

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MACHINERY AND)
EQUIPMENT SALES, INC.)

Under DGS Project No.)
TS-000-812-003)

) Docket No. MSBCA 1171

February 20, 1984

Estoppel By Record Admission - Appellant was not estopped from attacking the responsiveness of its competitors bid in these proceedings because the State had not demonstrated that Appellant admitted responsiveness in prior proceedings conducted with regard to the instant procurement.

Motion To Dismiss - A motion to dismiss on grounds of timeliness was dismissed when the State failed to establish that Appellant had not filed a protest within seven days of the date it knew or should have known of the grounds for protest.

Motion In Limine - A motion in limine was granted where it was established that a line of evidence was irrelevant to the disposition of the appeal.

Rejection of Bids - Rejection of all bids and resolicitation was found to be permissible where the procurement officer reasonably determined that it was fiscally advantageous or otherwise in the best interests of the State to do so.

APPEARANCE FOR APPELLANT

Benjamin F. Lucas, II, Esq.
Williams, Lucas & Fleury
Baltimore, MD

APPEARANCE FOR RESPONDENT

Edward S. Harris, Esq.
Assistant Attorney General
Baltimore, MD

APPEARANCES FOR INTERESTED PARTY
—JOHNSON CONTROLS, INC.

Robert M. Wright
Gerard P. Sunderland
Whiteford, Taylor, Preston,
Trimble & Johnston
Baltimore, MD

OPINION BY CHAIRMAN BAKER

This appeal is taken from a Department of General Services' (DGS) procurement officer's final decision to reject all bids under the captioned solicitation and readvertise the procurement. The procurement officer's decision and subsequent action primarily were based upon the existence of

defects in the solicitation process which this Board previously identified in its September 21, 1983 decision in the Appeal of Johnson Controls, Inc., MSBCA 1155, recon. den., November 30, 1983. Appellant contends that the procurement officer's rejection of all bids nevertheless was arbitrary and that an award properly should have been made to it under the captioned solicitation.

Findings of Fact

1. In June 1983, Johnson Controls, Inc. protested the proposed award of a contract to Appellant for the installation of an energy maintenance system at Salisbury State College.

2. The DGS procurement officer denied this protest on June 30, 1983 and a timely appeal was taken therefrom.

3. On September 21, 1983, this Board issued an opinion detailing the confusion which existed as to the procurement method selected by DGS and concluded that:

. . . DGS may not award a contract to M&E under a competitive sealed bid procurement in that Appellant [Johnson Controls, Inc.] and not M&E was the lowest responsive and responsible bidder. Further, even if it reasonably could be established that a competitive negotiation was intended, the procedures followed were so defective as to have affected the ability of the offerors to compete equally. Accordingly, any award to M&E is impermissible under the captioned solicitation.

Johnson Controls, Inc., MSBCA 1155 (September 21, 1983), p. 15.

4. Appellant filed a timely motion for reconsideration on October 21, 1983 alleging that it had not had an opportunity to present evidence as to (1) whether Johnson was a responsive bidder and thus entitled to an award under competitive sealed bid principles and (2) whether the proposal submitted by Johnson was sufficiently acceptable to warrant further negotiations under competitive negotiation principles. This motion was denied on November 30, 1983. See Johnson Controls, Inc., MSBCA 1155 (November 30, 1983).

5. Shortly after receiving the Board's September 21, 1983 decision in Johnson Controls, Inc., the DGS procurement officer apprised Appellant that he was going to reject all bids and resolicit.

6. Appellant, after learning of DGS' proposed course of action, requested a meeting with DGS procurement officials to review the Johnson Controls' proposal. This meeting took place on September 27, 1983. It was at this meeting that Appellant familiarized itself with the particulars of the Johnson Controls' proposal and became concerned over various aspects thereof.

7. On September 30, 1983, Appellant filed a new protest alleging that Johnson Controls' bid or proposal either was non-responsive or unacceptable depending upon the procurement method actually being utilized by DGS. For this reason, Appellant contended that any confusion over the procurement method used had not affected its right to an award.

8. By final decision dated November 8, 1983, the DGS procurement officer denied this protest and reiterated his plan to resolicit. This decision was received by Appellant on November 14, 1983.

