

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of LONG FENCE COMPANY, INC.)
Under State Use Industries) Docket No.
Solicitation No. KB-000-911-003) MSBCA 1607

December 2, 1991

Decision Summary:

Board of Contract Appeals - Jurisdiction - The exclusion from the coverage of the General Procurement Law of procurement in support of enterprise activities for the purpose of direct resale or remanufacture and subsequent resale (State Use Industries exception) does not apply to the procurement from the private sector of the furnishing and installation of the perimeter security fence to surround a prison facility to be constructed by State Use Industries.

Responsiveness - A review of the bid documents made it clear that the low bidder was a sole proprietorship and so representing itself and not misrepresenting itself as a corporation. Therefore intention to be bound could be determined from the face of the bid and the bid was thus ~~un~~responsive.

APPEARANCE FOR APPELLANT:

Joel S. Rubinstein, Esq.
Sadur, Pelland & Rubinstein
Washington, D.C.

APPEARANCE FOR RESPONDENT:

Linda K. Boyd
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON¹

Appellant appeals the denial of its bid protest that the low bidders' bid was nonresponsive.

¹The opinion was originally issued as a bench opinion on November 12, 1991.

1. Appellant timely appeals the procurement officer's final decision denying its protest regarding State Use Industries Solicitation No. KB-000-911-003 for a security fence. Appellant contends that the solicitation is subject to the State Finance and Procurement Article, Division II, and that the bid submitted by All Steel Products Co. (All Steel) was nonresponsive.

2. State Use Industries, sometimes hereafter referred to as State Use, contends that the contract contemplated by the solicitation is excluded from the State Procurement and Finance Article, Division II, and that All Steel was the lowest responsive bidder and was properly awarded the contract.

3. State Use is established pursuant to Article 27, Section 680, et seq., of the Maryland Annotated Code, the "State Use Industries Act." State Use is a separate unit within the Department of Public Safety and Correctional Services that is

financially self-supporting. State Use uses inmate labor to provide goods and services to be sold to governmental entities and certain non-profit groups.

4. State Use and the Department of Public Safety and Correctional Services reached an agreement to construct a concrete panel plant and a 420-bed minimum security facility at the Eastern Correctional Institution in Somerset County. State Use will function as general contractor, and inmate labor will be utilized to construct the facility. The first step in this project is the construction of a perimeter security fence around the building site. State Use determined to contract out the construction and installation of the security fence, issuing in connection therewith on September 4, 1991 the instant solicitation to furnish and install the perimeter security fence.
5. The bids were opened on September 17, 1991. Two bids were received: one from Appellant in the amount of \$389,900 and another from All Steel in the amount of \$347,678.
6. The bid by All Steel was signed by Mr. Richard Fadeley as individual principal and owner. Mr. Fadeley is doing business as All Steel Products Co.
7. On September 27, 1991, the contract to furnish and install the perimeter security fence was awarded to All Steel, which is currently in the process of installing the fence.
8. After review of the All Steel bid on September 18, 1991, Appellant protested award to All Steel by letter to the State Use procurement officer, dated September 20, 1991, in which it was alleged that the bid by All Steel was not responsive because it was submitted "under the name of a non-existent company" and "created an ambiguity as to what party would be bound by an award of the contract."
9. Appellant further argued in its letter of protest that "All Steel's trade name improperly indicates that it is a corporation when, in fact, no such corporation exists."
10. By letter dated September 27, 1991, the procurement officer issued a final decision denying the protest. The grounds for denial were that the contract contemplated by the solicitation

was not made under either State Finance and Procurement Article, Division II, or the procurement regulations and, thus, Appellant did not have the right to protest the award under the General Procurement Law and that, in any event, All Steel's bid was responsive.

