

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of PRIMA FACIE, INC)
)
) Docket No. MSBCA 2019
Under MTA Modifications to)
Contract Nos. MTA-0634 and)
MTA-0661)

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September 22, 1997

Bid Protests - Interested Party - Non-Bidder - A non-bidder on a prime contract would have standing to file a protest as a prospective bidder on an item proposed to be added to the prime contract by contract modification where the contract modification was entered into as a subterfuge to circumvent competitive bidding requirements for the item.

OPINION BY CHAIRMAN HARRISON

This bid protest appeal concerns the issue of when under the General Procurement Law and COMAR a State unit is required to conduct a separate procurement rather than issuing a contract modification to an existing contract to obtain a service or supply. The item desired to be obtained by the Respondent (MTA) is a digital video recording camera surveillance system (CCTV)¹ for installation on MTA buses² being manufactured under an existing contract between Respondent and North American Bus Industries, Inc. (NABI). In a Motion to Dismiss Respondent argued that Appellant lacks standing to pursue the matter because it is not an interested party since it is not a bidder or offeror or prospective bidder or offeror under the General Procurement Law and COMAR. Respondent also argued that Appellant's assertion that the system was not within the scope of the

¹ The CCTV system involves "supplies" defined at COMAR 21.01.02.01(86) as "... tangible personal property, including equipment...."

² Coach is the technical term used in the transit industry for what the Board frequently refers to in this opinion as a bus.

existing bus contract and thus needed to be separately procured was not timely. The Board denied the Motion as it related to standing and proceeded to hear the appeal on the merits. In denying the Respondent's Motion, the Board determined that Appellant would have standing as a prospective bidder to provide the CCTV system if Respondent (as alleged by Appellant) had used a contract modification as a subterfuge to circumvent bidding the CCTV system when it appeared Appellant would win under a competitive bidding process. The Board found, however, that the Appellant had not timely protested the issue of whether the CCTV system was within the scope of the bus contracts and thus a proper subject for a contract modification to the bus contracts. Accordingly, the Board held it lacked jurisdiction to determine whether the CCTV system was in fact within the scope of the bus contracts. This opinion proceeds therefore upon the premise that the CCTV system was within the scope of the bus contracts.³ Thus the specific issue before the Board is whether, as asserted by Appellant, the CCTV system was obtained through contract modifications to the two existing contracts between NABI and MTA as a subterfuge to circumvent competitive procurement requirements under the General Procurement Law and COMAR and Federal grant requirements. Appellant alleges that this stratagem was resorted to when it appeared that to follow competitive procurement procedures for a separate procurement of the CCTV system would result in an award to Appellant and not to Loronix Information Systems, Inc. (Loronix).⁴

Findings of Fact

1. On July 31, 1997, the Board of Public Works approved a contract for the manufacturing and delivery of 20 articulated transit coaches (Contract No. MTA-0634) and on November 13, 1996 the Board of Public Works approved a contract for the manufacturing and delivery of 50 advanced design transit coaches (Contract No. MTA-0661). The total cost of these procurements exceeded \$21,000,000, eighty (80) percent of which was funded with federal funds and twenty (20) percent of which was funded with special funds budgeted to Respondent. Each contract provided options for additional buses over a four-year period. The contractor who was to manufacture and deliver these buses under each contract was American Ikarus, Inc., the predecessor corporation to NABI.
2. Neither the contract for the articulated transit coaches or the advanced design transit coaches provided that the buses were to be equipped with a CCTV system.
3. Respondent is constantly evaluating bus and bus passenger safety concerns and analyzing, testing and reviewing new products and services from many different vendors in a rapidly

³ The assertion that the CCTV system was not within the scope of the bus contract between Respondent and NABI was first raised in Appellant's comment on the Agency Report filed with the Board on August 8, 1997 and is untimely under COMAR 21.10.02.03B which requires that a protest be filed not later than 7 days after the basis for protest is known or should have been known. Appellant's original protest filed with Respondent by letter dated May 16, 1997 only protested 1) an alleged failure to consummate a procurement accordingly to law and regulation and 2) improper use of a contract modification with NABI to circumvent the requirements of the General Procurement Law and COMAR when it appeared that to follow the General Procurement Law and COMAR would result in an award of a CCTV system contract to Appellant rather than to Loronix Information Systems, Inc. (Loronix). At the time of the original protest on May 16, 1997, Appellant should have known of the ground of protest that allegedly the CCTV system was not within the scope of the bus contracts.

⁴ The Board need not discuss the allegation that Federal procurement grant requirements were violated since States are directed to follow their own procurement practices and this Board finds herein that Maryland's procurement law was properly followed. See 49 CFR. §18.36(a) and paragraph 4a of FTA circular 4220.ID.

changing technological environment. Such activity often occurs outside of MTA's formal procurement process.

