

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of MERJO ADVERTISING )  
and SALES PROMOTION COMPANY )  
)  
) Docket No. MSBCA 2006  
Under DHR Contract for Photo )  
Identification Cards )  
)

May 29, 1997

Specifications and Drawings - Small Procurement Regulations, COMAR 21.05.07, permit informal procedures such as an oral solicitation to be used. However, these regulations mandate competition to the extent practical which requires that all bidders be bidding on the same specifications for each individual procurement.

APPEARANCE FOR APPELLANT: Allan K. Plimack, Esq.  
Baltimore, MD

APPEARANCE FOR RESPONDENT: Sherry L. Kendall  
Assistant Attorney General  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the specifications for an oral solicitation under the COMAR Small Procurement Regulations for photo identification card carriers required that the card carriers utilize a tamper proof security material like that manufactured by Polaroid. The procurement involves the purchase of card carriers by the Baltimore City Department of Social Services which is an agency for which the supervising agency is the State Department of Human Resources (DHR).

Findings of Fact

1. Appellant had been supplying the Baltimore City Department of Social Services (BCDSS) with all its needs for photo identification card carriers for the past several years. No other supplier had been located for this item. These cards are needed by recipients/customers of cash and food coupon assistance, to access their benefits from bank automated teller machines and point-of-sale machines in grocery stores. In Baltimore City new applicants for Electronic Benefit Transfer cards, known as Independent Cards, must first secure photo I.D. cards that utilize these card carriers. The card carriers are pressure sensitive, rather than heat laminated, in that the covering from the face of the card is pressed over the photo and

identification information. Appellant has for years been providing a card that used a Polaroid type security material pursuant to a specification in an earlier written solicitation for photo identification card carriers that provided in relevant part:

FUNCTION:

*The carrier required shall perform in the same manner as the Polaroid CR-80 Dual Bond which is a tamper-proof I.D. card. Tamper-proof means that when an attempt is made to open or otherwise alter the card, the chemical bond will totally destroy the contents.*

2. Sometime during the latter part of 1996, the Contract Processing Unit of the DHR, the supervising agency for local departments of social services, had issued an initiative to local departments to attempt to increase the value of their purchases from minority business enterprises (MBE's) either through direct contracts or subcontracts. The BCDSS Procurement/Purchasing Unit located several possible MBE vendors for the cards, including Imprint, Inc. (Imprint) in the MBE Directory that is published by a unit of the Department of Transportation pursuant to COMAR 21.11.03.06.
3. A staff member of the BCDSS Procurement/Purchasing Unit called several of these MBE vendors and determined that only Imprint could provide the cards. On or about December 12, 1996, a sample of the card being provided by Appellant was given to Imprint, verbal quotations obtained from both Appellant and Imprint, and 10,000 cards were then ordered from Imprint at \$390 per thousand, the lower bid. The order was not protested by Appellant. These carrier cards provided by Imprint did not have a security material manufactured by Polaroid or equivalent security material. However, the State accepted the Imprint cards.
4. Utilizing Small Procurement procedures, the BCDSS verbally solicits prices and issues purchase orders for these carrier cards three or four times a year, depending on how many new applications for benefits and requests for replacement cards it receives.
5. On February 19, 1997, on behalf of the DHR Agency Buyer, an employee of the BCDSS Procurement/Purchasing Unit solicited telephone bids for 20,000 card carriers from Appellant and Imprint. Appellant bid \$575 per thousand (57-1/2 cents each) and Imprint, \$360 per thousand (36 cents each). Imprint confirmed its bid in writing and the contract was awarded to Imprint as the low bidder. Appellant was advised during this oral solicitation to bid on the cards it had previously been providing. The Board infers from the record that Imprint was advised to bid on the card it had previously agreed to provide in the 1996 solicitation discussed in Finding of Fact No. 3.
6. On February 24, 1997, the BCDSS sent Imprint a signed Purchase Order for 20,000 carrier cards, for delivery on March 21, 1997.
7. The President of Appellant was advised of the award of the contract either on February 24 or February 27, 1997, and on February 27, 1997 Appellant's President sent the DHR Agency Buyer a fax letter protesting the award based on Imprint's not being able to meet State specifications for the use of Polaroid type security material in the card at the price Imprint quoted.
8. In a final decision dated March 19, 1997, the BCDSS responded to Appellant's protest, which it denied, stating in relevant part that the use of a security material like that manufactured by Polaroid was never a required specification for the carrier cards and that Imprint had submitted the most favorable bid price.
9. Appellant appealed to this Board on April 1, 1997.

