

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of  
H & N JANITORIAL SERVICE

Under DHR-BC/DSS88-022

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}  
} Docket No. MSBCA 1401  
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October 14, 1988

Notice - Incumbent Contractor - Publication of required procurement information in the Maryland Register constitutes constructive notice of agency action. An agency is not required to personally notify an incumbent contractor that the services it is performing under contract are to be rebid.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Sherry Kendall  
Assistant Attorney General  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of a bid protest and contract claim involving provision of janitorial services at 312 E. Oliver Street in Baltimore.

Findings of Fact

1. Appellant, a sole proprietorship, was the incumbent contractor on a services contract with the Baltimore City Department of Social Services (BC/DSS), providing janitorial services at 312 E. Oliver Street from September 1, 1987 - June 30, 1988.

2. The contract provided for renewal options as follows: "This contract shall remain in force for a period of one (1) year from the day of completion of contract documents and may be extended for up to two (2) additional one year periods at the sole discretion of BC/DSS."

3. On April 22, 1988, the service for 312 E. Oliver Street was included in a Request For Bids (RFB) for a nine location contract for janitorial services.

4. The RFB was advertised in the Maryland Register on April 22, 1988. In pertinent part it read: "Janitorial services for nine locations within BC/DSS to be bid as one contract - - no splitting accepted."

5. Notice of the RFB was posted on the bid board at the BC/DSS headquarters at 1500 Greenmount Avenue in Baltimore on April 22, 1988 and remained posted through bid opening on May 13.

6. Appellant did not submit a bid.

7. On June 8, the contract was awarded to the low bidder, Aqua-Klean Janitorial Services, Inc., effective July 1.

8. On June 27, Appellant was advised that his contract was not being renewed.

9. On July 1, Appellant filed a protest with the procurement

officer complaining that he did not receive adequate notice of the procurement and that the location he was serving at 312 E. Oliver Street should not have been included in the RFB. While it did not become apparent until the hearing on Appellant's bid protest appeal we find that Appellant also contemporaneously filed a contract claim with the procurement officer alleging that its contract for the 312 E. Oliver Street work should have been extended pursuant to the renewal option set forth above.

10. On July 6, the procurement officer denied both Appellant's protest and contract claim.

11. On July 19, Appellant filed this appeal.

### Decision

Appellant has taken an appeal regarding disputes concerning both nonrenewal of a contract and the formation of a new contract involving services at the same premises.

#### I. Bid Protest

BC/DSS has filed a motion to dismiss the bid protest dispute based on the alleged untimeliness of Appellant's protest. BC/DSS argues that as of April 22, 1988, the date the RFB for the nine location contract was published in the Maryland Register, Appellant had constructive notice of

that solicitation and therefore knew or should have known the basis for its protest. Thus the protest which was not filed until July 1, 1988 was not filed within the seven day time period as required by COMAR 21.10.02.03B.

Appellant claims on the other hand that he did not receive adequate notice that his contract at 312 E. Oliver Street was being included in a bid packet with eight other BC/DSS locations. This assertion is twofold: (1) Appellant argues that as an incumbent contractor at one of the nine locations, he was entitled to receive personal notification that bids were being solicited, particularly because he had been notified of prior bid solicitations by previous contract administrators and; (2) Appellant objects to the fact that the solicitation which appeared in the April 22 issue of the Maryland Register failed to specify which nine locations were being solicited and that 312 E. Oliver Street was among them.

As the incumbent contractor at 312 E. Oliver Street, Appellant asserts that he was entitled to be contacted by the contract administrator in charge of the procurement and advised that this location was being included with eight other BC/DSS locations and that a bid packet for submitting a bid on the nine location contract was available. The present contract administrator, Ms. Eisner, testified at the hearing of the appeal that she contacted by telephone approximately ten contractors whom she believed were qualified to bid on this contract and placed notices in the Maryland Register and on the BC/DSS bid board. She testified that she did not contact any of the incumbent contractors on any of the contracts at the nine locations.<sup>1</sup> The primary factor considered by Ms. Eisner in deciding who to personally contact was the size contract the supplier had

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<sup>1</sup>The contractor who ultimately was awarded the contract was the incumbent contractor at five of those locations, but it was not one of those contacted by Ms. Eisner.

handled in the past. She testified that she did not contact the Appellant because, in her opinion, he was not likely to be prepared to handle a contract of this size, since he had only bid on single location contracts in the past.

Appellant argues that the judgment exercised by BC/DSS, through its employee, Ms. Eisner, was improper and that as an incumbent contractor at one of the locations, he should have been one of those contacted.

