BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of J & L Industries, Inc.	)	
	)	
	)	Docket No. MSBCA 1230
Under MTA Contract No. MTA-0136	)	

April 15, 1985

Bid Protest - Unfair Competitive Advantage - The low bidder did not have an unfair competitive advantage due to preferential treatment by the State since the evidence did not reveal it obtained information regarding the new contract that also was not available to the other bidders.

Bid Protest - Organizational Conflict of Interest - Maryland law does not preclude the award of a second contract to a vendor performing under an existing contract where an organizational conflict of interest might arise due to the vendor being required to evaluate its performance under one of the contracts by the terms of the other contract.

Bid Protest - Employee Conflict of Interest - Award of a contract to the low bidder who is not a State employee is not precluded by Art. 40A, §3-101, Ann. Code of Md., which makes it unlawful only for a State employee to participate in a contract matter in which he has a financial interest.

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OPINION BY MR. KETCHEN

This appeal arises from a Mass Transit Administration (MTA) procurement officer's final decision denying Appellant's protest of an award to the apparent low bidder, Nutshell Enterprises, Ltd. (Nutshell). Appellant contends that award may not be made to Nutshell because it has a conflict of interest and had an unfair competitive advantage as a result of having provided services to the MTA under an ongoing related contract. MTA, however, maintains that Nutshell does not have a conflict of interest and did not have an unfair advantage since the services to be provided by Nutshell under the captioned contract are distinct from the services currently being provided under an environmental testing services contract.

Findings of Fact

1. On December 7, 1984, MTA issued the captioned invitation for bids (IFB) on Contract No. MTA 0136 (hereafter new contract) to remove and dispose of waste oil, oil-water mixtures, oil sludge and oil solids from the five MTA maintenance facilities. The work currently is being performed by Nutshell under an interim contract until the new contract is awarded to replace MTA Contract 0077 (old contract) which was awarded to Appellant on February 1, 1983 and expired on February 8, 1985. The new contract specifies the same scope of work as that contained in the old contract. The estimated quantity of waste oil products has been increased in the new contract to reflect MTA's anticipated needs during the contract performance period. (Tr. 101, 104).

2. The new contract provides for payment for removing and disposing of waste oil products as follows:

> Item 1 - payment will be made by Contractor to MTA for each gallon of waste oil removed from MTA property.
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> Item 2 - payment will be made by MTA to Contractor for each gallon of oil/water mix removed from MTA property.
>
> Item 3 - payment will be made by MTA to Contractor for bi-weekly removal of oil sludge and oily solids. This is a fixed monthly charge and includes payment for cleaning, removing & replacing covers, etc.
>
> Item 4 - payment will be made by the MTA to Contractor for disposal of oil sludge and oily solids. Payment shall be made for each cubic yard of oil sludge and oily solids removed by Contractor from MTA property. Item 4 is a variable amount related to the amount of material removed.[1]

3. Item 2 of the scope of work under the new contract provides as follows:

> Payment by the MTA to the CONTRACTOR for pick-up and disposal of oil/water mix will be based on the amount of oil-water mix actually removed by the CONTRACTOR . . . Attached to each monthly bill the CONTRACTOR shall have an itemized report indicating the date, quantity and location of each oil/water mixture pick-up, vouchers signed by an authorized MTA representative indicating the date, quantity and location and vouchers from the disposal facility indicating date and quantity of disposal of oil/water mixture.
> (Underscoring added).

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[1]Item 3 is a fixed monthly charge for scheduled cleaning of the waste oil tanks and equipment while Item 4 is a variable charge based on the amount of material removed during the cleaning operation.

4. Award of the new contract is to be made to the responsive and responsible bidder having the lowest bid price computed as follows:

Item 1: 55,000 gals. [Waste Oil] x $_____ / gal. = $_____

Less

Item 2: 840,000 gals. [Oil-Water Mixtures] x $_____ / gal. = $_____

Less

Item 3: 24 months [Cleaning] x $_____ / month = $_____

Less

Item 4: 200 cu. yds. [Oil Sludge & Solids] x $_____ / cu. yd. = $_____

Net Bid (Payment to Contractor) _____

5. Bids were received and opened on January 11, 1985 with the following results:

Lightning Oil Services	$144,154.00
Nutshell Enterprises, Ltd.	192,300.00
Appellant	202,150.00
A & A Waste Oil	283,500.00
Baumgartner Co.	(Nonresponsive)

The bid of Lightning Oil Services was rejected as nonresponsive because it did not include the required bid bond.