9. A timely appeal was taken by Appellant on November 29, 1983.

10. With the concurrence of Appellant, the State Agency Report, required under our regulations, was not filed until January 9, 1984. On January 18, 1984, the Board conducted a telephone conference to ascertain the need for a hearing. During this conference, DGS and Johnson Controls, Inc. respectively expressed a desire to file a motion to dismiss and a motion in limine. In view of the fact that the resolicitation process had not yet begun and resolution of this appeal was not as urgent as it otherwise would be, the Board established a time schedule to permit disposition of these motions prior to hearing.

11. On January 23, 1984, Johnson Controls filed its motion in limine contending that evidence concerning the technical aspects of its proposal would not be relevant to the disposition of this appeal.

12. On January 26, 1984, DGS moved to dismiss the appeal on the basis that (1) the appeal was untimely, (2) Appellant is estopped from challenging the responsiveness of the Johnson Controls' bid, and (3) the issues raised by Appellant are moot in view of its decision to reject all bids and resolicit.

13. Appellant responded to the foregoing motions and the State Agency Report by separate memoranda on February 3 and January 26, 1984 respectively.

14. In a telephone conference conducted on February 7, 1984, the parties indicated that the record was adequate to permit the Board to resolve all motions. Appellant further stated that a hearing would not be necessary in the event the Board granted the motion in limine filed by Johnson Controls.

Decision

I. Motion To Dismiss

Bids¹ submitted pursuant to the captioned solicitation were opened on June 2, 1983. DGS contends that the Johnson Controls' technical proposal thereafter was available for Appellant's review during the period prior to the August 25, 1983 Board hearing on MSBCA 1155. By the date of this hearing, we further are told that it was incumbent upon Appellant to have reviewed the Johnson Controls' price and technical proposals so as to determine whether Johnson Controls had standing to bring its appeal either as a responsive bidder or acceptable offeror. Failure to challenge the standing of Johnson Controls during the original proceedings allegedly estops Appellant

¹Although the parties have used the term bids, it more correctly could be said that the parties submitted price and technical proposals.

from raising questions of responsiveness or proposal acceptability now. Further, by waiting until September 30, 1983 to protest, Appellant is said to have lost its right to seek administrative redress.

Considering initially the question of estoppel, DGS apparently contends that the failure of Appellant to challenge the standing of Johnson Controls under MSBCA 1155 constituted a record admission that its competitor indeed had submitted either a responsive bid or acceptable offer. Under Maryland law, we further are told that such an admission estops Appellant from now denying that Johnson Controls was a responsive bidder or acceptable offeror. We disagree.

Although estoppel by admission long has been recognized in this State, it applies only where an admission is contained in the record of a prior judicial proceeding and formed a basis for the adjudication or dismissal of the action then being considered. See Van Royen v. Lacey, 266 Md. 649, 651 (1972); Schultz v. Kaplan, 189 Md. 402, 411 (1947). Neither of these requisites has been established here.

The Appeal of Johnson Controls, Inc., MSBCA 1155 involved the question of whether Appellant was entitled to the award of a contract under the captioned solicitation. In arguing that Appellant was not so entitled, Johnson Controls maintained that the procurement process followed by DGS placed a chill on competition and warranted rejection of all bids and resolicitation. Johnson Controls thus did not ask that the contract be awarded to it and, therefore, the question of its responsiveness or acceptability as an offeror did not have a bearing on the substantive matters before the Board. (Tr. 11, MSBCA 1155).

With regard to the significance of Appellant's failure to challenge Johnson Controls' standing to protest under MSBCA 1155, we further conclude that it did not constitute an admission that Johnson Controls was a responsive bidder or an acceptable offeror. As stated, Johnson Controls was seeking to effect a resolicitation of bids. Where the basis of protest, if valid, would produce such a result, a protestor has standing even if his bid was non-responsive or his proposal unacceptable. Compare Therm-Air Mfg. Co., Inc., Comp. Gen. Dec. B-195401.2, 80-1 CPD ¶119 (Feb. 11, 1980). Appellant, therefore, was not under a duty to question the standing of Johnson Controls under MSBCA 1155 and its failure to do so cannot be held against it now.

