

BY THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ECONOMIC &)
TECHNICAL CONSULTANTS, INC.)
Under Maryland People's) Docket No. MSBCA 1572
Counsel RFP 90-015)

June 11, 1991

Motion for Reconsideration - Appellant failed to demonstrate by a change in conditions or other different factors that an error was caused by fraud, mistake, surprise or inadvertence.

APPEARANCE FOR APPELLANT: Jatinder Kumar, President
Economic & Technical
Consultants, Inc.
Rockville, MD

APPEARANCES FOR RESPONDENT: Doris F. Low
Staff Attorney
Joseph P. Gill
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON
ON APPELLANT'S MOTION FOR RECONSIDERATION

On April 19, 1991, the Board issued its decision in the captioned matter denying Appellant's bid protest appeal. That decision is incorporated herein by reference as if fully set forth. The Appellant's bid protest related to the award to a competitor of a contract to provide expert analysis in cost of service/rate design. Asserted as sole grounds for protest before the Maryland People's Counsel (MPC) Procurement Officer was the following; "We are highly qualified to provide services in electric rate case filings. And we are well versed in analyzing rate case filings of

the Potomac Electric Power Company, which is the utility of concern in the RFP. We are requesting the Maryland People's Counsel not to award a contract until the protest has been resolved." MPC denied the protest and Appellant timely appealed. At the hearing Appellant asserted that it was the most competent to perform the requested services as a fair unbiased evaluation of proposals should have indicated. Following the hearing at which both evaluators who had evaluated Appellant's and the winning proposal testified, the Board concluded that the evaluators reasonably scored the technical proposals of Appellant and its competitor (Tellus Institute) in accordance with their individual judgment and the criteria listed in the RFP. Since no arbitrary action by the evaluators was reflected in the record, the Board denied the appeal.

On May 14, 1991, Appellant filed a timely motion for reconsideration of the Board's decision asserting that the Board erred in determining that the evaluator's technical evaluations were not arbitrary, unreasonable and in violation of procurement regulations. No showing or attempted showing was made by Appellant that the Board's decision was in error through fraud, surprise, mistake or inadvertence. See Opinion on Motion for Reconsideration in the appeal of Reliable Janitor Service, MSBCA 1247, 2 MSBCA ¶126 (1986). Appellant asserted that the Board's decision was wrong and that the Board was biased against Appellant because the Board deliberately ignored the evidence which Appellant claims showed that the evaluations were arbitrary, unreasonable and in violation of procurement regulations. The Board fully considered all evidence

of record in reaching its decision and upon further review continues to conclude that Appellant and its proposal were afforded fair and unbiased evaluation by MPC. The Board also rejects Appellant's assertion that failure to sustain the appeal shows that the Board was or is biased against the Appellant.¹

Appellant next asserts in its motion for reconsideration that the Board's opinion is "a clear signal to MPC that it should continue its bias against the Appellant." Although not raised with the MPC Procurement officer, Appellant asserted in its appeal to the Board that MPC was biased against Appellant. While the Board dismissed Appellant's appeal on grounds of alleged bias for procedural reasons since an allegation of bias had not been raised before the MPC procurement officer, the Board nevertheless addressed in its opinion each allegation of alleged bias and found none. Since the record does not reflect any bias toward Appellant by MPC relative to this procurement dispute and appeal, Appellant's assertion that this Board's opinion resolving the dispute will foster, continue or encourage bias against Appellant is rejected.

Finally, Appellant asserts in its motion for reconsideration that the Board "failed to consider MPC's improper practice" relative to work performed by Tellus Institute on the requested services prior to contract award. This allegation involves one of several previously raised by Appellant for the first time on appeal

¹Appellant asserted in its motion for reconsideration that the Board ignored its contention at the hearing that the cost evaluations were flawed thus further indicating that the Board was biased against Appellant. The Board found from the record as set forth in its opinion that Appellant's cost was higher than Tellus Institute's and still so finds. Appellant's assertion of bias relative to the Board's finding in this regard is rejected.

as showing that MPC was biased against it. As noted above, Appellant's appeal based on allegations of alleged bias was dismissed for procedural reasons since such allegations were not raised with the procurement officer and may not now be considered. Nevertheless, the Board discussed the allegation's and at pp. 10 and 11 of its opinion particularly discussed the asserted improper practice allegation as follows:

4. Even though the MPC made the selection by January 16, 1991, MPC had assigned another firm to do the work requested in the RFP. For example, on December 21, 1990, the MPC submitted a data request prepared by the Tellus Institute on the subject of the RFP. The MPC had no authority to retain and pay for the services requested in the RFP prior to its selection."

MPC did not decide to award the contract due to a pending budgetary analysis until January 10, 1991. However, in the interim Tellus was allowed to proceed after the evaluation process was completed, and at its own risk, without assurances that a contract would ever be awarded. While permitting a vendor to work prior to contract award could certainly prejudice the rights of other vendors, in this appeal Tellus did not gain any unfair competitive advantage relative to award, because the substantive evaluation process to determine award under the RFP had already been completed.

A party seeking to show that bias on the part of State officials precluded it from award has a very great burden. See *Economic and Technical Consultants, Inc.*, MSBCA 1378, 2 MICPEL ¶ 184 (1988), p. 8. Appellant must prove by specific facts that its competitive position was affected by bias or unfair treatment. See *Transit Casualty Company*, MSBCA 1260, 2 MICPEL ¶ 119 (1985), at pp 43-44. It must offer proof that contracting officials had a specific intent to harm the protestor, since contracting officials are presumed to act in good faith. Prejudicial motives will not be attributed to such officials on the basis of inference or supposition. See *Micronics, Inc.*, B-228 404, 88-1 CPD ¶ 185 (1988), p. 4.

In this case, Appellant has cited circumstances which fail to show singly or in combination that Appellant's competitive position was unfairly jeopardized by bias or, indeed, that any bias existed. All of the events cited here occurred after the technical evaluation and do not reflect on

the integrity of the process. The evaluators testified at the hearing as did the procurement officer concerning all aspects of Appellant's protest and appeal.

Nevertheless, we must dismiss Appellant's appeal on grounds of alleged bias for procedural reasons, since an allegation of bias was never raised with the procurement officer and may not now be considered.

For the foregoing reasons the motion for reconsideration is denied.²

²Appellant also asserts in its motion for reconsideration for the first time an alleged failure of MPC to properly assign weights to evaluation criteria in Phase I and Phase II. Such alleged failure may not now be considered and should have been raised prior to the due date for receipt of Phase I technical proposals. See *Transit Casualty Company*, MSBCA 1260, 2 MSBCA ¶ 119 (1985) at pp. 37-38; COMAR 21.10.02.03A. The Board notes in passing that weights are assigned to Phase I and Phase II criteria.