6. At the time of bid opening for the new contract, Nutshell, the apparent low responsive and responsible bidder, was providing environmental testing services to MTA under MTA Contract 0078 (hereafter environmental testing contract). The services under this contract were to be provided from February 1983 through February 1985. The environmental testing contract was extended in February 1985 pending resolution of a protest involving the award of a new contract. Nutshell was the sole bidder for the new environmental testing contract.

7. Under the existing environmental testing contract, Nutshell is required to provide sampling and laboratory testing of effluents from MTA facilities. Nutshell's specific responsibilities require it to monitor and inspect various discharges, analyze the effluents, determine compliance with permissible levels of discharge, and file monthly reports with regulatory authorities. Samples of effluents are sent to independent laboratories for analysis and the associated laboratory reports are forwarded to the appropriate regulatory authorities for review. Nutshell's duties include preparation of internal procedural manuals for handling hazardous substances, reporting emergency situations to MTA management personnel, and providing

advisory and emergency services regarding fuel and oil spills or line leaks. Nutshell also is required to advise MTA on cost effective methods and means of compliance with waste water discharge and oil handling requirements and to attend meetings, inspections and hearings concerning MTA's compliance with effluent discharge permits. The environmental testing contract does not contain provisions indicating that Nutshell is to supervise the work of other contractors under other existing MTA contracts.

8. The services provided under the environmental testing contract have been performed by Mr. Arthur A. Shellhouse (Shellhouse), Nutshell's President. When Appellant began performance of the old contract in 1983, Shellhouse, as an accommodation to MTA, conducted Appellant's representative on a tour of the MTA facilities pointing out the oil holding tanks, oil separators, pits and related equipment that had to be pumped out and cleaned. (Tr. 81, 116-17). On several occasions in 1983, Nutshell billed MTA for its work in providing emergency supervision to Appellant. Shellhouse also had numerous conversations with persons at Appellant's offices during performance of the old contract. (Tr. 82).

During his performance of the environmental testing contract, Shellhouse has reported to MTA regarding discharges into storm sewers, participated in the cleanup of fuel spills and oil spills, and attended meetings of Federal and local water pollution control agencies on behalf of MTA. Shellhouse provided advice to MTA pursuant to the environmental testing contract, although he did not assist MTA in developing the bid documents and estimated quantities for either the old or new contracts for removal of waste oil products. (Tr. 40, 104-05, 117, 126, 135). Shellhouse or Nutshell also have performed work related to waste oil handling for MTA under other competitively bid contracts including the installation of an oil separator at the Kirk Division facility. (Tr. 30-31, 155).

9. On a number of occasions during performance of his advisory responsibilities under the environmental testing contract, Shellhouse suggested to MTA officials that chemicals could be used to treat oil-water mixtures followed by discharge of the mixtures into the sewer system. (Tr. 51-54, 57, 112). Use of this method would eliminate the need to physically remove oil-water mixtures from MTA facilities by truck and thereby avoid such costs and payment for charges assessed by an offsite disposal facility. (Tr. 52, 59). MTA neither considered Shellhouse's suggestion nor indicated to him that the chemical treatment was an acceptable method under the terms of the contract for removing oil-water mixtures from the MTA facilities. (Tr. 57-58, 109-110, 112-14). In this regard, the specifications for the new contract require that oil-water mixtures be physically removed from the site. (Findings of Fact No. 3; Tr. 57).

10. By letter dated January 14, 1985, Appellant filed a protest with the MTA procurement officer contending that award of the new contract to Nutshell for the removal and disposal of waste oil products would be inappropriate since Shellhouse's employment by MTA under the current environmental testing contract and possibly under the next environmental testing contract represents a conflict of interest.

11. The MTA procurement officer denied Appellant's protest in a final decision dated January 24, 1985.

12. Appellant filed a timely appeal from the procurement officer's final decision on February 11, 1985.

Decision

I. Unfair Competitive Advantage

The State is not required to equalize competition by considering the competitive advantage which may accrue to particular bidders because of their prior experience or particular circumstances. Compare Avitech Inc., Comp. Gen. Dec. B-214670, July 30, 1984, 84-2 CPD ¶125; Del Rio Flying Service, Inc., Comp. Gen. Dec. B-197448, August 6, 1980, 80-2 CPD ¶92; ENSEC Service Corp., Comp. Gen. Decs. B-184803, B-184804, B-184805, 55 Comp. Gen. 656 (1976), 76-1 CPD ¶34. The appropriate test to apply is stated, in pertinent part, as follows:

> "* * * certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances, * * * We know of no requirement for equalizing competition by taking into consideration these types of advantages nor do we know of any possible way in which such equalization could be effected. * * * Rather, the test to be applied is whether the competition advantage enjoyed by a particular firm would be the result of a preference or unfair action by the Government. . . . (Underscoring added).

