

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CONSOLIDATED STANDARD )	
ELEVATOR COMPANY )	
Under Dept. of Education )	Docket No. MSBCA 1267
Contract No. 620032 )	

January 10, 1986

Rejection of Bids - Cancellation of Solicitation - The procurement officer after bid opening reasonably cancelled the invitation for bids and rejected the only bid received where material changes to the technical specifications were required.

APPEARANCE FOR APPELLANT:	None
APPEARANCE FOR RESPONDENT:	W. Carter Lester, Jr. Assistant Attorney General Baltimore, MD

OPINION BY MR. KETCHEN

This timely appeal is taken from a Maryland State Department of Education (MSDE) procurement officer's decision denying Appellant's protest of the resolicitation of bids and the subsequent award to General Elevator Company (General) of the captioned contract. Appellant maintains that: (1) the procurement officer improperly decided to resolicit bids and (2) its price became a public record when the first bid was opened thus giving General an unfair advantage.

Findings of Fact

1. On June 4, 1985, MSDE issued an Invitation for Bids (IFB) for Contract No. 620032 for the maintenance and repair of five elevators in the Maryland Rehabilitation Center. Bids were due June 17, 1985.
2. When bids were opened, Appellant was the only company that submitted a bid.
3. On June 26, 1985, the MSDE procurement officer sent the contract to Appellant with a letter requesting that certain forms be signed and returned. The letter stated in part: "After receipt of the above material, we can begin the approval process. We will forward the approved award when the process is completed." Appellant executed and returned the contract documents to MSDE on July 8, 1985 and began to perform the elevator maintenance services without objection by MSDE.

4. By letter dated July 22, 1985, the procurement officer then submitted the contract executed by Appellant to the Department of General Services (DGS) for review. MSDE states that the technical specifications for the contract were not submitted to DGS prior to bid opening because they were not timely submitted by the Maryland Rehabilitation Center and there was a need for immediate elevator service upon expiration of the prior contract. The record, however, does not indicate why DGS' review of the contract's specifications was not sought at the time of issuance of the IFB when they were available nor why the request for DGS review of the specifications was deferred until July 22, which was after bid opening and after return of the contract documents executed by Appellant.

5. In early August 1985, after reviewing the contract documents DGS informed the procurement officer that the technical specifications were inadequate. The specifications were rewritten and approved by DGS as of September 5, 1985 and transmitted to the MSDE procurement officer on September 10, 1985.

6. On September 6, 1985, Appellant was notified that bids would have to be resolicited because of significant changes to the specifications required by DGS. Appellant was paid its contract fee for the services it provided during July and August 1985, but not for September and thereafter.

7. On September 25, the procurement officer issued a new IFB with revised specifications. The bid deadline was October 17, 1985.

8. By letter dated October 1, 1985, Appellant protested the cancellation of the first IFB and the resolicitation. Appellant advised that it would continue to perform under the contract already awarded to it based on the first IFB.

9. On October 14, 1985, the MSDE procurement officer issued a final decision denying Appellant's protest.

10. Bids on the resolicitation were received and opened on October 17, 1985. General was the low bidder; Appellant the second low bidder.

11. Appellant filed a timely notice of appeal of the procurement officer's final decision with this Board on October 28, 1985.<sup>1</sup>

#### Decision

Appellant contends that the procurement officer improperly decided to resolicit bids because it already had been awarded the contract and that in any event it was at a disadvantage, as compared to General, because its original bid became a public record when it was opened. In determining whether the procurement officer properly rejected all bids, and issued a new solicitation, a primary issue to be determined here is if there was a valid contract between Appellant and MSDE.

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<sup>1</sup>Neither party has requested a hearing pursuant to COMAR 21.10.07.06.

