opportunities or set-asides for MBEs or small businesses.

3. Bids were received at the time and date set for bid opening as follows:

<u>Bidder</u>	<u>Total of hourly rates</u>
Phelps Protection Systems, Inc. (Phelps)	\$15.50

¹Md. Ann. Code.

Colonial Detective Agency	\$16.00
Elite Security Services, Inc.	\$19.00
Metropolitan International, Inc.	\$19.00
Loughlin Security Agency	\$22.38

Copies of the bids were available for public review immediately after they were opened on August 17, 1987. The low bid submitted by Phelps reflects that it is a minority business certified as an MBE by the Federal Small Business Administration and the Maryland Department of Transportation.

4. On or before September 17, 1987, the procurement officer received a letter of protest dated September 2, 1987 on behalf of Appellant. The letter arrived in the mail in an envelope showing two postmarks by the United States Postal Service, one dated September 2, 1987 and the other dated September 8, 1987.

5. The grounds for the protest were that Appellant should be awarded the contract, because it is entitled to "the special consideration for a certified female minority and small business entity" and the "the small business enterprise adjustment (5%) should have been applied."²

6. The Procurement Officer denied the protest by letter dated September 17, 1987. The grounds for the denial were that the IFB clearly stated that the contract would be awarded to the firm bidding the lowest sum of the non-overtime hourly rates for unarmed guards and armed guards, and that no special considerations, opportunities or set-asides for minority businesses or small businesses were identified. Appellant then filed its appeal with this Board on September 28, 1987.

7. Appellant elected not to comment on the Agency Report pursuant to COMAR 21.10.07.03D, and did not request a hearing pursuant to COMAR 21.10.07.06. The Agency Report states that Phelps, the low bidder, is a minority business certified as an MBE and that "if Colonial were entitled to some preference or special consideration as an MBE, Phelps would be entitled to the same privilege and as low bidder still would be entitled to award." In the absence of comment on the Agency Report and the reflection in the Phelps bid that it is a certified MBE, the Board finds that Phelps is an MBE.

8. The Agency Report states that Appellant knew or should have known of the grounds for protest at bid opening on August 17, 1987 when bids were available for public review and Phelps was announced as low bidder and thus that the protest filed more than seven days later was untimely.

Decision³

The IFB did not identify the procurement as a small business set-aside. The 5% preference for a small business⁴ only applies to those procurements designated by the

²Appellant's protest suggests that there is no substantive difference between a minority owned business and a small business respecting alleged preferential treatment under the State's procurement law and that it is entitled to a price adjustment to its bid under either. In fact there are major substantive differences between the treatment of the two under the procurement code and COMAR. There is no provision in the law or regulations for a price adjustment to the bid of a minority business. Compare Section 11-140, Division II, State Finance and Procurement Article and COMAR 21.11.01 (Small Business) with Section 11-148, Division II, State Finance and Procurement Article and COMAR 21.11.03 (MBE).

³While not raised by the procurement officer who addressed Appellant's protest on the merits, we note that the assertion by DGS in the Agency Report that the protest was untimely may well be correct. We also note that a challenge to the discretionary determination by the Secretary of DGS not to designate the procurement as a small business set-aside should be made, if at all, prior to bid opening. See COMAR 21.10.02.03 A and B.

⁴COMAR 21.11.01.01B(3) provides:

The Secretaries of General Services and Transportation and the President of the University of Maryland shall accept the lowest responsive and responsible bid from a small business for a small business set-aside procurement, if the small business bid does not exceed by more than 5 percent the bid received from the lowest responsive and responsible regular vendor.

Secretary of DGS as a small business set-aside procurement. Section 11-140, Division II, State Finance and Procurement Article; COMAR 21.11.01.01B(3). See McGregor Printing Corporation, MSBCA 1082, 1 MICPEL ¶26 (1982). All procurements designated as small business set-asides must be so identified in the solicitation. COMAR 21.11.01.01B(2). Since this procurement was neither designated as a small business set-aside by the Secretary nor identified as a small business set-aside in the IFB, the fact that Appellant may be a small business is immaterial and could not be considered in awarding the contract. Accordingly, we deny Appellant's appeal on grounds that it should have been granted a price preference as a small business.

Respecting Appellant's assertion that it is entitled to award because it is an MBE, neither the statute⁵ nor the regulations governing MBE opportunities, as set forth in COMAR 21.11.03, give an MBE any price adjustment preference in bidding nor specifically set aside any contracts for MBEs. Appellant's status as an MBE, therefore, is immaterial to award of the contract, and in any event, the low bidder, Phelps, is a certified MBE. Therefore, even if Appellant were entitled to some preference or special consideration as an MBE, Phelps would be entitled to the same privilege and as the apparent low responsive and responsible bidder still would be entitled to award.

Accordingly, Appellant's appeal on grounds of failure to accord it special treatment as an MBE is denied.

⁵See Section 11-148, Division II, State Finance and Procurement Article.

