

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ENTERPRISE SYSTEMS,)
INCORPORATED) Docket No. MSBCA 1807
Under Department of Assessments)
& Taxation IFB 94-DAT-0017)

DECISION SUMMARY

Bid Protest - Timeliness - A protest based upon improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals are required to be filed prior to bid opening or the closing date for receipt of proposals.

APPEARANCE FOR APPELLANT: Howard Stern, Esq.
Stern & Connelly
Camp Springs, MD

APPEARANCE FOR RESPONDENT: David M. Lyon
Asst. Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Thomas C. Lederman, Esq.
Tydings & Rosenberg
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its March 22, 1994 bid protest that it submitted the bid most advantageous to the State.¹

Findings of Fact

1. The Department of Assessments and Taxation (Department) includes the Corporate Charter Division which serves as the public depository for all legal documents required to be filed by corporations, limited partnerships, limited liability companies, and other organizations, and for UCC filings. These documents are all public documents, copies of which are regularly requested by members of the public.

¹At the hearing of the appeal the Board granted the Respondent's motion for summary disposition of several issues on grounds the Board lacked jurisdiction over such issues raised for the first time either with counsel for Respondent after the protest was filed with the Procurement Officer or at the hearing of this appeal.

2. At times, it is not necessary to see the actual document, but only to verify in the index that it has been filed; and, in an effort to make the index files more easily accessible to the public, the Department in January of 1994 requested bids on a multi-year "900" direct dial telephone service to corporate charter files via personal computers.
3. Specification 19 of the Invitation to Bid (IFB) specified that the public, 40% for the cost of each subsequent minute, and 20% for the cost of the development of the screen menus and instructions with documentation.² The first two costs were to be paid by the public, but the cost of development of menus and instructions was to be paid by the Department of its own budget.³
4. It was anticipated that this service will generate revenue for the State with the amount of revenue generated based on usage. However, it was determined prior to the bid solicitation that an accurate estimation of use was not possible. In this regard Specification 4 provided: "Volume - This is a new project, therefore there are no estimates of usage available."
5. Appellant acknowledged and accepted the "basis of award as stated in [Specification] number 19" by faxed correspondence.
6. At the pre-bid conference, the Procurement Officer indicated that the primary purpose of the procurement was to disseminate information to commercial users of the proposed service and at the same time generate revenue for the State's General Fund. However, there was never a written addendum issued to clarify how the low bid would be determined or otherwise change the language of Specification 19. The Procurement Officer, when

²Specification 19 provided as follows:

19. Basis of Award - The award will be based on the most favorable bid price. The bid price for the cost per telephone call will be weighted at 80% (40% for the first minute of each telephone call and 40% for each subsequent minute). The bid price for instructions for the public including user menus for the Corporate and UCC files will be weighted at 20%.

³From a financial perspective, the contract will work as follows. The state will set the price charged to the actual user. The provider will have a contract with a telephone company and the user will access the corporate charter files via a "900" service. The telephone company will collect the fees from the users as part of their monthly telephone bill and forward that amount to the provider, minus the telephone bill service charges. The provider will deduct its share from those proceeds based on its bid price. From that share, the provider must pay all of its costs and derive its profit. After deducting its share, the provider will forward the balance to the Department. The balance will then be forwarded by the Department to the State's General Fund.

asked, stated he could not estimate the volume of calls that would be received under the procurement.

7. At bid opening on or about March 15, 1994, two bids were received. DATOR Corporation, the interested party herein and successful bidder, bid \$.35 for the first minute, \$1.35 for each additional minute, and \$1.00 for the menu development and documentation. Appellant bid \$.20 for the first minute, \$.22 for each additional minute, and \$9,863.00 for the menu development and documentation.
8. The initial bid evaluation done by the Department determined that DATOR Corporation had submitted the most favorable bid.

The evaluation was done as follows:

	DATOR	APPELLANT
1st min. x 40%	.140	.08
2nd min. x 40%	.54	.088
Dev. cost / 1000 x 20%	<u>.002</u>	<u>1.973</u>
Total	.662	2.141

9. By letter dated March 2, 1994, Appellant protested the contract award on the basis that, assuming a high enough volume of calls, the State would ultimately earn more money over the full term of the contract if it awarded the contract to the Appellant and that if the Department had divided the menu development cost by 1,000,000, the Appellant would have won the bid solicitation.
10. After a review of the protest, the Procurement Officer determined that Appellant had failed to protest the price evaluation factors included in the basis of award and their

assigned weights prior to bid opening and therefore, it was too late to do so. Additionally, the Procurement Officer determined that the dividing of the menu cost by 1,000 was inappropriate and that the proper analysis was to simply multiply the bidders price by the percentage weight as follows:

	DATOR	Appellant
1st min. x 40%	.140	.08
2nd min. x 40%	.54	.008
Dev. cost x 20%	<u>.20</u>	<u>1972.6</u>
Total	.860	1972.768

This analysis also resulted in the same bidder (DATOR Corporation) being successful. Thus, the Procurement Officer found that the division of the development cost by 1,000 represented harmless error and was not an appropriate reason to sustain the protest. ⁴ Accordingly, the protest was denied.

