

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF KENNEDY)
PERSONNEL SERVICES)
) Docket No. MSBCA 2425
)
Under Maryland Transit)
Administration Contract No. T-8000-0118)

October 15, 2004

Rejection of Bids — Rejection of all bids and resolicitation is permissible where the procurement agency reasonably determines that it was fiscally advantageous or otherwise in the best interest of the State to do so.

APPEARANCE FOR APPELLANT: Scott A. Livingston, Esq.
 Rifkin, Livingston, Levitan
 & Silver, LLC
 Greenbelt, Maryland

APPEARANCE FOR RESPONDENT: Laurie A. Lyte
 Assistant Attorney General
 Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Marvin Mandel, Esq.
(Free State Adjusters, Inc.) Marvin Mandel, P.C.
 Annapolis, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the cancellation of the Invitation for Bids (IFB) for the above captioned Contract was improper. Appellant withdrew its request for a hearing, and no other party requested a hearing. Accordingly, the appeal is decided on the written record.

Findings of Fact

1. On December 30, 2003, the Maryland Transit Administration (MTA) issued an IFB for the above captioned Contract.
2. The IFB requires that the successful vendor provide skilled temporary personnel for claims processing, adjusting, auditing, and supervision to process bodily injury and property

damage claims against the MTA. The personnel provided will work in-house at the MTA within the Transit Insurance Group (TIG) and be responsible for investigating claims, assessing claims with respect to both damages and liability, determining adequate reserves for claims, negotiating settlements, and assisting in trial preparation under TIG's direction. The IFB requires that the successful vendor assign adequate staffing levels of experienced, quality personnel to the MTA.

3. Historically, the MTA maintained significant in-house claims adjusting ability, using State employees. However, in November, 2000, the MTA issued a purchase order to Free State Adjusters, Inc. (Free State), the Interested Party herein, for temporary claims adjusters, with a not-to-exceed amount of \$25,000.
4. This sole source award was justified by MTA on the basis that Free State was the only company available that provides this service. In the subsequent months and years, MTA modified this purchase order by significantly increasing the purchase order amount.
5. In May of 2003, the MTA Office of Finance questioned why this work had not been put out for bid, and in the late summer of 2003, Maryland Department of Transportation (MDOT) officials concluded that the procurement did not comply with COMAR because it exceeded MTA's delegation from the Department of Budget and Management (DBM) and because it required Board of Public Works (BPW) approval.
6. On November 12, 2003, MDOT brought this purchase order to the BPW seeking retroactive approval. The BPW approved the purchase order retroactively, and approved a request for extension to February 29, 2004 to allow the MTA to do a proper solicitation.
7. MDOT directed MTA to start a procurement in order to have a new contract in place by the end of the requested extension. As part of this effort, TIG drafted a scope of services and, on October 16, 2003, forwarded it to the MTA Contracts Administration Office (Contracts Administration) for review.
8. Contracts Administration forwarded the draft specifications to DBM, which oversees MTA's procurement of these types of services. Although DBM expected this solicitation to be done with competitive sealed proposals, MTA chose to do it with competitive sealed bids, explaining that the specifications were "prescriptive in nature." As MTA later determined, this left it with an inability to judge whether a bidder was qualified to perform the contract work.
9. TIG followed up with Contracts Administration on December 11, 2003, again asking if the draft scope of services had been reviewed and reminding Contracts Administration about the expiration date of the current purchase order on February 29, 2004. Contracts Administration responded that the draft scope of services had been reviewed and was being prepared for advertisement pending DBM comments.
10. On December 30, 2003, before it received DBM's approval, the MTA issued a solicitation for the above captioned Contract, Contract No. T-8000-0118, for Professional Independent Claims Adjuster Services.
11. A pre-bid conference was held on January 8, 2004. MTA was asked several questions about the fact that while different positions were described, there was only one hourly rate shown on the bid sheet. In response, MTA issued Addendum No. 1, which included the transcript of the pre-bid conference, and a revised bid sheet requiring bidders to specify an hourly rate for four categories of adjuster services. MTA did not include, however, any detail about the minimum qualifications for each position specified.