10. Initially, owing to the protest, the BCDSS suspended the 20,000 card order it has placed with Imprint, so that the March 21, 1997 delivery date was not met. However, because the BCDSS had been issuing approximately 6,000 replacement identification cards per month to recipient customers, in addition to I.D. cards for all new applicants, it proceeded with delivery of the order rather than risk the inability of its customers, lacking the requisite identification cards, to access their benefits.

### Decision

This small procurement is governed by the Small Procurement Regulations set forth in COMAR 21.05.07.

While these regulations permit informal procedures such as an oral solicitation to be used, "competition should be sought to the extent practical." COMAR 21.05.07.06A(1). "Oral solicitation" is defined to mean "the procurement officer's oral description of the procurement to a vendor who reasonably may be expected to provide the required item." COMAR 21.05.07.01B(3). We believe that the intent of the Small Procurement Regulations regarding competition to the extent practical is that all bidders or offerors should be bidding on the same "description of the procurement," i.e., under the same specifications.<sup>1</sup> Here we find that Appellant and Imprint were not bidding on the same description of the procurement because of a misunderstanding.

The employee of the BCDSS Procurement/Purchasing Unit who contacted Imprint and Appellant on February 19, 1997 to solicit the carrier cards did not testify nor was a written summary or written protocol concerning what was communicated to these two vendors provided to the Board. Such written protocol or at least a written summary of the conversation would have been very useful to document compliance with small procurement procedures, and to permit a re-construction of what occurred. However, based on un rebutted testimony at the hearing from Appellant's President who received the telephone call from the BCDSS Procurement/Purchasing Unit we have found that Appellant was asked to bid or quote a price on the carrier card it had previously been providing. These card carriers had the Polaroid like security material. No one from Imprint or the State testified about the February 19, 1997 telephone solicitation of Imprint. We have found, however, by reasonable inference from the evidence of record that Imprint was told by the employee of the BCDSS Procurement/Purchasing Unit to bid or quote a price on the card carriers Imprint had previously agreed to furnish the State based on the 1996 procurement. These card carriers as actually furnished by Imprint under the 1996 procurement and accepted by the State did not have the Polaroid or equivalent security material feature.

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<sup>1</sup> COMAR defines a specification in relevant part as a "clear and accurate description of the functional characteristics or the nature of an item to be procured." COMAR 21.04.01.01. Specifications may not be drawn in such a manner as to favor a single vendor over other vendors. COMAR 21.04.01.02. Appellant suggested at the hearing that the State could not change the specification (as set forth in Finding of Fact No. 1) that appeared in an earlier written solicitation that requires as a tamper-proof functional characteristic that a Polaroid type security material be utilized because of the potential for fraud and theft from altered cards. The State has the right, however, to draft specifications to meet its reasonable minimum needs in a cost effective manner and may change specifications in a subsequent procurement subject to the policies set forth in COMAR 21.04.01.

Therefore, it appears from the record that due to a misunderstanding both Appellant and Imprint were bidding on a different basis. Since the record also reflects that it is more costly to manufacture a card carrier with the Polaroid security material than without it, the difference in the item that Appellant and Imprint were being asked to submit a bid or quote on must be held to be material.

We find that Appellant reasonably understood it was being asked to bid on a card carrier with the Polaroid type security material and Imprint reasonably understood it was being asked to bid on a card carrier without the Polaroid security material or equivalent. Under COMAR, however, both Appellant and Imprint should have been asked to bid on a product that was materially similar. A rebid would ordinarily be an appropriate method to resolve the matter. However, the procurement has in good faith been concluded. See Finding of Fact No. 10. Therefore a rebid is not possible. The appeal is thus sustained. There is no necessity for a remand since the procurement has been completed.

Wherefore, it is this 29th day of May 1997, Ordered that the appeal is sustained.

Dated: May 29, 1997

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Robert B. Harrison III  
Chairman

I concur:

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Candida S. Steel  
Board Member

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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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2006, appeal of Merjo Advertising and Sales Promotion Company under DHR Contract for Photo Identification Cards

Dated: May 30, 1997

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Mary F. Priscilla  
Recorder