⁴ COMAR 21.05.02.13 A., B. and D. provide:

A. General. The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the most favorable bid price or most favorable evaluation bid price. A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids.

B. Determination of Most Favorable Bid. Bids shall be evaluated to determine which bidder offers the most favorable price to the State in accordance with the evaluation criteria set forth in the invitation for bids. Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the most favorable evaluated bid price. The State reserves the right to make the award by item, or groups of items, or total bid if it is in the best interest of the State to do so unless the bidder specifies in its bid that a partial or progressive award is not acceptable.

11. Appellant appealed to this Board on April 6, 1994.

Decision

Appellant has protested award to DATOR Corporation on grounds that Appellant submitted the most favorable bid price under the evaluation criteria set forth in the IFB.

COMAR 21.10.02.03A provides:

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.

Specification 19 of the IFB, Basis of Award, set forth the factors and their relative weights that were going to be considered as the basis of award. Therefore, any protest against these factors or their assigned weights should have been made before the bid opening. COMAR 21.10.02.03A; Packard Instrument Company, MSBCA 1272, 2 MSBCA ¶125 (1986); Delaware Elevator, Inc., MSBCA 1741, MSBCA ¶ (Sept 15, 1993). Appellant's allegation that the State would receive more income under its bid over the full

D. Award. Upon determination of the most favorable bid, review of the bid for responsiveness, and satisfaction that the bidder is responsible, the procurement officer shall, after obtaining all required approvals, award the contract to that bidder.

Based upon the above COMAR sections, the Department should not have divided the cost of the menu development by 1,000. For the same reason, those costs should not be divided by 1,000,000 as suggested by the Appellant. That division was an attempt by the Department to compare the two bids submitted. The winning bidder was providing the menu development at virtually no cost to the State while the Appellant was charging the sum of \$9,683. However, under a proper analysis of the bids, DATOR Corporation's bid remained the winning bid. Dividing by 1,000 made Appellant's bid closer, but did not alter the outcome of the analysis. Therefore, this mistake by the Department represented insignificant or harmless error and does not require that the procurement be overturned.

contract term may be correct if a high enough number of calls are made to overcome the difference in the costs of development of menus and instructions. Indeed, given enough calls, the potential revenue loss to the State incurred by acceptance of DATOR Corporation's bid could be substantial. However, the Department chose not to include a factor representing potential income to the State based on the number of calls, and the Appellant acknowledged and accepted the basis of award as actually set forth in the IFB in faxed correspondence with the Department dated March 17, 1994. The anticipated revenue will depend on usage, and Specification 4 of the Invitation to Bid stated that this was a new project and that there were no available estimates of usage.⁵ Additionally, of significant concern to the Procurement Officer was the cost to the agency of setup expenses, an amount chargeable directly against the Agency Budget and independent of any income which would have to be remitted to the State's General Fund.

There is no evidence in the record that the ultimate revenue generated to the State could have been determined or estimated with any reasonable degree of accuracy, particularly since this service may only be used by persons capable of accessing the system with modem-enhanced computers. It was not unreasonable, therefore, not to include and assign weight for potential income to the State as a separate factor based on a stated assumption regarding the number of calls or users.

Furthermore, the choice of the basis of award for any bid solicitation and the inclusion and assignment of weight to the different factors represent the State's determination of its needs and how to accommodate them. Such determinations must be upheld unless they are shown to be arbitrary or unreasonable. "This Board will not question an agency's decision concerning its needs and the

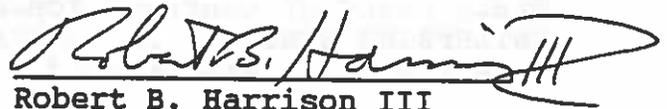
⁵ The Procurement Officer testified that the revenue estimates for this procurement provided the Department of Budget and Fiscal Planning were simply unquantified numbers to comply with revenue estimate reporting requirements. These estimates were not shared with the public so that no bidder could have known what they were.

best method of accommodating them absent clear evidence that those decisions are arbitrary or otherwise unreasonable." Helmut Guenschel, Inc., MSBCA 1434, 3 MSBCA ¶211 (1989). See Admiral Services, Inc., MSBCA 1341, 2 MSBCA ¶159 (1987) at pp 2 - 3. There has been no showing on the record that it was arbitrary or unreasonable to omit a price evaluation factor to reflect potential income to the State. Since the Department had determined that an estimate of usage could not be given with any accuracy, any decision based upon such an income factor might itself have been arbitrary. The record reflects that revenue generation was a secondary "political" consideration and that the main thrust of the procurement was to produce the service to the public at the lowest possible start up cost to the State. Therefore, the Department's determination of the factors appropriate for the basis of award for this solicitation will not be disturbed.

Accordingly, the appeal is denied.

It is therefore, Ordered this 17th day of June, 1994 that the appeal is denied.

Dated: June 17, 1994


Robert B. Harrison III
Chairman

I concur:


Candida S. Steel
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 1807, appeal of ENTERPRISE SYSTEMS, INCORPORATED under Department of Assessments & Taxation IFB 94-DAT-0017.

Dated: *June 17, 1994*

Mary F. Priscilla

Mary F. Priscilla
Recorder