

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of MEGACO,
INCORPORATED

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Docket No. MSBCA 1924

Under SHA IFB Contract No.
M-742-701-380

December 14, 1995

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:

Sally B. Pfund, Esq.
Williams & Jensen, P.C.
Washington, D.C.

APPEARANCE FOR RESPONDENT:

Linda D. Strozyk
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the above captioned proposed contract should not be resolicited but rather be awarded to it as the low responsive and responsible bidder.

Findings of Fact

1. Bids for the proposed contract to clean and paint four bridges over the Capital Beltway (I-495) in Montgomery County were opened by the State Highway Administration (SHA) on August 1, 1995.¹
2. Appellant submitted the lowest responsive bid in the amount of \$462,394.00.

¹ This is the second solicitation for Contract M-742-701-380. All bids in the first solicitation were rejected due to a protest over a pre-certification requirement.

3. The specifications set forth in the Invitation for Bids (IFB) permitted work during two time periods:

1. Night time: Closure of one lane of traffic from 9:00 P.M. to 5:00 A.M. and closure of 2-3 lanes from 10 P.M. to 5:00 A.M.
2. Daytime: Closure of one lane from 9:00 A.M. to 3:00 P.M.

4. After all bids were received, the Procurement Officer was advised by the Director of the SHA Office of Traffic and Safety that daytime lane closures on the Capital Beltway, inclusive of the locations of the four bridges to be cleaned and painted as part of the proposed contract, presented a traffic concern based on traffic volume. The Director of the SHA Office of Traffic and Safety recommended that if certain adverse traffic conditions occurred as a result of the daytime lane closures that operations should be suspended and the lane reopened again as soon as possible and a determination made concerning whether to close the lane the next day.

5. Acting on this advice the agency determined to reject all bids. Accordingly, by correspondence dated August 21, 1995 sent to all bidders and predicated on COMAR 21.06.02.02C.(1), the Procurement Officer advised that all bids were rejected and invited all bidders to submit a revised bid based on the night time lane closures only.

6. On September 22, 1995, Appellant timely submitted its protest of SHA's rejection of all bids. On October 20, 1995, the Procurement Officer issued his final decision denying Appellant's protest and on October 30, 1995, Appellant noted its appeal to this Board.

7. Appellant has asserted in its protest and appeal that the elimination of the daytime lane closure would have no significant impact on its work or the cost of its work and that it believes it would have no significant impact on the work or cost of the work of any other bidder either.

Specifically, Appellant asserts that:

The DOT based its decision to reject all bids on the deletion of the daytime single lane closing period. However, this change will have no significant impact on the work or the cost thereof, therefore, this change does not justify rejection of bids under the referenced regulation.

The daytime closure period permitted in the solicitation, as bid, was of insufficient duration and magnitude to permit efficient work. The set-up and take-downtime for lane closure, equipment moving, etc., would have been too great to allow cost-effective work (which was limited to the area available in a single lane) in the daytime period . . . Because it would not be feasible to work during the daytime period originally permitted, Megaco

believes that all other responsible bidders will have prepared their bids based on the same assumptions and that, therefore, the change in the work will have no significant impact upon any bids.

As is detailed further below, Megaco is, however, seriously concerned that the public release of Megaco's low bid to its competitors will have a very significant effect upon the procurement and will severely prejudice Megaco. The impact of the public disclosure is made even more severe by the fact that this requirement was previously submitted and all bids rejected due to protests. In that solicitation, the protest resulted in deletion of a pre-certification requirement which made real changes to the bidding environment, since it broadened the base of competition. Nevertheless, the fact that two rounds of bids have been publicly announced for the same requirement gives competitors an enhanced opportunity to determine the methods employed by competitors in formulating their bids.

