

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of JAMES M. HELLER )  
 )  
Under DGS Project No. S-00456 ) Docket No. MSBCA 1882  
 )

June 7, 1995

Award of Contracts - Sole Source - A sole source procurement is not permissible unless a requirement is available from only a single vendor. When the compatibility of Equipment is the paramount consideration, procurement of such equipment by sole source to meet such compatibility is permissible. The safety and consistent training of bomb squad personnel relative to use of a particular bomb disrupter that was compatible with the bomb squad robot are factors that satisfy the paramount consideration condition for use of a sole source.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Michael P. Kenney  
Assistant Attorney General  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant, as agent for the Ithaca Acquisition Corporation, (Ithaca) timely appeals the denial of his protest (on behalf of Ithaca) that the State should have solicited a written bid from his principal Ithaca, pursuant to procurement by competitive sealed bids for the acquisition of bomb disrupters.

Findings of Fact

1. As a preliminary matter the Board denies the State's Motion to Dismiss. The State preliminary filed a Motion to Dismiss on grounds that the protests was not timely filed. The Board took the Motion under advisement pending the hearing of the appeal due to a dispute as to a material fact concerning whether Appellant reasonably believed that he was to file his protest with the State Fire Marshal rather than the procuring agency Procurement Officer. After hearing the Appeal the Board finds that the record reflects that Appellant reasonably believed that he was to file his protest with the State Fire Marshal. Because the Board also finds that the letter sent by

Appellant to the Fire Marshal by fax constituted a protest that was received by the Fire Marshal within seven days of Appellant becoming aware of the grounds for protest the Board finds the protest was timely and denies the Motion to Dismiss.

2. Turning now to the merits of the protest and appeal the Board find as follows.

On January 19, 1995 Purchase Order S-00456 for a dozen bomb disrupters for use by the bomb squad in the Office of the State Fire Marshal (OSFM) was placed with Pedesco, Ltd. (Pedso) of Ontario, Canada. The goods were shipped on April 25, 1995 and received by the OSFM in Bel Air on April 28 and May 2, 1995.

Earlier the OSFM which is within the Department of Public Safety and Correctional Services (DPSCS), had sent a requisition dated September 12, 1994 to the Department General Services (DGS) Purchasing Bureau. The requisition called for the order of twelve (12) bomb disrupters at an estimated cost of \$300 each, and it included a list of three vendors including Appellant, as well as a product literature sheet from one of those vendors, Martin L. Kaiser, Inc. (Kaiser). The DGS Procurement Officer who was to handle the subject procurement on behalf of the OSFM, anticipated this would be a small procurement, without a written solicitation, with bidding by telephone.

3. Because Mr. Heller's name appeared on the vendor list the Procurement Officer attempted to contact him. On October 13, 1994, the Procurement Officer unsuccessfully attempted to reach Mr. Heller by telephone. Again on October 20 1994, the Procurement Officer called Mr. Heller but does not remember reaching him personally.
4. On October 18, the Procurement Officer sent a Requisition Clarification Request to DPSCS, noting that the Department's requisition package had not included a copy of the back of the Kaiser product literature sheet. DPSCS responded on December 29, 1994 with a revised specification.
5. On January 4, 1995, the Procurement Officer received a written quotation from Kaiser at \$3,780 per unit, more than ten times the amount estimated by the using agency. The next day, the Procurement Officer faxed another requisition Clarification Request to DPSCS noting that the single quotation so far received greatly exceeded the estimate and again asking for clarification of exactly what the Fire Marshal wanted to purchase.
6. On January 9, 1995, the Procurement Officer again attempted to reach Mr. Heller by telephone to get product information and

a price quote. The Procurement Officer does not recall the substance of his conversation with Mr. Heller at this time, but it is probable that there was a discussion of the prices of Ithaca's bomb disrupter equipment. According to Mr. Heller's testimony at the hearing of the appeal, Mr. Heller quoted a basic price for the Ithaca disrupter of \$451.00.

