

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of
JAILCRAFT, INC.

Under DPS&CS
Solicitation No. 8841-04

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Docket No. MSBCA 1398

November 7, 1988

Rejection of Bids - Resolicitation - The procurement officer's determination pursuant to COMAR 21.05.02.20A to reject the only bid received and resolicit was not unreasonable where such single bid exceeded the highest estimated cost of the project by 18%.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Alan D. Eason
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This is a timely appeal of the Department of Public Safety and Correctional Services (DPS&CS) procurement officer's final decision denying Appellant's protest that upon public opening of its bid, the only bid submitted, the General Procurement Law required that it be awarded a contract.

Findings of Fact

1. This appeal arises from a procurement undertaken by the Division of Correction (DOC) of the DPS&CS to obtain the replacement of cell doors and locks for the Maryland Correctional Institution-Hagerstown (MCI-H). The procurement method utilized was competitive sealed bidding under COMAR 21.05.02. The solicitation was advertised in the Maryland

Register on Friday, April 15, 1988. The solicitation provided for a base bid and two alternates.

2. Addendum No. 1 to the solicitation issued May 2, 1988 changed the bid opening to May 17, 1988 at 1:00 P.M. Although ten businesses received the specifications for the procurement, only Appellant submitted a bid. Appellant's bid was publicly opened. Appellant's base bid was \$354,200.00 with prices for alternates 1 and 2 of \$6,200.00 and \$21,280.00, respectively.

3. Under CoMAR 21.02.01.04B, the control agency with the authority for approval of the award of this contract was the Department of General Services (DGS).¹ Chuck Powers, Assistant Division Chief of the Plant Management Division of DGS, was the authorized representative of DGS from whom DPS&CS had to seek contract approval. After he was made aware of the single bid in the procurement, he informed Myles Carpeneto, Director of Procurement Services for the DOC of DPS&CS, that the DOC could not accept the single bid it had received. In further discussions with Mr. Carpeneto, Mr. Powers noted that the base bid was substantially higher than the State estimate of from \$150,000.00 to \$200,000.00 developed for the procurement and was higher than the \$300,000 approximate cost figure

¹Pursuant to COMAR 21.02.01.04B, the Board of Public Works has delegated to DGS the authority to approve contracts for the purchase of all commodities and supplies regardless of the amount of the contract for agencies such as DPS&CS. We find that the jail doors and locks are commodities or supplies as defined in COMAR 21.01.02.17 and COMAR 21.01.02.67.

which appeared in the solicitation.² Based on these figures, Ms. Debra Carty, the procurement officer, agreed that Appellant's bid should be rejected because it was unreasonably high.

4. On May 31, 1988, Ms. Carty telephoned Mr. Dorian E. Mullar, Appellant's President, and informed him of the decision to reject Appellant's bid and to solicit new bids under the same procurement.

5. Subsequently, an amended solicitation (No. 8867-04) was issued which was essentially the same as the first, except that certain Folger Adams locks were made an acceptable alternative to the Roanoke Iron and Bridge locks (or equal) which were specified in the original solicitation. Only one bid was received under this solicitation, and it was returned unopened. This bid was not from Appellant. No further solicitation for the procurement of locks and doors for MCI-H has been undertaken.

6. On June 6, 1988 Appellant filed a protest of the decision to reject its bid under the original solicitation. The protest was based upon the grounds that DPS&CS:

1. Publicly opened the single bid; thus exposing Appellant's price to its competitors and otherwise making its

²There is no explanation in the record for the divergence between the estimate developed for the procurement and the approximate cost figure which appeared in the solicitation.

bid a matter of public record and open to public inspection;

2. Did not award the contract to Appellant; and

3. Re-bid the contract, placing Appellant at a competitive disadvantage because its bid had been publicly opened and made available for public inspection.

7. By letter dated July 5, 1988, the protest was dismissed as untimely by the procurement officer. The merits of the protest were not discussed. However, subsequent investigation demonstrated the protest was in fact filed timely.

8. Upon review of the Agency Report filed with the Board, the Board contacted the parties and in a telephone conference suggested to counsel for DPS&CS that DPS&CS formally consider Appellant's June 6, 1988 protest on the merits, since it had now been determined that this protest was timely.³ Appellant acquiesced in the suggestion that a final agency decision on the merits be issued. By letter dated September 26, 1988, the procurement officer denied the protest on the merits and confirmed that

³While the Agency Report discussed the merits of the protest in some detail respecting the facts that led to the protest and offered a legal justification for denial of the protest on the merits, it could not be ascertained from the record if the matter set forth in the Agency Report reflected the considered view of the procurement officer and agency head on the protest.

the position of DPS&CS on the merits of the protest was as set forth in the Agency Report.