4. Manufacturers of new technology, including camera surveillance systems (both CCTV and VCR), which may promote bus and passenger safety, attempt to persuade Respondent to purchase their products. To this end Appellant approached Respondent personnel sometime prior to March 1996 regarding its CCTV system. In March 1996, a CCTV system produced by Appellant was installed on an MTA coach for test purposes, and in December 1996 a CCTV system produced by Loronix was installed for test purposes in another coach. This testing was not undertaken pursuant to a procurement process, but as part of the ongoing process at MTA to analyze and evaluate new products and service for potential use in transit service.
5. Concerns about the enforceability of the bus manufacturer's warranty and ensuring that a CCTV system is compatible with other electronic systems in the bus makes its preferable to install the CCTV system during the bus manufacturing process rather than as a separate add-on after the buses have been manufactured.
6. In February and March, 1997, the results of the live testing of Appellant's and Loronix equipment on the MTA buses, including demonstrations of each system, were presented to the MTA Director of Operations, Mr. Charles (Sam) Carnaggio, and the MTA Administrator, Mr. Ronald Freeland, for decision concerning possible acquisition of a CCTV system by MTA.
7. The testing and demonstration of the functioning of the CCTV systems of Appellant and Loronix had been the responsibility of Ms. Phyllis Mowery, the Chief of Bus Operations for Respondent's Bush Street Division. Ms. Mowery was chair of a subcommittee formed in February 1996 and charged with exploring the feasibility of camera surveillance systems on MTA property and equipment. The subcommittee was part of a larger committee of MTA employees formed in January, 1996 known as the Visual Presence on Buses Committee tasked generally to look into transit and ridership safety issues with a goal of increasing operator safety and increasing ridership by improving public perception of bus safety.
8. Formation of the Visual Presence on Buses Committee was coincidental to and not caused by the efforts of Appellant and subsequently Loronix to market their CCTV systems. The formation of the subcommittee chaired by Ms. Mowery had as its focus testing and evaluation of camera surveillance systems consistent with MTA's ongoing evaluation and testing of new products and services. Ms. Mowery and her subcommittee were not actually or constructively conducting a procurement as contemplated by the General Procurement Law and COMAR.
9. When the issue was presented to MTA management concerning whether to acquire a CCTV surveillance camera system on the buses, it was suggested by the MTA Chief Procurement Officer, Mr. Richard Wolfe, that prices be sought from both Appellant and Loronix because the MTA Administrator had not at that point in time (February 1997) decided which system to purchase, or whether to purchase any system.
10. Accordingly, Mr. Thomas Shockley, MTA's bus fleet manager, was directed in February 1997 to contact NABI and seek prices based on the specifications for their respective CCTV systems provided by Loronix and Appellant.
11. By letter dated February 12, 1997 to NABI, Mr. Shockley requested that NABI seek price quotations from both Appellant and Loronix in anticipation of a possible change order to be

issued to NABI for a CCTV system.

12. NABI forwarded price quotations to MTA which Mr. Shockley believed to be too high. Mr. Shockley learned that the reason the quotes were "high" was that NABI was including an overhead and profit factor of 35%. Accordingly, NABI was asked to obtain "best and final offers" from Loronix and Appellant and NABI was instructed by Mr. Wolfe to reduce its overhead and profit factor.
13. Following direction to NABI to reduce its overhead and profit, the following prices from Appellant and Loronix⁵ for 70 buses were presented to MTA in a letter from NABI dated April 9, 1997.⁶

Although NABI does not make a practice of soliciting our suppliers for "best and final offers", NABI has, on the MTA's suggestion, requested the MTA's preferred camera suppliers to reevaluate their costs. Following are revised prices, to include the camera systems in the MTA's 40 = (MTA-0661) and 60 = (MTA-0634) buses being manufactured by NABI.