7. On January 11, 1995, the Fire Marshal, presumably in response to the January 5 Requisition Clarification Request, sent a letter to the Procurement Officer advising him to ignore the original requisition. According to the Fire Marshal, the disrupter needed to be Compatible with the OSFM robot which had been manufactured by Pedsco. The Fire Marshal noted that compatibility with its Pedsco robot was "extremely important" for the safety of the bomb squad technician and training of the bomb squad. The Fire Marshal also attached to his letter a faced copy of a quotation from Pedsco at \$458 for each bomb disrupter, dated January 9, 1995.
8. Based on the Fire Marshal's justification, the \$458 per unit quote from Putsch and the \$3,780 per unit from Kaiser, the Procurement Officer initiated a sole source request which was ultimately approved Pursuant to DDS sole source approval procedure by an Assistant Secretary of DDS on January 18, 1995. The purchase order was placed with Putsch on January 19, 1995.

#### Decision

With the initial price estimate from OSFM of \$300 per unit for a dozen units, this procurement fell in the small procurement category under COMAR 21.05.07. More specifically, it was a category II small procurement under COMAR 21.05.07 04, the expected

total price falling between \$1,000 and \$5000. While competition is encouraged for small procurements, procurement by competitive sealed bidding is not required. Bids were solicited orally by telephone which is permissible under COMAR 21.05.07.06B(1) and at least two bids were obtained. Thereafter, however, the Fire Marshal requested that a sole source procurement be undertaken.

The requirements for a sole source procurement are set forth in COMAR 21.05.05.

COMAR 21.05.05.01 provides in relevant part:

*.01 Application.*

*If the procurement officer determines that a competitive source selection method cannot be used because there is only one available source for the subject of the contract ... the procurement officer, after obtaining the approval of the agency head and all other approvals required by law or regulation, may award a contract without competition to the sole source.*

COMAR 21.05.05.02 provides in relevant part:

*.02 Conditions for Use.*

*A. Sole source procurement is not permissible unless a requirement is available from only a single vendor. The following are some examples of circumstances which could necessitate sole source procurement;*

- (1) When only one source exists which meets the requirements;*
- (2) When the compatibility of equipment, accessories, or replacement parts is the paramount consideration;*
- (3) When a sole vendor's item is needed for trial use or testing;*
- (4) When a sole vendor's item is to be procured for resale.*
- (5) When certain public utility services are to be procured and only one source exists.*

*B. The determination as to whether a procurement shall be made as a sole source shall be made by the procurement officer, with the approval of the agency head or designee. This determination and the basis for it shall be in writing. The procurement officer may specify the application of the determination and the*

duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted to one vendor shall be accompanied by an acceptable explanation as to why no other shall be suitable or acceptable to meet the need.

The Procurement Officer had to request the using agency to clarify exactly what it wanted to order. By the time the Fire Marshal personally intervened, requesting the Pedsco unit on compatibility grounds to enhance safety and bomb squad training, the Procurement Officer had one "exorbitant" bid from Kaiser, together with some product literature, and a reasonable bid from Pedsco and from Mr. Heller. The Procurement Officer deferred to the Fire Marshal's technical judgement on compatibility of the Pedsco product. The Appellant has not shown any evidence of abuse or illegality in the Procurement Officer's accepting the using agency's judgement as expressed by the Fire Marshal whose personnel included the bomb squad. COMAR 21.05.05.02A(2) specifically enumerates a situation where compatibility of equipment is the paramount consideration. Safety of the bomb squad technicians is a paramount consideration. The record also reflects that the applicable procedural provisions of COMAR 21.05.05 were complied with.

Accordingly, the appeal is denied.

It is therefore Ordered this 7<sup>th</sup> day of June, 1995 that the appeal is denied.

Dated: June 7, 1995

  
Robert B. Harrison III  
Chairman

I concur:

*Candida Steel*

Candida S. Steel  
Board Member

*Randolph B. Rosenkrantz*  
Randolph B. Rosenkrantz  
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 1882, appeal of James M. Heller under DGS Project No. S-00456.

Dated: 6/7/95

*Mary F. Priscilla*  
Mary F. Priscilla  
Recorder