

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of TABS ASSOCIATES, )  
INC. ) Docket No.  
 ) MSBCA 1624  
Under DGS RFQ P7802 )

February 14, 1992

Decision Summary:

Bid Protest - Notice to Bidders - Standing - Where the public notice requirements of COMAR 21.05.02.04 are satisfied, a prospective bidder who does not submit a bid even where it did not actually receive the notice lacks standing to protest award to a contractor who actually submits a bid.

APPEARANCE FOR APPELLANT:

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Royston, Mueller, McLean  
& Reid  
Towson, MD

APPEARANCE FOR RESPONDENT:

Michael P. Kenney  
Assistant Attorney  
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APPEARANCE FOR INTERESTED PARTY:  
DDD Company

Daniel J. Katz, Esq.  
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the Department of General Services (DGS) reject all bids and resolicit the captioned procurement.

Findings of Fact

1. RFQ P7802 called for competitive sealed bids for a three-year Statewide services contract for pickup and sorting of mail for various State agencies involving from 30,000 to more than 100,000 items daily. Notice of the solicitation was published in the Maryland Register on September 20, 1991 stating that bids were due on October 21, 1991.

2. At the time of the solicitation for this RFQ in September, 1991, Appellant was the incumbent contractor pursuant to an oral extension to the previous three-year contract for such services which had expired on June 30, 1991. Prior to that, the Appellant and the State, including DGS and various other agencies, had enjoyed continuous contractual relationships since 1978.

3. In September 1991, DGS sent the instant solicitation (bid package) by regular mail to four vendors including Appellant on the State's vendor list for such services and to a fifth vendor who requested it having read the Maryland Register notice. The Appellant claims it never received the solicitation. At bid opening on October 21, 1991, only two bids had been submitted. Appellant did not submit a bid. Later that day, a DGS procurement official telephoned the Appellant to inquire why it had not submitted a bid.

4. At Appellant's request, a meeting was held at DGS on November 6, 1991 in which the Appellant confirmed that it did not submit a bid but denied receiving the solicitation. Subsequent investigation by DGS of the mailing of the solicitation and non-receipt by Appellant turned up no evidence of negligence by DGS and in a letter to DGS dated November 8, 1991, Appellant noted that as of that date it was unaware of any facts indicating any action or inaction on behalf of the State which contributed to Appellant's failure to submit a bid.

5. The record does not support an inference that Appellant did not receive the solicitation mailed by DGS due to the action or inaction of the State.

6. After further discussion and correspondence with the Appellant and its attorney, DGS requested Appellant to furnish written reasons by November 29, 1991 why DGS should reject all bids and allow the project to be rebid, thereby giving Appellant a chance to submit a bid for consideration.

7. After Appellant's response dated November 29, 1991 was received, the DGS procurement officer responded by letter to Appellant's attorney dated December 18, 1991 stating that it was not in the State's best interest to reject all bids and confirming that award would be made to the low bidder, DDD Company. Thereafter, Appellant appealed to this Board by letter dated December 27, 1991.

#### Decision

DGS contends it notified the Appellant of the solicitation directly by mail. Appellant insists that it never received such notification, which caused it to miss the bidding deadline.

In order for Appellant to have had standing to file a bid protest and appeal relative to the instant procurement it would ordinarily have been required to have submitted a bid.<sup>1</sup> It did not submit a bid because it alleges that it did not know about the procurement.

COMAR 21.05.02.04 relative to public notice of procurements

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<sup>1</sup>The facts in this appeal are to be distinguished from those instances where a firm files a pre-bid protest asserting a deficiency in the procurement and thereafter does not submit a bid. Filing of a pre-bid protest asserting, for example, that the specifications go beyond the minimum needs of the agency and thus improperly restrict competition would confer standing as an interested party even where the firm does not submit a bid. See Helmut Guenschel, Inc., MSBCA 1434, 3 MSBCA ¶ 211 (1989) pp. 7-8.

provides in relevant part:

.04 Public Notice

A. Distribution. Invitations for bids or notices of the availability of invitations for bids shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notices of availability shall indicate where, when, and for how long invitations for bids may be obtained, generally describe the supply, service, or construction desired, and may contain other appropriate information. A fee or deposit may be charged for the invitation for bids documents.

B. Publication.

(1) Notice of an invitation for bids for which the bid amount is reasonably expected to exceed \$25,000 shall be published in the Maryland Register unless the resulting contract is reasonably expected to be performed entirely outside this State or the District of Columbia. Publication shall be at least 20 days before the bid submission date. Publication of notice less than 20 days before bid submission is defective unless notice of the project is not required by State law.

In the instant procurement DGS complied with COMAR 21.05.02.04 A and B by mailing the solicitation to four potential bidders on the State's vendor list including Appellant in September of 1991 and publishing the notice of the invitation in the Maryland Register on September 20, 1991, more than 20 days prior to the date set for bid opening.

Where, as in the instant appeal, the public notice requirements of COMAR are satisfied, a prospective bidder who does not submit a bid even where it did not actually receive the notice lacks standing to protest award to a contractor who actually submits a bid or otherwise challenge the procurement. This is true even if the contractor (as in the case with Appellant) is the incumbent, because an incumbent contractor under the General

Procurement Law is entitled to treatment no better or worse than its non incumbent competitors. See Calso Communications, Inc., MSBCA 1277, 2 MSBCA ¶ 185 (1988); H&N Janitorial Service, MSBCA 1401, 2 MSBCA ¶ 191 (1988). Therefore, DGS was not required to make special efforts to notify Appellant that the contract would be rebid. On the other hand, failure by DGS to attempt to notify Appellant pursuant to the mailing or otherwise furnishing requirement of 21.05.02.04A might not have been in compliance with the goal of securing competition because Appellant was successfully performing the services and was on the State's vendor list.<sup>2</sup> However, the Appellant has failed to rebut DGS's assertion that it in fact mailed the solicitation to Appellant, notwithstanding Appellant's contention that it never received the solicitation. Accordingly, Appellant lacks standing to challenge the DGS procurement officer's determination that DGS would not reject all bids and resolicit. Accordingly, the appeal is dismissed.

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<sup>2</sup>This should be distinguished from the facts in H&N Janitorial Service, *supra* where that Appellant was performing janitorial services in one location that was included in a combined resolicitation of nine locations including the one Appellant was servicing. The record in that appeal reflected that the procurement officer reasonably determined in deciding which janitorial firms to contact to primarily consider the size contract the supplier had handled in the past. The procurement officer testified she did not contact the Appellant because in her opinion he was not likely to be prepared to handle nine locations since he had only bid on single location contracts in the past. The procurement officer did contact approximately ten contractors whom she believed were qualified to bid on the expanded nine location contract. The Board found that a sufficient number of competitors received notice of the solicitation to secure adequate competition pursuant to the notice requirements of 21.05.02.04A. The Board rejected Appellant's argument that the procurement officer was required to notify Appellant as the supplier on one of the nine locations to be rebid as a package.