Turning to the question of timeliness, the record is insufficient for us to conclude that Appellant failed to protest within the seven day period mandated by COMAR 21.10.02.03. The action being protested here involves the decision by the DGS procurement officer to reject all bids and resolicit. This decision was made and communicated to Appellant sometime between September 21 and September 27, 1983. An appeal was taken on September 30, 1983. We cannot say, therefore, that the appeal was untimely.

In concluding, on the basis of the record before us, that the appeal was timely, we have not ignored the fact that Appellant may have had access to the Johnson Controls' technical proposal in August 1983. However, it is important to remember that Appellant here is contending that the rejection of all bids under the original solicitation was unreasonable. Accordingly, the timeliness of the protest must be measured from the date upon which this decision was made.

For the foregoing reasons, DGS' motion to dismiss is denied.

II. Motion In Limine

In his November 8, 1983 final decision, the DGS procurement officer stated as follows:

The technical issues raised in your challenge to Johnson's proposal need not be addressed because the resolution of those issues will not affect this department's decision to re-solicit [sic] proposals on this project.

On the basis of this statement, Johnson Controls asks this Board to preclude Appellant from introducing evidence pertaining to the responsiveness of its bid or the acceptability of its technical proposal.

Maryland Annotated Code, Article 21, §3-301 provides that "[i]f the procurement officer, with the approval of the agency head or his designee, determines that it is fiscally advantageous or is otherwise in the best interest of the State, an invitation for bids, a request for proposals, or other solicitation may be cancelled, or all bids or proposals may be rejected." Where such a determination is made:

[t]he Board's scope of review is a narrow one for it can only disturb the decision of the procurement officer if the Board finds that his decision was not fiscally advantageous or otherwise 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.

University of Maryland v. Solon Automated Services, Inc., Misc. Law No. 82-M-38 and 82-M-42 (Balto. Co. Cir. Ct. October 13, 1982).

Here the DGS procurement officer has decided that even if the Johnson Controls' bid was non-responsive or its proposal unacceptable, there were other compelling reasons which necessitated a rejection of all bids and resolicitation. The issue before us, therefore, is whether these other reasons were sufficient to meet the standard enunciated by the court. Since the adequacy of the Johnson Controls' bid did not influence this decision, evidence regarding this matter would be irrelevant to our proceedings and should be excluded.

For the foregoing reasons, therefore, Johnson Controls' motion in limine is granted.

III. Substantive Matters

As previously stated, the parties have stipulated that a hearing would not be necessary in the event that the Johnson Controls' motion in limine was granted. Given that the parties each have had an opportunity to file written pleadings and comments pertaining to the substantive matters raised in this appeal, we now may proceed to resolve this bid dispute.

In deciding to reject all bids received under the original solicitation, the DGS procurement officer was armed with the knowledge that:

1. The original solicitation did not indicate that a factory authorized representative such as Appellant would be considered equivalent to a manufacturer of automatic temperature controls. Further, it did not state that a manufacturer's experience in the installation of temperature control systems would be considered in lieu of any lack of independent experience of its factory authorized representative. Nevertheless, DGS was willing to accept bids from factory authorized representatives and consider such firms as responsible bidders.

2. The original solicitation did not apprise offerors that an award could be made without negotiations.

3. Negotiations were not conducted prior to award in contravention of COMAR 21.05.03.02A(3).

4. Price was evaluated in accordance with weighted guidelines which were not set forth in the solicitation.

5. It was not clear to those involved in the procurement, including DGS personnel and consultants, as to whether the procurement was being conducted under competitive sealed bid or competitive negotiation principles and requirements.

These defects further were identified in our earlier September 21, 1983 decision. Johnson Controls, Inc., MSBCA 1155, supra. As we also noted, an award to Appellant under the original solicitation would have resulted in a contract amount 20% above that which was bid by Johnson Controls without assurance that Appellant's technical proposal was sufficiently superior to the Johnson Controls' proposal to warrant the increased expenditure. Given the foregoing deficiencies in the solicitation and evaluation process, we cannot say that the DGS procurement officer acted arbitrarily in concluding that it was fiscally advantageous and otherwise in the best interests of the State to reject all bids and resolicit the work set forth in the captioned solicitation.

For all of the foregoing reasons, the appeal is denied.