It is accepted that a notice of award sent by the procuring agency to the low responsive and responsible bidder constitutes an acceptance. Compare: COMAR 21.01.02.06, COMAR 21.01.02.20; and State Finance and Procurement Article, Md. Ann. Code, Section 11-101(f) and Section 13-202(g). If there is no acceptance, a valid contract cannot be formed. The June 26, 1985 letter from MSDE to Appellant stated that the approval process was not yet complete and that the letter was not a final notice of award, but only a conditional indication that Appellant would be awarded the contract. (Finding of Fact No. 3). Here, there was no notice of award, no acceptance, and no contract.

State Finance and Procurement Article, Md. Ann. Code, Section 13-301, regarding the grounds for cancellation of a solicitation, provides that:

If the procurement officer, with the approval of the agency head or his designee, determines that it is fiscally advantageous or is otherwise in the best interests of the State, an invitation for bids, a request for proposals, or other solicitation may be cancelled, or all bids or proposals may be rejected.

COMAR 21.06.02.01C(1)(c) implements the foregoing statute by providing that prior to award if "proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable" then it is legitimate to reject all bids or proposals. This Board has stated that "the determination of whether it fiscally is advantageous or otherwise in the State's best interest to reject all proposals and cancel a solicitation has been left to the collective discretion and judgment of the procurement officer and agency head." The Fechheimer Brothers Co. and Harrington Industries, MSBCA 1181/1182 (June 8, 1984) at 5. The procuring agency, thus, had the right to resolicit bids for this contract because it adopted the DGS changes to the technical specifications that it found materially changed those specifications, and there was not yet a valid contract between Appellant and MSDE.

It is not possible to say, based on the record before us, that the procurement officer improperly decided to resolicit bids because the decision is clearly within his reasonable discretion. Since the procurement officer had the right to resolicit this procurement based on a material change to the specifications, Appellant's claims lose their validity. While it may be true that Appellant was at a competitive disadvantage in relation to the other bidders in the second solicitation because its price was exposed, this reason is not enough to sustain its appeal as the original IFB was legally cancelled. See: The Fechheimer Brothers Co. and Harrington Industries, *supra*; see: Peter J. Scarpulla, Inc., MSBCA 1209 (November 13, 1984) at 9, *rev'd Maryland Department of General Services v. Scarpulla, Inc.*, Memorandum Opinion and Order (Balto. City Cir. Ct., May 31, 1985).

While the actions taken here are consistent with the letter of Maryland procurement law and require the procurement officer's decision to be affirmed, they are less than what is expected to promote the law's underlying purposes and policies to:

- (1) Provide for increased public confidence in the procedures followed in public procurement;

(2) Insure the fair and equitable treatment of all persons who deal with the procurement system of this State;

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(6) Provide safeguards for the maintenance of a procurement system of quality and integrity;

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State Finance and Procurement Article, Md. Ann. Code, Section 11-201(b).

It is important to note that the proposed contract executed by Appellant and the attendant technical specifications were not submitted to DGS for review until July 22, 1985, although the IFB was issued on June 4, 1985 and bids opened on June 17, 1985. MSDE states that the specifications were not submitted to DGS for review prior to the opening of bids on the initial solicitation because the specifications were not timely submitted by the Maryland Rehabilitation Center, and because there was a need for immediate elevator service upon expiration of the existing contract. However, this explanation does not adequately explain the delay in seeking DGS review of the technical specifications which were available at least by June 4, 1985, when they were issued as part of the IFB. In any event, this "need" for haste does not excuse the imprudence inherent in issuing an IFB that contained specifications that were subject to review by another agency and in waiting until long after bid opening to seek that review. It is Appellant who has been injured by this entire process having extended manpower and money in preparation of a bid in the original IFB without its acceptance (it was underbid by \$1,996.08 for the three year contract term in the second solicitation), and yet it has no legal recourse because there was no contract and MSDE clearly had the right to resolicit bids because of a material change to the specifications. Such an occurrence tends to discourage competition, 52 Comp. Gen. 285 (1972), and certainly does not help "provide for increased public confidence in the procedures followed in public procurement," or "insure the fair and equitable treatment of all persons who deal with the procurement system of this State."

For the foregoing reasons, therefore, Appellant's appeal is denied.