Boston Pneumatics, Inc., Comp. Gen. Dec. B-188275, June 9, 1977, 77-1 CPD ¶416.

The fact that a particular bidder may have acquired a unique advantage or capability because of experience on related contracts is not itself unfair. Avitech, Inc., supra; Boston Pneumatics, Inc., supra. Compare Crown Point Coachworks, Comp. Gen. Dec. B-208694.2, September 29, 1983; 83-2 CPD ¶386; Houston Films, Inc., Comp. Gen. Dec. B-184402, Dec. 22, 1975, 75-2 CPD ¶404; affirmed 76-1 CPD ¶380. Thus a bidder who furnished specifications in connection with an earlier production contract is not barred from participating in a subsequent procurement because of preferential treatment. Compare 48 Comp. Gen. 702 (1969). However, government action that gives preferential treatment to one bidder is unfair. Remedial action thus is required, if a bidder is provided information by the government that allows that bidder to adjust its bid based on facts known only to it. Compare Midland Maintenance, Inc., Comp. Gen. Dec. B-184247, August 5, 1976, 76-2 CPD ¶127; Columbia Van Lines, Inc., Comp. Gen. Dec. B-182855, May 14, 1975, 54 Comp. Gen. 955, 75-1 CPD ¶295; Photo Data, Inc., Comp. Gen. Dec. B-188912, July 29, 1977, 77-2 CPD ¶62; Honeywell, Inc., Comp. Gen. Dec. B-210000, April 22, 1983, 83-1 CPD ¶445; see Teledyne Ryan Aeronautical, Comp. Gen. Dec. B-187325, May 20, 1977, 77-1 CPD ¶352.

In the instant dispute, the evidence demonstrates that Nutshell has provided extensive environmental testing and advisory services to MTA related to all aspects of the handling and disposal of waste oil products at the five MTA facilities. Undoubtedly, Nutshell's knowledge and experience gained in providing the environmental testing services enhanced its competitive position as a general matter. On the other hand, Appellant also had an advantage in

the procurement as the incumbent contractor. No other bidder, including Nutshell, had the knowledge and experience that Appellant had gained from actually performing the waste oil removal and tank cleaning services. (Tr. 106). However, differences in competitive capabilities that may arise because of bidders' particular circumstances do not raise an issue that the Board must resolve. Del Rio Flying Service, Inc., supra. The issue is whether Nutshell was given an unfair competitive advantage through preferential treatment by MTA.

Here the specifications for waste oil disposal services to be provided to MTA under the new contract are not complex. They require the contractor to remove and dispose of waste oil products and to clean the oil handling apparatus on a periodic basis. Nutshell did not participate in the development of the specifications for either the new or old contract. Further, neither Nutshell nor Shellhouse ever advised MTA concerning the estimated quantities set forth in the IFB for the new contract. (Findings of Fact No. 8). While Nutshell, through its previous contracts with MTA may have had a general awareness of MTA's plans and requirements regarding waste oil handling and disposal, there is no evidence that Nutshell obtained specific information not available to other bidders concerning the new contract. (Findings of Fact No. 8). Under these circumstances, we find that there was no action by MTA that gave Nutshell an unfair competitive advantage. See Houston Films, Inc., supra.

Shellhouse, however, has touted MTA on the use of chemicals to treat oil-water mixtures followed by disposal of the treated solution through the sewer discharge system. If this method of disposal is permitted, a cost savings is possible. (Findings of Fact No. 9). While Shellhouse made this suggestion to an MTA employee on a number of occasions, MTA did not consider or accept Shellhouse's suggestion, nor indicate to Shellhouse that this method of disposal would be acceptable. (Findings of Fact Nos. 3 & 9). Had MTA informed Nutshell or Shellhouse that chemical treatment would be permitted without informing other bidders, Nutshell clearly would have had an unfair competitive advantage. Compare Midland Maintenance, Inc., supra; 51 Comp. Gen. 233 (1971). In any event, Nutshell's bid was based on physical removal and offsite disposal of oil-water mixtures. (Tr. 51-53, 55). Under these circumstances, we find that Nutshell did not obtain an unfair competitive advantage through preferential treatment by MTA. Of course, our decision would have been different had MTA indicated to Shellhouse that use of the chemical treatment method is permissible.