11. Appellant appealed the decision to this Board by Letter dated October 3, 1991. Neither party requested a hearing.

Decision

Under Section 15-211, State Finance and Procurement Article, the jurisdiction of the Board of Contract Appeals extends only to disputes in contract formation concerning procurement contracts subject to Division II of the State Finance and Procurement Article. This Board has no jurisdiction to entertain an appeal concerning a dispute relative to a contract that falls outside Division II of the State Finance and Procurement Article. Section 11-203(a)(3), State Finance and Procurement Article, provides as follows:

(a) In general - Except as provided in Subsection (b) of this section, this Division II does not apply to:

3. Procurement in support of enterprise activities for the purpose of:

- (i) direct resale or,
- (ii) remanufacture and subsequent resale.

Pursuant to this section the General Procurement Law does not extend to a procurement in support of an enterprise activity made for the purpose of direct resale.

State Use is established pursuant to Section 680, et seq., of Article 27 of the Maryland Annotated Code. State Use is a unit within the Division of Correction of the Department of Public Safety and Correctional Services that is "financially self-supporting." State Use "generates revenues for its operations and capital investments" and provides work experiences for prisoners to improve their employability upon release. State Use is to engage in "correctional industries" modeled on the operations of private business. State Use, pursuant to such

goals, is in the business of operating "industrial plants and service centers" that provide "services and goods."

State Use operates such industrial plants and service centers in order to provide services and goods to be sold to governmental entities and certain non-profit groups. Section 14-103 of the State Finance and Procurement Article and Section 681C(a)(2)(i) of Article 27 give a preference to goods and services produced by State Use and require a state agency to first attempt to purchase supplies and services from State Use prior to seeking an alternate source. State Use supports and funds its budget through sales of its goods and services. The goods and services must be sold by State Use at competitive market prices in order for the statutory preference to be operable. Essentially, State Use engages in enterprise or business activity that generates revenue in a competitive environment.

The legislative history surrounding enactment of Section 11-203(a)(3) of the State Finance and Procurement Article indicates that the section was adopted on behalf of State Use Industries. In 1982 House Bill 294 was introduced to amend then Section 1-202(b) of Article 21 [now Section 11-203(a)] to adopt the exclusion for enterprise activities. The legislative notes pertaining to House Bill 294 indicate that this exclusion was intended to apply specifically to State Use Industries. The Legislature thus excluded from the General Procurement Law contracts made in support of enterprise activities by State Use for the purpose of direct resale.

In the instant case, the facility after construction will be sold to the Department of Public Safety and Correctional Services. State Use argues that, because the fence will be incorporated in the project that will be directly resold by State Use to the Department of Public Safety and Correctional Services, the contract governing the purchase of the fence is a "procurement in support of enterprise activities for the purpose of...direct resale." As such, State Use contends the procurement

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is excluded from the General Procurement Law pursuant to Section 11-203(a)(3) and this Board lacks jurisdiction over the appeal. We disagree.² This exclusion is not applicable to the procurement of the perimeter security fence because it is the private sector, not State Use, which is providing the fence. The solicitation's plans and specifications call for the furnishing and installation of security fencing by the contractor. The materials to be furnished by the contractor are not simply delivered to the state for further manufacture or installation. The contractor furnished the fence and, upon installation, fulfills the requirements of the contract. There is nothing being constructed or provided by State Use relative to this solicitation. There are no raw materials which State Use will itself fashion and incorporate into the project. No services or goods are provided by State Use in connection with the instant solicitation which invites the private sector alone to perform the work involved in the provision and erection of the perimeter security fence.