12. In the meantime, DBM became aware that the solicitation had been issued prior to its approval, and was concerned because the document did not meet DBM standards for approval and publication.
13. On January 22, 2004, two bids were received by MTA, one from Free State and one from Appellant. At the bid opening, the bid sheets were compared, and it was determined that Appellant was the apparent low bidder.
14. On February 17, 2004, Appellant was notified that it was being considered for award, which award was to be contingent upon MDOT, DBM, and BPW approval. Free State was also notified that Appellant had been determined to be the responsible and responsive low bidder.
15. On or about February 25, 2004, Free State submitted a bid protest to MTA challenging MTA's determination that Appellant was a responsible bidder. To meet its needs for claims work, MTA requested and was granted permission to extend the Free State purchase order while the protest was addressed and the transition to Appellant completed.
16. On March 19, 2004, MTA issued a final decision denying Free State's bid protest on its merits. At that point, MTA began preparing for transition of the claims work to Appellant. On March 25, 2004, Free State filed an appeal of the March 19, 2004 final decision with this Board.
17. On March 23, 2004, Appellant wrote to MDOT Secretary Robert Flanagan, expressing unhappiness with the procurement process and alleging serious improprieties and agency bias in favor of Free State.
18. Because of the need to continue the claims adjusting on behalf of MTA, MTA decided to ask for the BPW's approval of a contract with Appellant despite Free State's protest, pursuant to COMAR 21.10.02.11. Preparations were made to seek approval of a contract with Appellant at the April 21, 2004 meeting of the Board of Public Works, along with an emergency extension of the Free State purchase order to allow a smoother transition.
19. At the same time, as a result of Free State's protest and Appellant's allegation of improprieties, the solicitation was subject to extensive review by MTA and MDOT. Upon this examination, MDOT concluded that the Contract was missing material terms and was flawed in other fundamental ways. Respondent determined that the scope of work fails to articulate agency requirements. Such determination is described in the Agency Report filed pursuant to COMAR 21.10.07.03C as follows:

Position descriptions are absent or incomplete, even though the proposed cost associated with filling these positions was the basis for determining lowest bidder. The position description for the Claims Adjuster position description [sic] fails to distinguish between the different levels of skills and experience required to adjust claims of differing seriousness. There is no position description at all for the "claims/legal data entry" position, even though the two proposers' pricing of this position determined the low bidder. The bid sheet does not attempt to estimate quantities, and instead simply averages four "unit prices" (the four different hourly rates associated with four different positions) despite the fact that vastly different quantities of each type position were anticipated. This allows for an "unbalanced bid" where a company minimizes the cost of items which will be underutilized, and maximizes the cost of items which may be overutilized.

Another defect is the proposed contract's failure to identify how the staffing of positions would take place, despite the fact that filling such positions is the sole purpose of the proposed contract. The solicitation does not discuss the provision, review of, or approval of, prospective applicants, nor the vendor's obligations in pre-screening applicants. And even though the claims adjusters were to be given up to \$25,000 in settlement authority, there was no requirement for criminal background checks. The solicitation was likewise silent as to insurance, bid and performance bonds, and liquidated damages.

