

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF HOUSING AND)
DEVELOPMENT SOFTWARE, LLC)
Under DHCD RFP #S00R1200024) Docket No. MSBCA 2289

August 23, 2002

Rejecting of Proposals - Rejection of all proposals and resolicitation by the procuring agency is permissible where such action results from a reasonable decision by a control agency that the contract recommended for approval by the procuring agency should not be placed on the agenda of the Board of Public Works for approval.

APPEARANCE FOR APPELLANT: Scott A. Livingston, Esq.
Rifkin, Livingston, Levitan &
Silver, LLC
Baltimore, MD

APPEARANCE FOR RESPONDENT: Jan M. Bryant
Assistant Attorney General
Crownsville, MD

OPINION BY BOARD MEMBER HARRISON

Appellant, Housing and Development Software, LLC (HDS), appeals from a decision of the Maryland Department of Housing and Community Development (DHCD), which denied its bid protest regarding a cancellation of DHCD's solicitation for information management system services. As set forth below, the appeal will be denied and the decision of DHCD upheld.

Findings of Fact

1. One of the missions of the Department of Housing and Community Development is to revitalize communities, encourage homeownership and expand affordable housing opportunities for people of limited income. To accomplish this mission, DHCD acts as a housing finance agency that provides financial assistance to those who further its mission. The nature of DHCD's financial assistance mandates certain reporting and monitoring requirements. To improve efficiency and accuracy, DHCD determined that it needed to automate its multifamily loan and capital grants programs into one integrated information management system. To that end, on January 30, 2001, DHCD issued the above captioned Request for Proposals (RFP) soliciting proposals from qualified offerors to provide an integrated information management system (System) to automate current multifamily business processes.
2. The ultimate authority on procurement matters resides with the Board of Public Works

(BPW). See Division II of the State Finance and Procurement Article, Annotated Code of Maryland. The BPW delegated limited authority to several primary procurement units or control authorities. Md. State Finance and Procurement Code Ann., § 2-107 et seq.; COMAR 21.02.01.03. The control authorities have the power to regulate departments' procurements that fall under their jurisdiction in order to ensure compliance with procurement laws and regulations. COMAR 21.01.02.01B(28) and (29). The Department of Budget and Management (DBM) has jurisdiction over procurement for information processing equipment and associated services. Md. State Finance and Procurement Code Ann., § 12-107(b)(2). Thus the issuance of a solicitation by DHCD for an integrated information management system, i.e. the System, brought the procurement for the System under DBM's jurisdiction and authority. Consequently, DBM became the DHCD's control agency for the solicitation of the System. DBM, as the control agency, had the authority to review and approve all aspects of the procurement process, up to and including making the decision whether the award recommendation should be submitted to the BPW for final approval.

3. DHCD received four proposals to the RFP to provide the System. All offerors were deemed reasonably susceptible for award. DHCD requested a Best and Final Offer from the offerors. The DHCD Procurement Officer reviewed the proposals, considered the recommendation of the evaluation committee, and made a recommendation to award the contract to Application Oriented Designs, Inc. (AOD). All offerors were notified of the intent to award the contract to AOD.
4. On July 24, 2001, Appellant HDS filed a protest with the DHCD Procurement Officer against the recommended award to AOD. The Procurement Officer denied the protest, and HDS appealed the final agency decision to this Board on August 17, 2001. Following a hearing, by decision dated October 30, 2001, this Board sustained the appeal and remanded to DHCD with the recommendation that the award be made to HDS.
5. DHCD determined to accept this Board's recommendation and forwarded to DBM, its control agency, a request to place DHCD's award recommendation to HDS as an item on the BPW agenda.
6. At the March 13, 2002 BPW meeting, the award recommendation was pulled from the BPW agenda by DBM after discussion.¹ The BPW, as articulated by the Lieutenant Governor, requested that Ms. Linda Burek, the new State Chief Information Officer (CIO), review the contract and report to the BPW with her recommendation within two (2) weeks. The CIO serves at the pleasure of the Secretary of DBM and is responsible for information technology matters statewide. Md. State Finance and Procurement Code Ann., § 3-410.
7. Ms. Burek reviewed the contract and the HDS and AOD proposals. At the conclusion of the review process, Ms. Burek, in a memorandum to the Lieutenant Governor and the Secretary of DBM dated March 25, 2002, advised that "there [was] too much risk in awarding the contract." Ms. Burek further advised in her memorandum that the RFP was not "sufficiently detailed to ensure successful implementation," and did not include a plan for operation and maintenance. Ms. Burek concluded that "as a result of the risks inherent in proceeding, it is my recommendation that the Board of Public Works decline to approve the award of the contract as proposed by DHCD." Ms. Burek further suggested that the solicitation for the

¹ The transcript of the March 13, 2002 meeting reflects that the Lieutenant Governor was acting for the Governor.

DHCD multifamily information management system be revised with assistance from her staff. This Board finds that Ms. Burek's memorandum constitutes the report requested by the BPW.