A. **THREE (3) Digital Camera System, including installation approved at NABI's Anniston facilities and the required inspection and operational checks performed in Baltimore after vehicle delivery:**

1. Prima Facie:

- | | |
|--|----------|
| a. 1ea (per bus) RoadRecorder 4001 3 Camera System | \$ 7,580 |
| b. 2ea (total) Video Playback System | \$10,080 |

2. Intellect Corporation:

- | | |
|--|----------|
| a. 1ea (per bus) CCTV ware 3 Camera System | \$11,806 |
| b. 2ea (total) Video Playback System | \$27,053 |

B. **FOUR (4) Camera system, including installation approval at NABI's Anniston facilities and the required inspection and operational checks performed in Baltimore after vehicle delivery:**

1. Prima Facie:

- | | |
|---|----------|
| a. 1ea (per bus) RoadRecorder 4 Camera System | \$ 7,751 |
| b. 2ea (total) Video Playback Systems | \$10,080 |

2. Intellect Corporation:

- | | |
|--|----------|
| a. 1ea (per bus) CCTV ware 4 Camera System | \$12,156 |
|--|----------|

⁵ The price quotations for the Loronix systems were provided in the name of Intellect Corporation, a local representative of Loronix. Appellant alleges in his protest letter of May 16, 1997, discussed below, that MTA may have been improperly influenced by favoritism because the owner of Intellect Corporation may have been a former MTA employee. The owner of Intellect Corporation is in fact a former MTA employee who left MTA's employ sometime in 1991. The record does not reflect that MTA showed any favoritism or was otherwise influenced as a result of its former employee being the owner of Intellect Corporation.

⁶ The prices of Loronix and Appellant were not actually reduced from those presented in the first price quotation. The price reductions reflect reductions in NABI overhead and profit.

NOTES:

1. NABI must apologize for the short time notice, however, due to the quickly approaching manufacture of the subject buses, NABI must have a written response on or before 25-April-1997.
 2. The installation of either system will require a storage compartment for the bus mounted recorder. This cost (\$150) is included in the camera equipment cost (lines A.1.a., A.2.a., B.1.a and B.2.a.).
 3. These prices are for seventy (70ea) buses having the same system installed. If less than (<70) are opted for, the per bus price may have to be adjusted.
14. In a memorandum dated May 6, 1997, from Ms. Mowery to Mr. Shockley, the results of the evaluation by Ms. Mowery's subcommittee of the Visual Presence on Buses Committee of various visual systems (CCTV and VCR) were set forth.
 15. While Appellant's system was described as reliable in the May 6 evaluation memorandum, a clear preference for the Loronix system was expressed as follows:
 - This system proved to be superior to all others in the following areas: recording time, clarity of video, data enhancement, video playback, exportability, equipment reliability, preventative maintenance, expansion capability, etc. to name a few.
 16. As a result of the preference for the Loronix system as expressed in the May 6 memorandum, the MTA Administrator decided to obtain the Loronix system. Mr. Wolfe directed that change orders (contract modifications) be issued to NABI for NABI's two prime contracts requiring that all 70 buses (coaches) covered by the prime contracts be equipped with the Loronix 4 camera CCTV system. In response to this direction Mr. Shockley on the same day, May 6, 1997, sent a letter to NABI advising NABI that the MTA would process formal change orders for approval by the Board of Public Works for contract modifications to the prime contracts requiring that the seventy coaches be delivered with the Loronix 4 camera CCTV system.
 17. When Appellant learned that Loronix was to provide the CCTV system it timely protested such action to Mr. Wolfe (the MTA Procurement Officer) by letter dated May 16, 1997 as supplemented by letter dated June 3, 1997. Appellant alleged that the issuance of the contract modifications to the NABI prime contracts was a subterfuge to avoid the requirements of a competitive procurement under Maryland and Federal procurement requirements that MTA had initially undertaken and then abandoned when it appeared Appellant would win any such competition.
 18. On June 5, 1997, Mr. Wolfe issued a final agency decision denying Appellant's protest on grounds of lack of standing and on the merits.
 19. On June 10, 1997, Appellant timely appealed to this Board.

Decision

The State has the authority to enter into contract modifications with its contractors pertaining to matters within the scope of an existing procurement contract. Sections 13-201(c) and 13-218(a)(6) State Finance and Procurement Article. Contract modifications are defined at COMAR 21.01.02.01(26) as “. . . any written alteration in the specifications, delivery point, date of delivery, contract period, price, quantity, or other provision of any existing contract, whether accomplished in accordance with a contract provision, or by mutual action of the parties to the contract. It includes change orders, extra work orders, supplemental agreements, contract amendments, or reinstatements.” Potential or actual subcontractors to the contractor, however, have no standing to protest a contract modification because they are not interested parties. Only an interested party, i.e., an actual or prospective bidder or offeror for a contract with the State, may protest the award of a contract. COMAR 21.10.02.01B(1). See John D. Lucas Printing Company, MSBCA 1973, 5 MSBCA ¶408(1996). Appellant, however, asserts that the contract modifications undertaken by MTA were an improper attempt to avoid a competitive procurement when it appeared Appellant would win such a procurement. Appellant also contends that a CCTV system is not within the scope of the bus contracts and thus must be procured by a separate contract rather than by a contract modification to an existing contract.

