

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ORFANOS CONTRACTORS,)	
INCORPORATED)	
Under DGS Project No. DT-000-)	Docket No. MSBCA 1854
910-001)	

January 27, 1995

Bids-Rejection of all Bids or Proposals- COMAR authorizes a procurement agency to reject all bids when fiscally advantageous or otherwise in the State's best interest to do so.

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APPEARANCE FOR RESPONDENT: John H. Thornton
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APPEARANCE FOR INTERESTED PARTY: John G. Sakellaris, Esq.
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest concerning the propriety of the rejection of all bids and resolicitation of the above procurement.

Findings of Fact

1. Department of General Services (DGS) Project No. DT-000-910-001 (the Project) involves renovation of various buildings at the Charles H. Hickey, Jr. School (Hickey) a correctional facility for incarcerated minors. Hickey is Operated by the Department of Juvenile Services.

2. DGS first opened bids for the Project on August 24, 1993. Because bids exceeded the funds available and because the contract operator of Hickey had requested scope changes, DGS rejected all bids under COMAR 21.06.02.02C. No one protested against this action by DGS. The record does not reflect the amount of funding available for the Project at this time.
3. DGS redesigned the bid documents based on changes in facilities operation requirements and issued a new solicitation requesting bids for a bid opening on August 2, 1994. The low base bid of \$5,967,747 was submitted by Appellant. The publicly available DGS approximate estimate of the cost of the Project (base bid) was \$4,500,000. Funds available for the Project at this time were stated in the Agency Report to be approximately \$5,068,810. Because bids still exceeded available funds, bids were rejected again and DGS revised the specifications and requested revised bids under COMAR 21.05.04, Procurement by Negotiated Award after Unsatisfactory Competitive Sealed Bidding. No one protested against such action.
4. Revised bids were received by DGS on September 9, 1994. The low bidder for the base bid was Appellant with a base bid of \$4,732,587. The solicitation documents provided that alternates (1 through 10), if any were awarded, would be awarded in the order in which they were listed in the bid form. Alternate 1 was a deduct alternate; the remaining alternates were add alternates. The deduct alternate of \$85,000.00 eliminated certain labor costs for certain work to be performed by inmates as part of a training program.
5. According to the agency Report, Juvenile Services had funds available to spend on the Project in September 1994 from the following fund sources:

<u>Fund Source</u>	<u>Gross Fund Source Amount</u>
JSA Capital Project Fund 236 GCL 1983	\$ 747,024.34
JSA Capital Project Fund 043 MCCBL 1980	\$1,358,373.75
JSA Capital Project Fund 094 MCCBL 1991	\$2,090,444.47
Capital Maintenance 004 MCCBL 1992	\$ 250,000.00
JSA Capital Project Fund MCCBL 1993	<u>\$ 622,967.60¹</u>
TOTAL	\$5,068,810.16

From this \$5.1 million, however, DGS was advised by Juvenile Services to reserve \$250,000 for the design/build of a modular detention addition to the Thomas H. Waxter Center, \$870,000² for a Juvenile Services facility in Baltimore City and \$250,000 for water distribution system work at Hickey. Therefore, DGS believed that the funds available to pay for the Hickey renovations amounted to only \$4,568,810,³ and Appellant's September 9 bid for the base bid work was \$4,732,587. Therefore, DGS believed it did not have sufficient funds available to pay for the project at the prices bid on September 9.

¹There is a dispute over whether \$870,000 from the original fund source of \$1,443,000 in JSA Capital Project Fund MCCBL 1993 was designated for the Baltimore City Juvenile Justice Center in the September 1994 time frame. In a post-hearing pleading filed with the Board on January 25, 1995, DGS asserted that the \$870,000 was not available for expenditure on the Project from the September 1994 time frame through the January 25th date of the pleading. In this same January 25, 1995 pleading, DGS also asserted for the first time that another \$623,000 (\$622,967.60) from the original \$1,443,000 JSA Capital Project Fund MCCBL 1993 was not available to spend on the Project from the September 1994 time frame at least through the date of the pleading, January 25, 1995.