8. Based on Ms. Burek's recommendation, in a letter to the DHCD Procurement Officer dated April 12, 2002, DBM advised that it was "unlikely that the Board [BPW] would approve the award of the contract," and DBM, therefore, would not move the item forward to the BPW agenda.
9. The members of the BPW were copied on this April 12, 2002 letter.
10. As a result of Ms. Burek's recommendation and DBM's decision not to submit the award recommendation to the BPW, DHCD advised Appellant that as a result of DBM's decision, DHCD had determined to cancel the solicitation.
11. On April 19, 2002, Appellant HDS filed a protest based on DHCD's cancellation of the solicitation. HDS alleges that DHCD's decision to cancel based on the recommendation of Ms. Burek, who was neither the Procurement Officer nor a member of the DHCD evaluation committee, was arbitrary and capricious, particularly since prices had been exposed during the first appeal to this Board. The DHCD Procurement Officer denied the protest, informing HDS of this decision in a letter dated May 28, 2002.
12. The letter stated that "DBM is the Department's control agency and has the authority of [DHCD's] procurement exceeding a certain dollar amount. Thus, a reasonable reason existed upon which the Department made its cancellation decision."
13. HDS appealed the DHCD's denial of its protest to this Board on June 7, 2002.
14. Appellant HDS did not comment on the Agency Report, and neither party requested a hearing.

Decision

COMAR 21.06.02.01A provides that "[t]he Board [BPW] hereby delegates to each Department head authority to approve cancellation of a solicitation or rejection of all bids or proposals for procurements within the Department's jurisdiction." In this regard COMAR 21.06.02.02C(1) further provides that "[a]fter opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest."² At DHCD, the Procurement Officer is the designee of the Department head authorized to determine on behalf of the agency whether rejection of all bids or proposals is fiscally advantageous or otherwise in the State's best interest.

This Board may reverse the decision of the Procurement Officer with respect to such a determination only where it finds that the "decision was not fiscally advantageous or otherwise in the best interest of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust." Maryland Dep't of Gen'l Serv. v. Peter J. Scarpulla, Inc., Cir. Ct. For Balto. City, Memorandum Op. CL 28625, p. 2 (May 31, 1985) rev'g Appeal of Peter J. Scarpulla, Inc., MSBCA 1209, 1 MSBCA ¶ 88 (1984) citing Hanna v. Board of Educ. of Wicomico Co., 200 Md. 49, 87 A.2d

² The cited regulation goes on to provide a non exclusive listing of reasons that support rejection of all bids or proposals.

847 (1952). This standard of review was acknowledged in MEGACO, Incorporated, MSBCA 1924, 5 MSBCA ¶ 385 (1995) where this Board opined that, if the record reflects that the procurement agency reasonably determined that rejection of all bids was fiscally advantageous or otherwise in the State's best interest, this Board may not disturb such determination.

In Scarpulla, the Baltimore City Circuit Court found that intended revisions of the bid documents "affected legitimate legal and technical interests of the State and therefore, was a valid consideration in the procurement officer's decision." *Id.* at 3. In MEGACO, Incorporated, this Board found that the State Highway Administration's determination that traffic conditions warranted fewer daytime lane closures, supported a cancellation of a bridge painting contract. *Id.* at 3-5.

In this instant case we find that the record reflects that DHCD reasonably concluded that it was in the State's best interest to cancel the solicitation, and, therefore, we shall deny the appeal.

DBM indicated to DHCD that it would not submit the award recommendation to the BPW. DBM is DHCD's control agency and has authority over DHCD's procurements exceeding a certain dollar amount, which amount is exceeded in this procurement. Therefore DHCD was legally required to accede to its control agency. More importantly, the BPW had requested that the solicitation be reviewed by Ms. Burek, the State Chief Information Officer who is the employee in DBM whose unit serves as a resource for all State information technology procurement. The transcript of the BPW meeting of March 13, 2002 reflects the BPW's concerns about the State spending money for information technology that does not meet the needs of the State, and the BPW requested the review by Ms. Burek to address this concern. Ms. Burek deemed it was not in the State's best interest to proceed with the award recommendation to Appellant HDS and so advised in her memorandum dated March 25, 2002. In this memorandum she specified her concerns and recommended a resolicitation that would address those concerns. The record does not reflect that Ms. Burek's conclusions were arbitrary or capricious.

Nor does the record reflect that the decision by the DHCD Procurement Officer to cancel the solicitation, notwithstanding that prices had been made public during the first appeal to this Board, was unreasonable based on the BPW's March 13, 2002 review request and Ms. Burek's conclusions. While there may be factual scenarios where prejudice to bidders and harm to the competitive process outweigh the agency's interest in resolicitation, this is not one of them. MEGACO, Incorporated, *supra* at p.5.

The DHCD's decision to cancel the solicitation was based on a directive from its control agency, DBM. DBM had informed DHCD in its April 12, 2002 letter that it was not submitting the award recommendation as a BPW agenda item in light of Ms. Burek's recommendation. DBM controlled what was placed on the BPW agenda, and DHCD had determined it would accede to its control agency's directive and cancel the solicitation. Complying with the control agency's directive is not an arbitrary and capricious act where there is a reasonable basis for the control agency's directive as there is in this case due to the concern of the BPW and Ms. Burek's response thereto. It should also be remembered that under Maryland's General Procurement Law, and under the doctrine of sovereign immunity, a contract that requires BPW approval may never be lawfully awarded without BPW approval. See ARA Health v. Dept. of Public Safety, 344 Md. 85 (1996). We believe

the same logic extends to the approval requirements of control agencies for procurement by units whose procurements they control, which authority should not be challenged absent evidence (and there is none here) of arbitrary and capricious decision making.

Accordingly, the appeal is denied.

Wherefore, it is Ordered this 23rd day of August, 2002 that the appeal is denied.

Dated: August 23, 2002

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
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 2289, appeal of Housing and Development Software, LLC under DHCD RFP #S00R1200024.

Dated: August 23, 2002

Michael L. Carnahan
Deputy Recorder