The absence of a timely challenge herein to whether the scope of the bus contracts would accommodate the CCTV system precludes the Board from considering any such issue. The Sexual Assault and Domestic Violence Center. Et Al., MSBCA 1858, 4 MSBCA ¶376(1995); Crystal Enterprises, MSBCA 1971, 5 MSBCA ¶407(1996).

Accordingly, the Board will only address the Appellant's contention that MTA used the contract modifications to avoid the probability of an award of a contract to Appellant for the CCTV system if a competitive procurement process were engaged in. The General Procurement Law and COMAR provide for contract modifications which include change orders. There clearly are appropriate sets of circumstances for their use and they are used routinely in State contracts. The Board is of the opinion, however, that the General Procurement Law and COMAR do not permit a State procurement unit to intentionally avoid or circumvent mandatory competitive procurement requirements to obtain desired supplies and services by the subterfuge or expedient of issuing a contract modification to an existing contract even where the supply or service is within the scope of the contract. See The Chesapeake and Potomac Telephone Company of Maryland, MSBCA 1194, 1 MSBCA ¶78(1984).

Unless specifically exempted, the General Procurement Law applies to all State contracting activity and mandates procurement by competitive sealed bidding unless other methods are authorized. Section 13-102, State Finance and Procurement Article. One such other authorized method is sole source procurement under Section 13-107 which is permissible when the Procurement Officer determines there is only one available source for the subject of a procurement contract. Appellant claims that MTA in effect engaged in an inappropriate sole source procurement (without meeting the statutory and regulatory requirements for a sole source procurement as set forth in COMAR 21.05.05) by use of the contract modification. In support of this argument Appellant notes that MTA was evaluating its product (system) and that its system was found acceptable by the

evaluation committee (Findings of Fact Nos. 4 and 15) and thus more than one source of supply existed. However, the Appellant bears the burden of proving that MTA engaged in an inappropriate sole source activity by entering into a contract modification with NABI to give Loronix the work involved and monetary compensation for such work when a competitive procurement should have been conducted. Appellant has not met its burden to prove these allegations which were rebutted by the testimony of MTA witnesses; specifically the testimony of Ms. Mowery, Mr. Shockley and Mr. Wolfe.

Appellant also argued on appeal that MTA was conducting the evaluation phase of a multi-step sealed bidding process under COMAR 21.05.02.17, a two-phase process where bidders submit unpriced technical offers or samples (or both) to be evaluated by the State and a second phase in which those bidders whose technical offers or samples (or both) have been found to be acceptable during the first phase have their price bids considered with award made to the low bidder. According to Appellant's allegations, this two-step competitive process was abandoned in favor of a contract modification when it appeared Appellant whose system was found acceptable in the first phase would submit the low bid. The record does not support these allegations.

The record reflects that MTA was engaged in normal ongoing product evaluation and pursuant to that evaluation determined that the Loronix system best met its minimum needs for a bus CCTV system at a price, albeit much higher than Appellant's price, that MTA found acceptable. The record further reflects that it is preferable from the standpoint of the bus manufacturer's warranty and compatibility with other electrical systems in the buses to install the CCTV system during the bus manufacturing process rather than as a separate add-on after the buses have been manufactured. See Finding of Fact No. 5. This did not preclude a separate competitive procurement to select a provider of a CCTV system and subsequent issuance of a contract modification for its installation to NABI prior to manufacture of the buses. However, the record reflects that it was more efficient, less time-consuming and less likely to compromise the enforceability of the bus manufacturer's warranty or integrity of other bus electrical functions to simply issue a contract modification for the CCTV system MTA wished to have installed based on MTA's normal ongoing product evaluation process.

Where the scope of the original contract is broad enough to include the subject of the contract modification (as we must in the absence of a timely challenge to this question assume it is) and the contract modification is not used as a subterfuge to exclude an acceptable equal (and the record in this appeal fails to support Appellant's allegation of subterfuge or equality) then a matter of agency discretion concerning how to obtain the item in question is presented.

Based on the record in this appeal, the Board will not challenge the judgment of the agency concerning a discretionary determination of whether more than one supply met its minimum needs, The Trane Company, MSBCA 1264, 2 MSBCA ¶118(1985); nor disturb the decisions concerning how that supply was to be obtained and what cost therefore was acceptable. Accordingly, the appeal is denied. Wherefore, it is Ordered this 22nd day of September, 1997 that the appeal is denied.

Dated: September 22, 1997

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 2019, appeal of Prima Facie, Inc. under MTA Modifications to Contract Nos. MTA-0634 and MTA-0661.

Dated: September 22, 1997

Mary F. Priscilla
Recorder