

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Peter J. Scarpulla,
Inc.

Under DGS Project No.
T-493-782-020

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) Docket No. MSBCA 1209
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November 13, 1984

Rejection of All Bids - All bids submitted under a DGS invitation for bids were rejected when the procurement officer concluded that a lower bid could be obtained under a new solicitation. However, in the absence of any need to significantly change the specification or evidence suggesting that the low bid under the initial solicitation was unreasonably high, the procurement officer's decision was deemed arbitrary. Any expectation of lower bids under the circumstances present was due to the effect which exposed bid prices would have on the competitive process. The auction atmosphere thus created was determined to be contrary to public policy and an insufficient reason to authorize a resolicitation.

Rejection of All Bids - The reasonableness of a procurement officer's decision to reject all bids must be assessed as of the date of the decision and not by subsequent events.

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APPEARANCES FOR RESPONDENT:

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OPINION BY CHAIRMAN BAKER

This appeal has been taken from a Maryland Department of General Services (DGS) procurement officer's decision to reject all bids submitted under the captioned project and resolicit. Appellant was the low responsive bidder under the cancelled solicitation and contends that the DGS procurement officer's decision both was arbitrary and contrary to the requirements of Maryland law. DGS denies these contentions and submits that its procurement officer's decision must be affirmed.

Findings of Fact

1. On March 21, 1984, DGS issued an invitation for bids (IFB) on its project number T-493-782-020. The work called for under this IFB involved substantial renovations to the power plant at Towson State University. The IFB subsequently was amended on three occasions prior to bid opening with bidders being required to acknowledge receipt of each addendum on their "proposal forms."¹

2. Bid opening occurred on June 14, 1984. Although fourteen bids were received at this time, only the four lowest are pertinent to this dispute. These were:

Charles J. Frank, Inc.	\$4,068,000
Lake Falls Construction, Inc.	4,082,000
The H. A. Harris Company	4,458,000
Appellant	4,590,000

The foregoing amounts were listed by the respective bidders as base bids. Prices also were solicited for sixteen "deduct alternates" as further described in section 01100 of the contract specifications. Award was to be made to the low responsive and responsible bidder as determined by the base bid, unless all bids received exceeded the allocated funds. Under the latter circumstance, the prices quoted for the alternates were to be deducted from the base bid in reverse order, i.e., beginning with deduct alternate number 16. The process was to continue until at least one responsive bid, as submitted by a responsible bidder, was brought within the appropriated amount. Here the four low base bids all were under the \$5,000,000 appropriation and below the DGS engineer's estimate. Accordingly, the deduct alternates did not affect the evaluation of bids.

3. The three low bidders each relied upon a subcontract bid for mechanical work as prepared by T & W Contracting, Inc. (T & W). After bid opening, T & W identified arithmetical and clerical errors resulting in a mistakenly low quote to its prime contractors. T & W thereafter apprised its prime contractors of this mistake and stated that its original subcontractor bid of \$2,553,916 correctly should have been \$3,421,108. This computes to an increase of \$867,192.

4. By letter dated June 19, 1984, Charles J. Frank, Inc. requested permission to withdraw its low bid in view of the T & W mistake. Worksheets containing the T & W errors were enclosed. After review of the T & W worksheets, the DGS procurement officer was satisfied that a mistake clearly and convincingly had been demonstrated and, pursuant to COMAR 21.05.02.12C(2), permitted withdrawal of the bid.

¹The instruction to bidders contained in the IFB stated that "[t]he 'Proposal' is that form which is included in the contract documents and which sets forth the lump sum cost of each division or combination of divisions of the work, the alternates (if any) and the unit prices (if any) solicited by the State."

5. DGS next notified Lake Falls Construction, Inc., as the low responsive bidder, that it was in line for award. By letter dated June 21, 1984, however, Lake Falls also sought permission to withdraw its bid for the same reason cited by Charles J. Frank, Inc. The DGS procurement officer again permitted withdrawal.

6. Award consideration sequentially was given to the bid of The H. A. Harris Company. By letter dated July 9, 1984, Harris similarly sought permission to withdraw its bid. Permission again was granted.

