

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of TATE PERSONNEL
SERVICES, INC.

Under MVA Bid No. MVA
HQ-96145-S

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Docket No. MSBCA 1958

September 23, 1996

Invitation for Bids - Multi-Year Contracts

It is not improper for a unit to base a determination of low price on an average price for a multi-year period rather than price for the first year only where the estimated amount of supplies or services required for the multi-year period are reasonably firm and continuing and the price for such supplies and services for each year of the multi-year may be approximately determined.

APPEARANCE FOR APPELLANT:

Daniel J. Bartolini, Esq.
Bartolini & Seaman, P.A.
Eldersburg, MD

APPEARANCE FOR RESPONDENT:

Jonathan Acton
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals a final decision of the Motor Vehicle Administration's (MVA) Procurement Officer that its bid to provide the MVA with temporary employment services for three years was not the low bid.

Findings of Fact

1. On April 6, 1996, the above captioned procurement was advertise in the Maryland Contract Weekly to obtain temporary employment payroll management services during peak periods at MVA Headquarters and other offices over a three-year period.
2. This was a "multi-year contract" as defined in Md. State Fin. & Proc. Code Ann. §13-217(a) that requires appropriations for more than one fiscal year. Accordingly, the Invitation for

Bid (IFB) followed the multi-year contract procedure as set forth in COMAR under which a solicitation must state:

- (a) The amount of supplies or services required for the proposed contract period;
- (b) That a unit price shall be given for each supply or service, and that these unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);
- (c) That the multi-year contract shall be cancelled automatically if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the State's rights or the contractor's rights under any termination clause in the contract;
- (d) That the procurement officer shall notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;
- (e) Whether bidders or offerors may submit prices for:
 - (i) The first fiscal period;
 - (ii) The entire time of performance only, or
 - (iii) Both the first fiscal period and the entire time of performance;
- (f) That a multi-year contract may be awarded and how prices shall be determined, if prices for the first fiscal period and entire time of performance are submitted;
- (g) That the effect of termination is to discharge both parties from future performance of the contract, but not from their existing obligations. The contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract.

COMAR 21.06.03.09D(1)

3. In accordance with COMAR 21.06.03.09D(1)(a)&(b)above the IFB specifications provided:

The Maryland Motor Vehicle Administration (MVA) intends to use a temporary employment agency for payroll management purposes during peak periods. It is estimated there will be 150 temporary employees during these periods. The MVA will refer 70% of employees to be hired by the temporary employment agency. The employees will be used starting July 1, 1996 and ending June 30, 1997. Subsequent years will be determined by the Administration. The temporary employees will work in the MVA Headquarters Facility in Glen Burnie, Maryland and other offices as required located in Annapolis, Baltimore City, Charles Center Metro Express, Bel Air, Chesapeake City, Easton, Essex, Columbia , Frederick, Gaithersburg, Glenmont, Hagerstown, Landover, Largo, LaVale, Salisbury, Towson, Walnut Hill, Westminster and Waldorf. It is anticipated that additional offices will be opening in FY'97 in various counties throughout the State which will utilize temporary employee services. Listed below are the classifications and hourly rates to be paid:

CLASSIFICATION

PAY RATE

MVA Clerk I	\$6.50 hr.
MVA Clerk II	\$7.00 hr.
MVA Assistant I	\$5.15 hr
MVA Assistant II	\$5.60 hr
MVA Assistant III	\$6.00 hr

It is estimated that payroll payments and temporary service agency fees will total approximately \$900,000.00 for the contract period. The selected vendor will be required to pay employees at the rate of time and one-half in excess of 40 hours per week.¹

4. Included with the new IFB were a sample Contract and a Cost Sheet giving prospective bidders separate pricing options for each of the three year terms based on a percentage of 100% of temporary employee salaries.

Paragraph 30 of the General Conditions for Service Contracts (Section VI of the IFB), contained the remaining statements required by COMAR 21.06.03.09D(1)(c),(b)&(g).

5. Appellant received a copy of the IFB as the incumbent. Appellant never filed a pre-bid protest concerning any of its provisions.