²For purposes of the resolution of this appeal, the Board assumes that the \$870,000 was considered by DGS not to be available to fund the Project. However, this number does not apparently affect the bottom line amount of \$4,568,810 that DGS believed was available through the date of the hearing of this appeal. As noted in Footnote 1 above, in a post-hearing pleading filed with the Board on January 25, 1995, DGS stated that the \$870,000 was not considered to be available and also for the first time asserted that an additional \$623,000 was also not available. DGS thus asserts as of January 25, 1995 that only \$3,939,000 was available from the September 1, 1994 time frame through January 25, 1995.

³See Footnote 2, above.

6. On September 15, 1994, a DGS Procurement Officer sent all bidders a letter informing them that all bids for the Project had been rejected again for lack of funds.
7. On September 21, 1994, Appellant filed a protest against the rejection of all bids on the grounds that DGS's rejection of the September 9 bids was wrongful because "the procuring authority is engaging in auction bidding which seriously compromises the integrity of the competitive bid system as it allows for manipulation of bidders."
8. On September 20, 1994, DGS re-advertised the Project for a bid opening to be held on October 20, 1994 with the same basic scope of work as contained in the September 9, bid opening solicitation documents. As noted in the Agency Report filed in this appeal, "[s]omeone in DGS then realized that a revision of the solicitation documents might be desirable in order to increase the likelihood of obtaining lower bids so as to permit an award within the available funds" DGS then believed were available. Accordingly, on October 12, 1994, DGS notified all those who had received copies of the plans and specifications that DGS would be issuing an Addendum Number 4 and that the bid due date was being postponed.
9. On October 20, 1994, DGS issued an Addendum Number 4 revising the scope of work under the base bid and alternates and establishing a bid date of November 7, 1994.
10. A summary of the changes to the scope of work under the base bid and the alternates as set forth in the September 9 and November 7 bid documents appears in the Agency Report as follows:

September 9 Base Bid and Alternates

Base Bid	-	Bldgs. 1-7 total renovation - with select finish work (material and labor)
	-	All asbestos work in Bldgs. 1-7
	-	Site work installation of new water line in lower campus near 14 & 15
Alt 1	-	Deduct labor for Bldgs. 1-7 select finish work

Alt 2 - Sprinkler and alarm in Bldgs. 8, 9, 14, 15
 Alt 3 - Thurgood Marshall dining room renovation
 (no sprinkler)
 Alt 4 - Building 14 only renovation (no sprinkler)
 Alt 5 - Building 15 only renovation (no sprinkler)
 Alt 6 - Building 8 only renovation (no sprinkler)
 Alt 7 - Building 9 only renovation (no sprinkler)
 Alt 8 - Sprinkler, asbestos and alarm in Thurgood
 Marshall School Bldg.
 Alt 9 - Administration Bldg. ADA renovation and
 Asbestos
 Alt 10 - Pratt School renovation (arch & lighting)
 Contract Duration - 395 calendar days
 Liquidated Damages - \$300/CD per Bldg. - \$2,700/CD for
 project completion

November 7 Base Bid and Alternates

Base Bid - Bldgs. 2-7 all renovation and asbestos
 - Sprinkler and alarm 8, 14, 15 only
 - Site work installation of new water line
 in lower campus near 14 & 15
 - Select finish work in 2-7 (material only)
 Alt 1 - Bldg. 1 renovation & asbestos including
 select finish work (material only), Bldg.
 9 sprinkler and alarm only
 Alt 2 - Thurgood Marshall dining room renovation
 (no sprinkler) & asbestos
 Alt 3 - Provide Thurgood Marshall School Bldg.
 sprinkler and alarm
 Contract Duration - 425 calendar days
 Liquidated Damages - \$300/CD per Bldg. - \$1,200/CD for
 project completion

11. DGS hoped that by revising the scope of work under the base bid and alternates the State might obtain lower bids within the funds it believed were available.
12. By decision dated November 4, 1994, another DGS Procurement Officer denied Appellant's September 21 protest on the ground that the September 9 bids had properly been rejected for lack of available funds.
13. DGS opened bids on the revised solicitation November 7, 1994. This time the low bidder for the base bid and for the cumulative sum of the base bid and each successive alternate was the Interested Party Heer Brothers, Inc. (Heer).
14. Appellant appealed the Procurement Officer's decision to this

Board on November 9, 1994.