7. After permitting The H. A. Harris Company to withdraw its bid, the DGS procurement officer decided that it was in the best interest of the State not to award a contract to Appellant and instead reject all bids and resolicit. The primary reason given for this action was that Appellant's bid was a half million dollars in excess of the low bid and, in the procurement officer's judgment, a better price than that offered by Appellant could be obtained if the job were resolicited. The procurement officer further testified that minor clarifications to the solicitation were deemed necessary and easily could be accomplished under a new procurement. The procurement officer admitted that the desired clarifications were not of sufficient magnitude to warrant, on their own, a rejection of all bids.²

8. The procurement officer's decision to reject all bids was approved by the DGS Secretary on or about July 9, 1984. As thereafter directed by the procurement officer, the DGS Contract Services Officer wrote all bidders on July 11, 1984 to apprise them that their bids had been rejected and that the project would be readvertised. A written determination of the reasons for rejecting all bids, as contemplated by COMAR 21.06.02.01D, was not made by the procurement officer.

9. By letter dated July 18, 1984, Appellant timely protested the DGS procurement officer's decision to reject all bids.

10. On August 10, 1984, the DGS procurement officer denied Appellant's protest by written final decision as follows:

The bids were rejected on July 11 by letter from Mr. William F. Lee, Contract Services Officer, to each of the bidders, notifying them of such action and returning their bid bonds.

This rejection is in accordance with the State's Instructions to Bidders for Construction Projects on page 2 thereof stating "The State reserves the right to reject any and all bids or to accept any bid in the interest of the people of the State of Maryland."

This action is permitted by COMAR 21.06.02 and was taken following receipt of requests from the three lowest bidders that their bids be withdrawn because of substantial errors in the formulation of their bids and the advisability of revising the bidding documents in order to more accurately specify what is intended.

²COMAR 21.06.02.01C(1)(a) permits rejection of all bids after opening where "[p]roposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable."

For the reasons stated above your protest is denied.

11. A timely appeal was taken by Appellant on August 29, 1984.

12. On August 30, 1984, DGS issued a second IFB for the captioned project. The second IFB interlineated the addenda to the first IFB within the body of the specifications and incorporated deduct alternates one through eight as firm contract requirements. Deduct alternates nine through sixteen became deduct alternates one through eight under the second IFB.

In preparing the second IFB, DGS engineers detected an error in one of the contract drawings relating to the demolition of a wall. The wall was determined to be load bearing and no provision had been made to support the surrounding structure in its absence. For this reason, the drawing was changed to obviate the demolition of the wall. This change was acknowledged by the DGS procurement officer to be minor in scope and was not said to be a reason for his decision to reject all bids.³

13. A number of other technical changes were made to the specifications under the second IFB. These changes were proposed by a DGS consultant who later characterized them as follows:

. . . there were few functional changes to the design. Most of the modifications were intended to either incorporate updated vendor information or to clarify areas that caused confusion among the bidders.

Exh. 7 to Agency Report.

14. Appellant presented the testimony of two estimators concerning the significance of the specification changes. First, Mr. Thomas F. Hastings stated that there were no changes substantial enough to cause price to be increased or decreased. Mr. Hastings is President of T.G.M.I. Contractors, Inc., a mechanical and general contractor which bid the captioned project under both solicitations. Although his company's bid was \$267,000 less under the second IFB, Mr. Hastings testified that this was due both to a sharpening of his mechanical estimate and the exposure of his competitors' bids under the initial IFB. Appellant's second witness was Mr. Calvin H. Boehm, its estimator. Mr. Boehm also testified that the changes made to the specifications were not substantial and that the subcontractor bids received under the second IFB all were identical to those obtained under the first IFB except for the mechanical work which was much higher. When queried on cross examination as to the increase in the mechanical bid, Mr. Boehm indicated that the subcontractor originally relied upon refused to participate in the second procurement and he thereafter was unable to obtain as favorable a subcontractor bid.

³The procurement officer, in fact, did not have knowledge of the error at the time he acted to reject all bids.

15. The eleven bids tendered under the second IFB were opened on October 18, 1984. The base bid submitted by The Farfield Company was identified as the lowest at \$4,396,000. Appellant's bid was sixth in line at \$4,968,000.

16. DGS has deferred award of a contract pending resolution of this appeal.

17. Appellant was determined to be a responsive bidder under the first IFB. The record does not demonstrate, however, that the DGS procurement officer attempted to ascertain whether Appellant also was a responsible bidder.

Decision

The initial IFB issued by DGS apprised bidders that "[t]he State [DGS] reserves the right to reject any and all bids or to accept any bid in the interest of the people of the State of Maryland. . . ." ⁴ DGS' right to reject all bids, however, clearly is limited by the following statutory language:

If 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 interests 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.