We find that the contract administrator was under no obligation to personally contact any particular potential bidder, although there was no impropriety in her having done so. The only obligation in this regard is as set forth in COMAR 21.05.02.04A, requiring that a sufficient number of competitors receive notice of State contracts which are to be bid in order to secure adequate competition:

#### .04 Public Notice

A. Distribution. Invitations for bids or notices of the availability of invitations for bids shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notices of availability shall indicate where, when, and for how long invitations for bids may be obtained, generally describe the supply, service, or construction desired, and may contain other appropriate information. A fee or a deposit may be charged for the invitation for bids documents.

Section 21.05.02.04B establishes the Maryland Register as the publication for bid notices:

#### B. Publication.

(1) Notice of invitation for bids on State contracts for which the bid amount is reasonably expected to be over \$25,000 shall be published in the Maryland Register. Publication shall be 30 days before the bid submission date. Publication of notice less than 30 days before bid submission is defective unless the project is exempt from competitive sealed bidding by State law. Notice of subsequent awards of contracts exceeding \$25,000 and notices of award of contracts exempt from the bid notice publication requirement shall be published in the Maryland

Register by the procurement agency.

We find that BC/DSS satisfied all notice requirements by advertising in the Maryland Register. This Board has previously held that notice in the Maryland Register is sufficient notice of a procurement contract. See Rolm-Mid Atlantic, MSBCA 1094, 1 MSBCA ¶35 (1983). The State was under no obligation to treat Appellant differently because he was an incumbent contractor on one of the locations to be included in the multiple location RFB. While an incumbent contractor may be perceived as enjoying a competitive advantage, an incumbent contractor under the General Procurement Law is entitled to treatment no better or worse than its nonincumbent competitors. See Calso Communications, Inc., MSBCA 1277, 2 MSBCA ¶185 (1988). As the incumbent, Appellant could reasonably have been expected to inquire about the status of its contract sometime before June 27, when he was advised that it would not be renewed, since the contract expired on June 30. If he had done so, he presumably would have been advised of the new RFB. The fact that the contract administrator had contacted Appellant on prior bid solicitations did not create an obligation for BC/DSS to contact him in this instance.

With regard to Appellant's assertion that the notice published in the April 22 issue of the Maryland Register was inadequate because (even if he had seen it) it failed to specify which BC/DSS locations were included in the nine location contract we note that BC/DSS has only a total of 17 locations requiring janitorial services and find that Appellant should reasonably have been expected to inquire whether 312 E. Oliver Street was among those included.



Because we find that the notice as given by BC/DSS was adequate, we must also find that Appellant's protest is untimely since it was not filed within seven days as required by COMAR 21.10.02.03B. See Frank W. Hake, MSBCA 1323, 2 MSBCA ¶151 (1987) and cases cited therein at p. 2. We thus dismiss Appellant's bid protest appeal.

## II. Contract Dispute

While not apparent until the hearing of Appellant's appeal, Appellant also complained contemporaneously with its bid protest that its contract should have been renewed pursuant to the terms thereof. Specifically it was learned at the hearing that Appellant objects that his contract at 312 E. Oliver Street was not renewed, in light of the fact that Appellant had been advised during the course of the contract term that his company's job performance was satisfactory. Appellant also objects to the decision to place the Oliver Street location with the eight other BC/DSS locations as not being in the best interest of the taxpayer.

We find that timeliness is not an issue with regard to the contract dispute portion of this appeal. Appellant first became aware that his contract was not being renewed on June 27 and his complaint in this regard filed contemporaneously with his bid protest was timely. We also do not find that Appellant's failure to distinguish the contract dispute portion of its complaint from its bid protest is fatal to the appeal. The test of whether an issue may be considered by this Board was articulated in Granite Construction Company, MDOT 1014, 1 MSBCA ¶66 (1983)

as follows: "First, does the issue involved flow from the claim or claims decided in the particular procurement officer's final decision serving as the vehicle for appeal. Second, has notice of that issue properly been given so as to avoid surprise and permit opposing counsel to prepare a defense." 1 MSBCA ¶66 at p. 14.

In his final decision, the procurement officer addressed the renewal option issue by stating: "It has been our policy that if an option on a contract is to be picked up, we notify the vendor, by letter, prior to using that option." We find that this sufficiently addressed the contract issue to allow us to consider it here. Based on the record compiled in this matter to date we believe the following observations to be appropriate. The contract states that the decision whether or not to renew is solely at the discretion of BC/DSS. Similarly, BC/DSS' decision to combine several of its janitorial service contracts into one contract was also a matter within its discretion. A contracting agency has broad discretion in determining its needs, subject only to a requirement of reasonableness. See Industrial Maintenance Services, Inc., B-207949, 82-2 CPD ¶296 (1982). Despite the burden that Appellant thus must meet, the determination of whether he wishes to pursue his contract claim is, however, solely for Appellant. Should Appellant elect to pursue his contract claim, he should file a complaint with this Board pursuant to COMAR 21.10.06.06 within thirty days of receipt of this decision or be held to have voluntarily dismissed his appeal as it relates to renewal of the 312 E. Oliver Street contract.