20. Despite MTA's preparation of a request for approval of the award to Appellant in the face of Free State's protest pursuant to COMAR 21.10.02.11, DBM informed MTA on April 8, 2004 that it would not submit this proposed contract award to the BPW while the protest was pending. MTA was allowed to extend Free State's purchase order so that claims adjusting could continue while the protest was being litigated.
21. On April 14, 2004, MDOT Secretary Flanagan made the determination that it was in the best interest of the State to cancel the solicitation because of the significant solicitation deficiencies described above.
22. On April 15, 2004, Appellant was informed via telephone of that decision. Free State was similarly informed.
23. On April 19, 2004, a representative of Appellant contacted MDOT Assistant Secretary James Ports to discuss MDOT's proposed cancellation. An employee of Appellant also spoke with Assistant Secretary Ports about the proposed cancellation and requested a meeting. In those phone conversations, also participated in by Mr. Brian McAllister, an MDOT procurement official, many of the same allegations that had been made earlier in Appellant's March 23, 2004 letter to Secretary Flanagan referenced above were repeated. However, new allegations of impropriety were also made in the phone conversations. Additionally, Appellant advised that he planned to staff the project by hiring personnel from Free State.
24. As requested by Appellant, MDOT Deputy Secretary Trent Kittleman met with Appellant to discuss the cancellation. Appellant continued to allege bias on the part of MTA in favor of Free State and requested that MDOT reconsider its decision to cancel the solicitation.
25. As a result of Appellant's allegations of bias, MDOT did an internal investigation and found no support for these allegations.
26. After considering Appellant's allegations and reviewing the solicitation again, MDOT determined that, due to the magnitude of the deficiencies in the solicitation, it was in the best interest of the State to reject all bids as permitted by COMAR 21.06.02 and Md. Code Ann., State Fin. & Proc. Article §13-206.
27. By letter faxed on May 3, 2004 to Free State and Appellant, MTA rejected all bids, cancelled the IFB and advised that a resolicitation through a revised IFB would be done. This cancellation was subsequently reported on DBM's Procurement Agency Activity Report.
28. Following MTA's cancellation of the solicitation, this Board dismissed Free State's bid protest appeal with prejudice on May 7, 2004.
29. On May 10, 2004, Appellant filed a bid protest with MTA, complaining of the cancellation. On July 14, 2004, MTA issued a final decision denying Appellant's protest, and Appellant appealed such denial to this Board on July 23, 2004.

Decision

Appellant asserts that the cancellation is unjustified, challenging the MDOT Secretary's determination that deficiencies in the solicitation justified cancellation of the IFB. Appellant also alleges that Respondent is biased in favor of the incumbent, Free State, and argues that the cancellation of the solicitation after bids had been opened and prices had been revealed creates an impermissible auction atmosphere contrary to public policy.

The question for this Board is whether MDOT had a rational basis to conclude it was in the State's best interest to cancel the solicitation. The IFB expressly warned bidders that MTA "reserves the right to cancel this solicitation . . . if in the best interest of the MTA and the State." IFB, Section I, § 4. Likewise, COMAR states that all bids may be rejected, even after bid opening, when the appropriate Department head or designee "determines that this action is fiscally advantageous or otherwise in the State's best interest." COMAR 21.06.02.02.C. COMAR lists seven possible reasons for rejection, including when "[p]roposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable." COMAR 21.06.02.02.C(1)(c).

This Board has recognized the discretion vested in State agencies to make this decision:

In making the determination concerning whether the Secretary's decision was otherwise in the best interests of the State, we are mindful that the Board's scope of review of the decision is a narrow one and that we may disturb that decision only upon finding that a decision was not 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.

Automated Health Systems, Inc., MSBCA 1263, 2 MSBCA ¶113, at pp. 12–13 (1985).

In two oft cited cases, this Board attempted to limit the discretion of procurement officers by requiring them to balance the interest of the State in resoliciting against the prejudice and harm to bidders and harm to the competitive process. These cases were reversed in the Circuit Courts. *See Solon Automated Services, Inc.*, MSBCA 1046, 1 MSBCA ¶10 (1982), *rev'd In the Matter of the Administrative Appeals of Solon Automated Services, Inc.*, Circuit Court for Baltimore County, Misc. Law Nos. 82-M-38 and 82-M-42 (1982); and *Peter J. Scarpulla, Inc.*, MSBCA 1209, 1 MSBCA ¶88 (1984), *rev'd State v. Scarpulla*, Case No. 84 347 041/CL28625, Circuit Court for Baltimore City (1985). Nevertheless, this Board will continue to scrutinize challenges to resolicitations to determine whether such action is arbitrary or capricious, taken in bad faith, fraudulent or otherwise illegal.