We now address the protest on its merits. Appellant argues that, because All Steel is a "non-existent entity," its bid was ambiguous and it was thus improperly awarded the contract by State Use. If the identity of the bidder cannot be established on the face of the bid, the bid is ambiguous. An ambiguous bid must be rejected as non-responsive. See e.g. National Elevator Company, MSBCA 1291, 2 MICPEL ¶ 135 (1987). Appellant specifically asserted in its protest that: "The bid was submitted in the name of All Steel Products Co., not in the name of Richard Fadeley T/A All Steel Products Co. As such, it is unclear whether the using agency could bind either All Steel Products Co. or, in the alternative, Richard Fadeley to the terms of the solicitation." However, we find that an examination of the All Steel bid documents establishes the identity of the

² Our disagreement is confined to the facts of this appeal relative to the procurement of the perimeter security fence.

bidder. On page two of the Bid Form, Richard Fadeley signed in the area allocated to "individual principal" rather than in the areas allocated to "partnership principal" or "corporate principal." At the bottom of page two of the bid form, Mr. Fadeley signed as "owner". In the Anti-Bribery Affidavit Mr. Fadeley indicated that he was "owner" of All Steel Products Co. Again, in the "Contract Affidavit", Mr. Fadeley signed as "owner" of All Steel. The bid by Mr. Fadeley thus indicates clearly that Mr. Fadeley is the owner and individual principal of All Steel doing business as All Steel Products Co.³

Appellant citing Section 2-106 of the Corporations and Associations Article of the Maryland Annotated Code argues that by using the term "Co.", All Steel is holding itself out as a corporation. Section 2-106, however, merely requires corporations to use certain descriptive words in their names. The Corporations and Associations Article does not preclude partnerships, sole proprietorships or joint ventures from using terms such as "Company" or "Co.". However, what is determinative is the status of the entity as gleaned from the face of the bid documents. The information supplied in the bid documents in this instance makes clear that All Steel Products Co. is a sole proprietorship owned by Mr. Fadeley. There is no ambiguity in the bid documents. We find that, in the event of default, the state could proceed against Mr. Fadeley in his capacity as owner.

In summary, we find the bid documents to be clear and consistent. Mr. Fadeley contracted as owner and individual proprietor to perform the work called for in the solicitation. Mr. Fadeley has obligated himself to perform the work and cannot avoid his obligations under the contract. Compare Martin Co., B-178540, 74-1 CPD ¶ 234 (1974); and Ebsco Interiors, B-205526, 82-2 CPD ¶ 130 (1982). See Jack B. Imperiale Fence Co., Inc.,

³ In the Contract Affidavit in Section 2, Certification of Corporation Registration and Tax Payment, Mr. Fadeley signed "N/A" and "Not Applicable", in accordance with the instructions for a sole proprietor.

B-203261, 81-2 CPD ¶ 339 (1981); Mark II, Inc., B-203694, 82-1
CPD ¶ 104 (1982). Accordingly the appeal is denied.

Dated: 12/2/91



Robert B. Harrison III
Chairman

MR. MALONE: I concur. To the extent that Maryland law prohibits the use of the abbreviation "Co." at the end of a name of a company doing business in Maryland unless it's a bona fide corporation, it does not affect the decision herein, as from the bid documents themselves it can clearly be determined that a sole proprietor was, in fact, providing the bid.



Neal E. Malone
Board Member

CHAIRMAN HARRISON: Mr. Press.

MR. PRESS: I concur, regardless of the Board's going into merits of the protest, primarily on the grounds of just on jurisdiction.


MS. BOYD: Can I just ask Your Honor for a clarification of Mr. Press's concurrence.

MR. PRESS: I concur completely with what the Board has found, but I'm primarily looking at what the Board originally stated and as the chairman read when he was reading the opinion, looking at jurisdiction more than going to the heart of the protest. I think that the Board -- I believe that there is no grounds for this Board -- or, rather, there's no jurisdiction relative to this type of proposal or solicitation.

MS. BOYD: Thank you.

MR. PRESS: Ms. Boyd, just if you have any questions, I'm

just looking at the jurisdictional issue, and I concur with the Board's decision.




Sheldon H. Press
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1607, appeal of LONG FENCE COMPANY, INC., under State Use Industries Solicitation No. KB-000-911-003.

Dated: 12/2/91



Mary F. Priscilla
Recorder