15. The low base bid submitted by Heer on November 7, 1994 (\$4,118,394) as well as the low base bids of a second bidder (\$4,153,348.50) and Appellant (\$4,234,795) were below the \$4,568,810 in funds DGS believed were available to spend on the project. This was the first time in four attempts to bid the project that DGS was able to obtain bids on a scope of base bid work that, it believed, would allow for an award within the funds it believed were available.
16. Representations were made in the Agency Report and a Supplement to the Agency Report filed six days before the hearing that DGS believed that only \$4,568,810 in funds were available for the Project in September, 1994. However, at the hearing of the appeal on January 18, 1995 DGS introduced oral testimony indicating that DGS really believed that the \$4,568,810 should be reduced by approximately \$606,000 to account for 5% contingency funds for potential cost overruns and the costs associated with asbestos removal elements of the Project. Finally, in the post-hearing pleading filed with the Board on January 25, 1995, DGS asserted that the funding actually available for the Project in September, 1994 should be reduced by a further \$623,000.

Decision

COMAR 21.06.02.02C⁴ authorizes a procurement agency to reject

⁴COMAR 21.06.02.02C provides:

C. Rejection of All Bids or Proposals

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:

- (a) The absence of a continued need for procurement;
- (b) The State agency no longer can reasonably expect to fund the procurement;
- (c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;

all bids when fiscally advantageous or otherwise in the State's best interest to do so. Automated Health Systems, Inc., MSBCA 1263, 2 MSBCA ¶113 (1985); The Fechheimer Bros. Co. and Harrington Industries, MSBCA 1181/1182, 1 MSBCA ¶74 (1984) at p. 4. One of the specific grounds for rejection under this standard is that all bids received exceed available funds. COMAR 21.06.02.02C(1)(d). DGS rejected the September 9 bids because the lowest base bid was \$4,732,587 while it believed that only \$4,568,00 in funds were available to be spent on the project. Therefore, the rejection of all bids was within DGS's authority under COMAR 21.06.02.02C if only \$4,568,000 in funds were available.

The crux of Appellant's appeal is its assertion that the State really had \$4.7 million in funds available rather than \$4.5 million and was thus obligated to award Appellant a contract on the September 9 bids. Alternatively, Appellant argues that if, as asserted by DGS for the first time at the hearing, only 3.96 million was available for funding due to the asbestos related expenses and 5% contingency overrun reserve then DGS should have rejected the November 7 bids, which were over 4 million, for lack of funds.

The record reflects that Juvenile Services desired to reduce the Project funds or reserve from the Project funds \$250,000 (actually \$226,000 rounded to \$250,000) for the Waxter Center,

(d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

(e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;

(f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or

(g) All otherwise acceptable bids or proposals received are at unreasonable prices.

(2) A notice of rejection of all bids or proposals shall be sent to all vendors that submitted bids or proposals, and it shall conform to SB(2).

\$250,000 for the Hickey water distribution system and \$870,000 for the Baltimore City Juvenile Justice Center. The desire to reduce or reserve the funding available for the Project was conveyed to DGS so that DGS concluded that only \$4,568,810 was available for the Project.

Based on the assumption that only \$4,568,810 was available to fund the project, the DGS Procurement Officer on September 15, 1994 rejected all bids because "the bids submitted on September 9, 1994 were above the available funds for the subject project" On November 4, 1994, another DGS Procurement Officer denied Appellant's protest concerning the September 15 rejection of bids on grounds that "all otherwise acceptable bids received were in excess of the funds available for the project." Appellant argues that funds were, in fact, available because the permission of the General Assembly was required to reduce or reserve the funds budgeted for the Project for use on the Baltimore Juvenile Justice Center, the Waxter Center and the Hickey water distribution system and such permission was never secured. Counsel for DGS acknowledges that such permission was never secured and that it was not until November 14, 1994 that DGS became aware that the Department of Fiscal Services had refused to reconsider its previous recommendations to the Budget Committees that money from the Project not be used to fund the Waxter Center. At some point in time between November 14, 1994 and the hearing of this appeal, DGS became aware that the General Assembly had also not agreed to a reduction of the funds for the Project for use on the Baltimore Juvenile Justice Center and the Hickey water distribution system.

