

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DOURON, INC.)
)
Under Maryland Department of) Docket No. MSBCA 1189
General Services (DGS))
Quotation Request No. P28689)

August 24, 1984

Rejection of All Bids - A DGS procurement officer's decision to reject all bids after bid opening was considered reasonable where it appeared from the bids received that the needs of the using agency could be satisfied by a less expensive equivalent item differing from that on which bids or proposals were invited.

Using Agency - Minimum Needs - The Board will not resolve disagreements between a using agency and procurement agency relating to the former's minimum needs. Such matters should be resolved, outside of the bid protest procedures, within the Executive Branch.

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APPEARANCE FOR RESPONDENT:

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OPINION BY CHAIRMAN BAKER

This appeal arises out of a May 14, 1984 DGS procurement officer's final decision rejecting Appellant's low bid and cancelling the captioned solicitation. The procurement was conducted by DGS on behalf of a Department of Education agency denominated as Disability Determination Services. DGS contends that the action taken by it was warranted since the bids received indicated that the needs of the using agency could be satisfied by a less expensive equivalent item differing from that on which the bids were invited. Appellant maintains that the cancellation of the solicitation was arbitrary in that the DGS procurement officer improperly substituted his judgment for that of the using agency.

Findings of Fact

1. Disability Determination Services (DDS) received a Federal grant from the Social Security Administration for the furnishing, delivery and installation of office partitions. This purchase, however, was to be consummated pursuant to Maryland's procurement laws and regulations.
2. In accordance with COMAR 21.04.01.03,¹ DDS was responsible for preparing the specifications for the office partition system. To assist in this task, a DDS committee visited six different panel installations and contacted several manufacturers. A floor plan and specifications were prepared following review of the information gathered.
3. The DDS floor plan and specifications were approved by the Social Security Administration. Copies thereafter were forwarded to the DGS Purchasing Bureau where a request for quotations (RFQ) was prepared. The RFQ, as issued on November 25, 1983, incorporated the DDS floor plan and specifications.
4. The DDS specifications generally called for a partition system featuring an all steel frame and shelving system. The frame was to include an electrical raceway. Partition panels fitting within this frame were to consist of a fabric covered acoustical core made of two, one inch thick fiberglass boards. This acoustical core also was to provide a tackable surface.
5. Bids were opened on December 27, 1983 and Appellant was identified as the low, responsive bidder. Of the seven bids received, only two were responsive. The nonresponsive bidders offered less expensive systems which had components made of materials other than steel.
6. Mr. George Miller, the DGS buyer assigned to this procurement, reviewed the nonresponsive bids tendered. Upon doing so, he questioned whether the needs of DDS could be satisfied by less expensive components. For example, would an aluminum frame instead of steel offer acceptable strength and durability? Would plastic fasteners be structurally adequate? Could metal or particle board shelving support the loads expected to be placed upon them?
7. As part of his review, Mr. Miller visited facilities where less expensive partition systems had been purchased. Specifically, he inspected partition systems manufactured by RAM and Panel Concepts. These systems had been bid by suppliers participating in the captioned procurement but were

¹COMAR 21.04.01.03 states that:

The using agency shall be responsible for preparing the specifications. To the extent practicable, functional or performance criteria shall be emphasized while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State.

determined to be nonresponsive. Possible cost savings resulting from the purchase of these less expensive systems, as demonstrated by the bid prices received, were estimated at 40 to 50 thousand dollars.

8. Mr. Miller met both with his supervisor, Mr. Paul Harris, and Mr. James Mann, the Chief of the DGS Purchasing Bureau, on March 22, 1984. After listening to Mr. Miller's presentation, Mr. Mann, as the procurement officer, determined that the needs of DDS could be met by a less expensive partition system and, for this reason, he decided to reject all bids and resolicit.

9. On March 29, 1984, Messrs. Miller and Harris met with Mr. Roger Griest of DDS to detail the reasons for the decision to reject all bids and to discuss proposed amendments to the solicitation.

10. By letters dated April 2 and April 16, 1984, Mr. Griest respectively wrote Mr. Miller and Mr. Mann stating that the original specifications were well considered and represented the needs of his agency.