Decision

If the record reflects that the procurement agency reasonably determined that rejection of all bids was fiscally advantageous or otherwise in the State's best interest, this Board may not disturb such determination. See, Inner Harbor Paper Supply Company, MSBCA 1064, 1 MSBCA ¶24 (1982); Machinery and Equipment Sales, Inc., MSBCA 1171, 1 MSBCA ¶70 (1984). The language of COMAR 21.06.02.02C. (1) which permits the rejection of all bids under certain circumstances suggests that the reasonableness of the procurement agency's determination to reject all bids shall be assessed as of the date the decision is made. The record herein reflects that at the time the bids were rejected, such decision was based on a rational analysis of the State's interests. The August 21, 1995 notification to bidders that all bids would be rejected and that a resolicitation would occur stated that ". . . all bids received on August 1, 1995 are rejected in accordance with COMAR 21.06.02.02C. (1) due to proposed changes to the maintenance of traffic schedule, which makes a new solicitation necessary."

COMAR 21.06.02.02C. (1) provides in part relevant to this appeal that "[a]fter opening of bids but before award, all bids . . . may be rejected when the procurement agency . . . determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids . . . include . . . [p]roposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable . . ."

The elimination of daytime closures reduced the time in which a contractor could work by requiring the contractor to work only at night. Additionally, night operations to clean and paint the

bridges rather than a mix of day and night operations might entail different cost considerations when compiling a bid. The tabulation of bids reflects that prices for certain bid items that appear to relate to traffic control necessitated by lane closures vary significantly between the bidders. Indeed, as set forth in the agency final decision issued on October 20, 1995, SHA had concluded in connection with the decision to reject all bids that a reasonable contractor would upon SHA's issuance of a post-award change eliminating the daytime lane closures file a claim for additional compensation and time extension because its bid would have been premised on accomplishing part of the work during daylight.

Under these circumstances rejection of all bids was rational and in the State's best interest despite Appellant's assertion that its costs would not be affected by the proposed change to the solicitation. Costs contained in the bids of other bidders may have been affected by the elimination of any daytime work. Furthermore, the agency's final decision reflects concern that by sustaining Appellant's protest based on Appellant's post bid opening assertion that the elimination of the daytime lane closure had no effect on its bid or work would endanger the integrity of the procurement process by allowing Appellant a second bite at the apple now that the bids of the other bidders had been exposed. The record reflects that after considering these factors, SHA rationally opined that the benefit of a new solicitation outweighed the auction atmosphere which might be created thereby. The record thus reflects a decision based on concern for the integrity of the procurement process.

The Appellant argues, however, citing this Board's decision in Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10 (1982) and Peter J. Scarpulla, Inc., MSBCA 1209, 1 MSBCA ¶88 (1984), that a balancing test must be applied pursuant to which the procurement agency may not reject all bids after bid opening and resolicit unless a reasonable determination is made that the State's interest in resoliciting outweighs the prejudice to bidders and harm to the competitive process. In both of the cited decisions the Board was reversed by the Circuit Court. See, In the matter of the Admin. Appeal of Solon Automated Services, Inc., Case Nos. 82-M-38 and 42, Circuit Court for Baltimore County, October 13, 1982; State v. Scarpulla, Case No. 84 347 041/CL28625, Circuit Court for Baltimore City, May 31, 1985.²

² An appeal of the Circuit Court decision in Scarpulla was dismissed as moot by the Court of Special Appeals in No. 825 [unpublished] (March 3, 1986).

As set forth In the matter of the Admin. Appeal of Solon Automated Services, Inc., and State v. Scarpulla, both the Circuit Court for Baltimore County and the Circuit Court for Baltimore City determined that in the context of the provisions of the General Procurement Law and COMAR regarding rejection of all bids and resolicitation, the procurement agency's decision to reject and resolicit may not be disturbed unless it can be shown that the 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. See also, Hanna v. Bd. Of Ed. Of Wicomico Co., 200 Md. 49 (1951). While there may be factual scenarios where prejudice to bidders and harm to the competitive process outweighs the agency's interest in resolicitation, this is not one of them.

For the foregoing reasons, the appeal is denied. Wherefore, it is Ordered this 14th day of December, 1995 that the appeal is denied.

Dated: December 14, 1995

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 1924, appeal of Megaco, Incorporated under SHA IFB Contract No. M-742-701-380.

Dated: 12/14/95

Mary F. Priscilla
Recorder