Md. Ann. Code, Art. 21, §3-301.

COMAR 21.06.02.01C implements the foregoing statute and specifically addresses the rejection of all bids after opening. Examples of factual situations which would warrant a rejection of all bids are provided in this regulation. The DGS procurement officer here testified that he did not consider the instant facts to fall within any of the examples set forth.⁵

⁴See Instructions to Bidders, p. 2.

⁵Reasons for rejection of all bids include but are not limited to:

(a) The State agency no longer requires the supplies, services, maintenance, or construction;

(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;

(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

The DGS procurement officer further testified that the decision to reject all bids was a "judgment call". In his view, a resolicitation was likely to result in a contract price below the \$4,590,000 bid by Appellant and hence would be fiscally advantageous to the State of Maryland. The underlying basis for this conclusion, however, is not evident from the record.

T & W Contracting, Inc. provided the three low bidders with a mechanical quote which was \$867,000 less than intended. While it is difficult to say how a correct quote from T & W precisely would have affected the three low bids, the DGS procurement officer could not deny that they would have been increased substantially and most likely would have been in excess of Appellant's bid. Although counsel for DGS hypothesizes that a lower subcontractor quote may have been obtained had T & W timely submitted a corrected price, the DGS procurement officer never considered this possibility and did not offer it as justification for his decision to reject all bids. In sum, the procurement officer evidenced no basis upon which any of the bidders could have been expected to reduce their bid amounts below what Appellant had bid, except in competitive response to Appellant's prices as revealed at bid opening. The DGS engineer's estimate, we might add, was considerably in excess of Appellant's bid and likewise offered no basis for the procurement officer to conclude that Appellant's price was unreasonably high.

A secondary consideration in the procurement officer's decision to reject all bids was his desire to clarify the bid documents. Although a number of technical changes ultimately were made to the specifications accompanying the second IFB, it is uncontroverted that the changes significantly did not affect the cost of the project. In essence, the second IFB called for the performance of the same work as originally was described in the first IFB.

It is well settled that "[t]he rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without an award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance." 52 Comp. Gen. 285 (1972); 53 Comp. Gen. 587 (1974). Harm to the procurement system especially is grievous where, as here, the resolicitation is for the same services originally sought. Under such circumstances, an auction atmosphere is created ". . . wherein the new bids . . . constitute responses to the prior exposed bid prices rather than to any significant change in the salient characteristics" of the services required. 52 Comp. Gen. 285, supra.

which the bids or proposals were invited; or

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

The principles and policies which underlie Maryland's procurement law demonstrate a strong public interest in fostering competition through the fair and equitable treatment of bidders. Md. Ann. Code, Art. 21, §1-201; COMAR 21.01.01.04. In the instant appeal, the DGS procurement officer has not articulated any basis for his judgment that bid prices would be reduced in a second procurement, except for the reasonable expectation that prices would be lowered as a response to those exposed at the initial bid opening. While DGS would benefit fiscally from such a procedure, the public interest in the long run would not be served.

We recognize that our scope of review here is a narrow one and that the DGS procurement officer had broad discretion to act. UMBC v. Solon Automated Services, Inc., Misc. Law Nos. 82-M-38, 82-M-42 (Balto. Co. Cir. Ct. October 13, 1982). Nevertheless, on the basis of the foregoing, we conclude that the procurement officer's decision was arbitrary and should be reversed.

In so ruling, we are mindful of the fact that DGS did obtain a lower price on the second procurement than Appellant bid under the initial IFB. The result, however, does not support the reasonableness of the procurement officer's action. As we have concluded, the only explanation for the lower bid price was the presence of an auction atmosphere. The decision to rebid under such circumstances is counterproductive to the establishment of a fair and equitable procurement system. While DGS thus is being required to forego a savings in this instance, it is well settled that maintenance of the integrity of the competitive procurement system infinitely is more in the public interest than a financial savings in an individual case. H. A. Harris, Inc., MSBCA 1109, February 4, 1982; 34 Comp. Gen. 82 (1954); 44 Comp. Gen. 495 (1965); Md. Ann. Code, Art. 21, §1-201 (1981 Repl. Vol., 1982 Supp).

In the event that DGS still desires to renovate the Towson State power plant, an award must be made under the initial IFB to the low responsive bidder who also is determined to be responsible. The appeal, accordingly, is sustained to this extent.

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