II. Conflict of Interest

Appellant next maintains that Nutshell should be excluded from consideration for award of the new contract because of a conflict of interest arising out of Nutshell's performance of environmental testing. Appellant contends that Nutshell initially will be monitoring or supervising its own performance of waste oil disposal services and will continue to do so if it receives award of the new environmental testing contract. Appellant argues that this circumstance is inevitable because Shellhouse when performing his environmental testing services supervised Appellant's performance of the old contract.

MTA, however, maintains that there is no conflict of interest if Nutshell is awarded both contracts since the scope of services of the two contracts are entirely distinct. The new contract merely requires the contractor to pick up and remove the waste oil products from the MTA facilities and clean the holding tanks while the environmental testing contract requires the testing and monitoring of MTA effluent discharges to assure compliance with the requirements of the effluent discharge permits. MTA also argues that while the contractor performing the environmental testing contract gathers samples of MTA effluents, analysis of those samples is conducted by independent laboratories with the results being reviewed by Federal, State, and local regulatory authorities. (Tr. 153).

An organizational conflict of interest[2] describes circumstances where a contractor's vested interests clash with its duty of performance under the contract. An organization conflict of interest thus may arise when a contractor is placed in a position of evaluating its own performance under a second contract. Gould, Inc. Advanced Technology Group, Comp. Gen. Dec. 181448, October 15, 1974, 74-2 CPD ¶205. The potential for harm is said to result from the difficulty the contractor would have in evaluating its own performance objectively. Id. However, while organizational conflicts of interest thus may not be in the public interest, their existence does not preclude the award of a contract absent a statute or regulation prohibiting such circumstances. Compare PRC Computer Center, Inc., 55 Comp. Gen. 81 (1975); Exotech Systems, Inc., 54 Comp. Gen. 421 (1974); VAST, Inc., Comp. Gen. Dec. B-182844, Janaury 31, 1975, 75-1 CPD ¶71; see Hayes International Corp. v. McLucas, supra, 509 F.2d, 263 n.26. Here we are not aware of a Maryland statute, regulation or other authority prohibiting award of the captioned contract even assuming an organizational conflict of interest.

In any event, we carefully have examined the services required under MTA's environmental testing contracts, and have not found a requirement for the contractor performing the environmental testing to supervise or directly evaluate performance of services under the waste oil disposal contracts. (Findings of Fact No. 7). While Shellhouse contacted Appellant on numerous occasions during Appellant's performance of the old contract, the record does not show that Shellhouse's contacts amounted to supervision of Appellant's work at the behest of the State. (Tr. 81, 115, 118). Further, Nutshell's vouchers submitted for payment in 1983 indicate that Nutshell had "supervised" Appellant in several emergency situations. However, we attribute

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[2]In Hayes International Corp., v. McLucas, 509 F.2d 247 (1975) the court stated, "[a]s the Government has had to rely increasingly on the use of private contractors to perform tasks which might previously have been performed by Government employees, the problem of reconciling the private interests of independent contractors with the public mission they are called upon to perform has resulted in substantial legislative concern about conflicts of interest. * * * 'Organizational conflicts of interest,' unlike ones concerning individual employees, normally do not arise in most aspects of public service. Rather they have been described as 'essentially creatures of federal government contract law and policy, more specifically of research and development contracting and of complex space age technology.'" (citation omitted.).

such statements to Shellhouse's articulation as a layman of the advisory services he was required to provide to MTA when emergencies related to oil handling arose. (Tr. 120-21).

Finally, Appellant maintains that Shellhouse was an employee of the State and thus Nutshell is barred from competition based on Paragraph 12 of the MDOT General Conditions which provides as follows:

> "It is unlawful for any State officer, employee, or agent to participate personally in his official capacity through decision, approval, disapproval, recommendation, advice, or investigation in any contract or other matter in which he, his spouse, parent, minor child, brother, or sister, has a financial interest or to which any firm, corporation, association, or other organization in which he has a financial interest or in which he is serving as an officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, is a party, unless such officer, employee, or agent has previously complied with the provisions of Article 40A, §§3-101 et seq of the Annotated Code of Maryland."

Appellant has the burden of proving its allegations. See Gorin v. Board of County Commissioners for Anne Arundel County, 244 Md. 106, 223 A.2d 237 (1969). Here, Appellant has not adduced any evidence that Shellhouse is a State employee. (Tr. 64). Accordingly, an award to Nutshell is not precluded as being unlawful on this ground.

For the foregoing reasons, therefore, the appeal is denied.

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