9. Although afforded additional time (ten working days as set forth in COMAR 21.10.07.03D) after receipt of the procurement officer's decision on the merits to comment on the Agency Report, Appellant elected not to comment on the Agency Report. Neither party requested a hearing.

Decision

Appellant's asserted first ground of protest is that the procurement officer opened a single bid when she could have returned the bid unopened, thus not exposing Appellant's price to its competitors and otherwise making its bid a matter of public record and open to public inspection.

Subsection (b) (3) of Section 11-110,⁴ Division II, State Finance and Procurement Article (1987 Cumulative Supplement) provides that "Bids shall be opened publicly at the time and place designated in the invitation for bids." COMAR 21.05.02.20 provides as follows:

If only one responsive bid is received
in response to an invitation for bids
(including multi-step bidding), an

⁴References are to the General Procurement Law in effect at the time of the procurement in question.

award may be made to the bidder if the procurement officer determines that the price submitted is fair and reasonable, and that other prospective bidders had reasonable opportunity to respond, or there is no adequate time for resolicitation. Otherwise, the bid may be rejected pursuant to the provisions of this chapter and:

A. New bids may be solicited;

B. The proposed procurement may be cancelled; or

C. If the agency head determines in writing that the need for the supply or services continues, but that the price of the one bid is not fair and reasonable and there is no time for resolicitation, or resolicitation would likely be futile, the procurement

may then be conducted under
COMAR 21.05.05 or 21.05.06.

We believe based on the above provisions of the General Procurement Law and COMAR that the State may permissibly accept a single bid and that the State may properly open and review this single bid to determine whether the price is "fair and reasonable" so as to justify accepting the bid if other prospective bidders had reasonable opportunity to respond, or there is not adequate time for resolicitation.

Concerning Appellant's complaint that after bid opening its bid was available for public inspection we note that COMAR 21.05.02.18 provides:

.18 Disposition of Bids.

When bids are rejected, or a solicitation cancelled after bids are received, the bids which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders upon request and the file so documented.

It would thus appear that once a bid is opened it is required to be retained in the procurement file. As such it is a public record open for inspection. We also note the requirement of the General Procurement Law

that subject to the provisions of Title 10, Subtitle 6, Part III (Access to Public Records) of the State Government Article, apparently not applicable here, at the public bid opening and thereafter, the contents of a bid and of any document submitted with a bid are open to public inspection. Subsection (c) of Section 11-117, Division II, State Finance and Procurement Article (1987 Cumulative Supplement). We therefore deny Appellant's appeal of the denial of its protest that its bid should not have been opened and made available for public inspection.

Appellant's second ground of protest is that it did not receive an award of the contract based on the original solicitation where it submitted the only bid. However, under COMAR 21.05.02.20, supra, a vendor offering the only bid in a procurement is not automatically entitled to an award. Instead an award may be made to the bidder if the procurement officer determines that the price submitted is fair and reasonable, and that other conditions are met. In this instance, the procurement officer did not find that the price was "fair and reasonable" because Appellant's base bid exceeded the State estimate developed for the procurement by approximately \$154,000.00 and exceeded the "approximate cost" set out in the bid notice by \$54,000.00 or 18%. Under these circumstances, and in the absence of any contrary evidence in the record, Appellant has not shown that the procurement officer acted unreasonably in determining that the requirements for the award of a contract where only a single bid is received had not been met because the price was too high.

Appellant's final ground of protest is that the DPS&CS improperly re-bid the contract, placing appellant at a competitive disadvantage.

Under COMAR 21.05.02.20A new bids may be sought after the rejection of a single bid. In this instance, the State modified the second solicitation by permitting the offering of certain Folger Adams locks in addition to the Roanoke Iron and Bridge locks (or equal). While changing and re-issuing the solicitation offered the possibility of an adverse competitive impact on Appellant because of the exposure of its earlier bid, it did not bid on the second solicitation and thus cannot show any competitive harm resulting from the resolicitation. Furthermore, while this Board has recognized that resoliciting after the public opening of bids is disfavored, it is permissible where the original solicitation was legally cancelled and the procurement officer's discretionary decision to resolicit was reasonably arrived at. Consolidated Standard Elevator, MSBCA 1267, 2 MSBCA ¶120 at p. 3 (1986). Where only one bid is received, and that bid exceeds the highest estimated cost of the project by 18%, we cannot say that it was not reasonable and appropriate, as permitted by COMAR 21.05.02.20A, to reject the bid and resolicit. Absent evidence that the decision of the procurement officer was unreasonable this Board will affirm such decision. See Automated Health Systems, Inc., MSBCA 1263, 2 MSBCA ¶113 at p. 12-13 (1985).