Therefore, at the time the bids were opened on the Project on September 9, 1994 an additional \$1,370,000 could have been determined by appropriate DGS and Juvenile Services officials to be available for the Project bringing the total available funds back to \$5,068,810.

However, sometime after the filing of the Supplement to the Agency Report with the Board on January 12, 1995, counsel for DGS discovered that DGS needed to reserve another approximately

\$606,000 from the available funding to account for potential overruns and asbestos removal aspects of the Project. Certain DGS officials may have been aware of such needs when bids were rejected in September of 1994. The DGS Procurement Officer's letter of September 15, 1994 rejecting all bids states that the bids submitted on September 9, 1994 "were above the available funds for the subject project" The DGS Procurement Officer's decision of November 4, 1994 rejecting Appellant's protest states that "it was apparent that all otherwise acceptable bids received were in excess of the funds available for the project." However, the record does not reflect whether these two Procurement Officers were aware of the \$606,000 additional funding requirement that was testified to at the hearing of this appeal. The Agency Report and Supplement to the Agency Report filed with the Board state that there was \$4,568,810 or "4.56 million" in funds available to spend on the project and the Agency Report states that the "low base bid submitted by Heer (\$4,118,394) as well as the low base bids of Frank (\$4,153,348.50) and Orfanos (\$4,234,795), all submitted on November 7, were below the \$4,568,810 in funds available to spend on the Project".

The board assumes from the Agency Report and Supplement to the Agency Report that the two DGS Procurement Officers in good faith believed that \$4,568,810 was available and were unaware when bids were opened on November 7, 1994 that there were only \$3,962,810 in funds available for the Project. ($\$4,568,810 - \$606,000 = \$3,962,810$). This level of funding is below the base bids submitted. It is below the low Heer base bid by \$155,584. Accordingly, since it cannot be determined whether such shortage resulting from the additional \$606,000 funding requirement was considered by the DGS Procurement Officers (and the Agency Report reflects that such shortage was not considered) the Board, noting that no award has been made, remands this matter to DGS for consideration by the appropriate Procurement Officer of whether there are at present sufficient funds available to consider award of a contract for the Project.

Concerning Appellant's principal argument, the Board notes that it now appears from the record that \$500,000 in funds relating to Juvenile Services' desire to shift funds from the Project to the Hickey water distribution center and the Waxter Center were actually available to fund the project on September 9, 1994, because the General Assembly had not approved the Juvenile Services request to shift such funds. Therefore, there was available to fund the Project in September, 1994 a total of \$5,068,810 in DJS funds, which amount exceeds the Appellant's base bid. However, from this \$5,068,810 there needs to be subtracted the \$606,000 that certain persons in DGS believed was necessary to be reserved for project overruns and asbestos removal work. This results in total available funding on September 9, 1994 of \$4,462,810 ($\$5,068,810 - \$606,000 = \$4,462,810$) an amount which is below the Appellant's base bid of \$4,732,587.

Based on the record developed through the hearing of this appeal, it appears that there would only be sufficient funds available on September 9, 1994 if a large portion of the \$870,000 Juvenile Services wished to reserve for the Baltimore City Juvenile Justice Center was actually dedicated to the Project. However, from a review of the entire record to include DGS' post-hearing pleading, the Board is unable to find that an additional \$870,000 or substantial portion thereof was dedicated to the Project in September, 1994. Finally, based on the representations made in DGS' January 25, 1995 post-hearing pleading, it appears that available funding should be further reduced by \$623,000, resulting in only \$3,739,810 being actually available to fund the Project in September, 1994. Accordingly, sufficient funds were not available in September, 1994 to fund the Project and rejection of all bids as authorized by COMAR was appropriate. Appellant's appeal is therefore denied and the matter is remanded to DGS to determine if a contract for the Project should be awarded to the Interested Party.

Accordingly, it is Ordered this 27th day of January, 1995 that the appeal is denied and the matter is remanded to DGS to determine if a contract for the Project should be awarded to the Interested Party.

Dated: January 27, 1995

Robert B. Harrison III
Robert B. Harrison III
Chairman

I concur:

Candida Steel
Candida S. Steel
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 1854, appeal of Orfanos Contractors, Incorporated, under DGS Project No. DT-000-910-001.

Dated: 1 27 91



Mary F. Priscilla
Recorder