During the review of the solicitation by the MDOT Secretary, in connection with a bid protest filed by Free State, certain perceived deficiencies were found. In the opinion of the MDOT Secretary, the solicitation failed to adequately specify the services required by MTA and failed to include adequate protections for the State. These perceived flaws in the solicitation document, in the opinion of the Secretary, would have resulted in a contract that was not fiscally advantageous to the State and that had the potential of subjecting the State to increased costs over the life of the contract.

The MDOT Secretary found, as noted in the Agency Report, that:

Position descriptions are absent or incomplete, even though the proposed cost associated with filling these positions was the basis for determining lowest bidder. The position description for the Claims Adjuster position description [sic] fails to distinguish between the different levels of skills and experience required to adjust claims of differing seriousness. There is no position description at all for the "claims/legal data entry" position, even though the two proposers' pricing of this position determined the low bidder. The bid sheet does not attempt to estimate quantities, and instead simply averages four "unit prices" (the four different hourly rates associated with four different positions) despite the fact that vastly different quantities of each type position were anticipated. This allows for an "unbalanced bid" where a company minimizes the cost of items which will be underutilized, and maximizes the cost of items which may be overutilized.

Another defect is the proposed contract's failure to identify how the staffing of positions would take place, despite the fact that filling such positions is the sole purpose of the proposed contract. The solicitation does not discuss the provision, review of, or approval of, prospective applicants, nor the vendor's obligations in pre-screening applicants. And even though the claims adjusters were to be given up to \$25,000 in settlement authority, there was no requirement for criminal background checks. The solicitation was likewise silent as to insurance, bid and performance bonds, and liquidated damages.

However, Appellant alleges that the cancellation of the solicitation by the MDOT Secretary was actually done due to a bias in favor of Free State so that Free State would continue to provide the requested services. A protestor alleging bias bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with specific and malicious intent to injure the protestor. Calso Communications, Inc., MSBCA 1377, 2 MSBCA ¶185 (1988). "Bias must be demonstrated to exist by substantive hard facts or evidence." Benton & Associates, MSBCA 2196 and 2201, 5 MSBCA ¶487 at p. 6 (2000); Yellow Transportation, MSBCA 2374 et. al., April 9, 2004. The written record herein does not provide the hard facts or evidence needed to prove bias.

Appellant alleged, incorrectly, that the specifications were not criticized until Appellant was identified as the low bidder. The written record reflects that DBM advised MTA Contracts Administration that the Contract was deficient even before bids were due, but Contracts Administration's desire to replace the much-criticized no-bid arrangement with a competitive solicitation outweighed its concerns over the specifications. Ultimately, however, when the MDOT Secretary considered the magnitude of the deficiencies, he came to a different conclusion. There is no credible evidence in the written record that Secretary Flanagan's determination that canceling the contract was in the best interest of the State was influenced by bias for or against Free State or Appellant.

Appellant's protest that cancellation of the IFB was unjustified fails on the merits. The MDOT Secretary's determination that rejection of all bids and cancellation of the IFB with resolicitation through a revised IFB would be in the best interest of the State has a rational basis and

is neither arbitrary nor capricious. The record supports his determination that the solicitation was flawed because it failed to adequately specify the requirements of the agency and it omitted terms necessary to protect the State's interests. Accordingly, Appellant's appeal is denied.

Wherefore it is Ordered this 15th day of October, 2004 that the appeal is denied.

Dated: October 15, 2004

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

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 2425, appeal of Kennedy Personnel Services under Maryland Transit Administration Contract No. T-8000-0118.

Dated: October 15, 2004

Michael L. Carnahan
Deputy Recorder