11. DGS' Mr. Mann nevertheless formally rejected all bids by letter dated April 16, 1984. Appellant filed a formal protest of this action on April 23, 1984.

12. By final decision dated May 14, 1984, Appellant was apprised that its protest was denied and that all bids on the captioned procurement were being rejected.

13. A timely appeal was filed on May 29, 1984.

Decision

DGS is authorized by law to purchase commodities and supplies for all State agencies. Md. Ann. Code, Art. 41, §231-G (1982 Repl. Vol); COMAR 21.02.05.01E(3). Although this authority may be delegated² to a using agency, DGS did not do so here. Accordingly, DGS remained the authorized procurement agency for the purchase of an office partition system for use by DDS.

While Maryland's procurement regulations require a using agency to prepare specifications and provide expertise governing the purchase of supplies and commodities for its use, this appears to be the extent of the using agency's participation in a competitive sealed bid procurement of this type. A procurement officer authorized and assigned by the procurement agency thereafter is responsible for review and approval of the specifications and for the administration of the procurement itself. COMAR 21.04.01.04; COMAR 21.01.02.50. Where the rejection of bids is concerned, COMAR 21.06.02.01C further provides, in pertinent part, as follows:

²See COMAR 21.02.05.04A for DGS policy pertaining to delegation of purchasing authority.

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement officer, with the approval of the agency head or his designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. . . . (Underscoring added).

Although this provision could have been more clearly written, we conclude that it refers to approval by the head of the procurement agency rather than the using agency. This, after all, is a procurement decision that is being reviewed and only the procurement agency head would have the necessary experience and expertise to assure that the requirements of the law are being applied correctly and consistently.

If there still is doubt as to the meaning of COMAR 21.06.02.01C, it may be resolved by reference to the regulatory history. Compare The Boeing Company, ASBCA No. 18916, 74-2 BCA ¶10,976. In this regard, we note that the drafters, as a starting point, utilized recommended regulations written by the American Bar Association's Coordinating Committee On a Model Procurement Code for State and Local Governments. Draft regulation R3-301-04.2³ makes clear that it is the procurement officer or the head of a purchasing agency who properly should make any determination to reject all bids. Accordingly, we find no legal requirement in Maryland that the head of a using agency approve a procurement officer's decision to reject all bids.

Turning our attention to the substantive aspects of this appeal, our review of the DGS procurement officer's action is limited to a determination as to whether it was fraudulent or so arbitrary as to constitute a breach of trust. University of Maryland v. Solon Automated Services, Inc., Misc. Law No. 82-M-38 and 82-M-42 (Balto. Co. Cir. Ct. Oct. 13, 1982); Telex Computer Products, Inc., MSBCA 1110, May 25, 1983, p. 7. Here the procurement officer's action was taken pursuant to COMAR 21.06.02.01C(1)(f) which expressly permits the rejection of all bids where:

Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which bids or proposals were invited.

The DGS procurement officer determined from the bids received that up to \$54,000 could be saved through the purchase of a RAM 2000 or Panel Concepts system featuring aluminum frames, plastic fasteners and other less expensive features. The only question remaining, therefore, is whether these less expensive features will meet the needs of DDS.

To the extent that there is disagreement between DDS, as the using agency, and DGS, as the procurement agency, concerning the minimum needs of DDS, it should be resolved in some manner within the Executive Branch of

³This provision states, in pertinent part, that:

(a) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Chief Procurement Officer or the head of a Purchasing Agency determines in writing that such is in the [State's] best interest . . .

State government and outside of the bid protest procedures. It is not the function of this Board to decide whether a particular product or feature will best serve the needs of a using agency and we have no intention of doing so.

In sum, if it ultimately is agreed that the needs of DDS can be met only by an all steel partition system, it must be purchased under the captioned solicitation assuming that the bids received are still valid. Otherwise, the rejection of all bids and resolicitation was reasonable.

The appeal, therefore, is remanded to the DGS procurement officer for disposition pursuant to the foregoing discussion.

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