6. An addendum (dated April 30, 1996) was issued on May 9, 1996, as a result of the pre-bid conference (held on April 30, 1996), to clarify the terms of the IFB with respect to averaging the add-on percentage rates for three years to determine the low bid. It read, in pertinent part:

Basis of award shall be the total sum of the Contractor's Percentage rate for three (3) years, averaged out for 1 year.

The award of this bid will be made to the responsive and responsible bidder meeting the specifications and submitting the lowest overall add-on percentage rate to cover the services required under this contract for three (3) years.

The Contractor shall adhere to the add-on percentage rate quoted on the Cost Sheet [sic] for each year of the contract.

¹ Except for the multi-year period, these "General Specifications" were identical to those in IFB No. MVA-HQ-95089-S for temporary employment services for a one year period. That IFB was issued in April 1995 and subsequently awarded to Appellant.

7. Appellant acknowledged receipt of the Addendum by signing a copy of the Addendum enclosed with its bid. Appellant did not protest the method of determining low price as set forth in the Addendum prior to bid opening.²

8. Bid were opened on May 10, 1996. There were four responsive and responsible bidders: Abacus Corporation (Abacus), Innovative Staffing Services, Kennedy Temporary Services and Appellant. Appellant submitted an add-on percentage of 16.0% for each one year term, an average percentage of 16% which was not the lowest. The low bidder was Abacus. It bid 16.19% the first year, 16.0% the second, and 15.8% the third for an average add-on percentage of 15.99%. Mathematically, Abacus was the lowest bidder by .01%. The MVA therefore proposed to award the contract to Abacus as the lowest responsive and responsible bidder.

9. Appellant filed a protest on May 22, 1996, alleging that the State lacked authority to enter into a multi-year contract and arguing that Appellant was "plainly the low bidder" for the first year. Appellant maintained in its protest that the estimated requirements for temporary services in the succeeding years were not reasonably firm and, without an appropriation, the State could not enter into a valid contract for them.

10. The MVA Procurement Officer denied Appellant's protest by final decision dated June 11, 1996 and Appellant appealed. No hearing was held, the parties having submitted on the record.

Decision

Appellant argues that the State may not legally base a low bid on any price other than the price set forth by a bidder for the first year in a multi-year contract, at least where there is a lack of appropriation other than for the first year and a lack of reasonably firm estimated requirements necessary to determine actual cost in any year.

The decision of the Procurement Officer was based in part on the language in Section 30 of the IFB General Conditions, "Multi-Year Contracts Contingent Upon Appropriations", which provides that a multi-year contract is automatically cancelled if funds are not appropriated. Also reflected in the Procurement Officer's decision was language in the Addendum which clarified the

² It was noted on Appellant's cost sheet that it had "carefully examined" Addendum No. 1 dated April 30, 1996, and had "received clarification on all items of conflict. . . ."

basis for the award as the total sum of add-on percentage rates for three years, averaged for one year.

Appellant did not protest the methodology for determining the low bid set forth in the Addendum which provided for award based on the lowest annual percentage rate derived by adding the percentage rate set forth for each of three years and dividing by three. In the absence of pre-bid protest such methodology may not now be challenged because COMAR 21.10.02.03A requires a protest based upon alleged improprieties in a solicitation that are apparent before bid opening to be filed before bid opening. See Bernie's Vending Service, Inc., MSBCA 1420, 3 MSBCA ¶207(1989).

The Addendum further estimated payments and fees at \$900,000 for a one year period and stated that contractual agreements would be signed annually if required and in the best interest of the State. In its Appeal, Appellant renewed its arguments that the estimated requirements for temporary services were not reasonably firm and that the State lacked authority to enter into a multi-year contract without an appropriation. Appellant continued to assert that Appellant was the low bidder for the first year and that the first year is the only year that may be considered to determine price because of the lack of an appropriation for anything other than the first year and the lack of reasonably firm estimated requirements necessary to determine cost. It may be argued that Appellant merely challenges the methodology for determining the low bid and thus consideration of the protest and appeal is barred jurisdictionally due to lack of timeliness. However, we will discuss whether the MVA Procurement Officer properly rejected Appellant's assertion that only the price (percentage rate) bid for the first year in this procurement could be considered in determining contract award.

A "Multi-Year Contract" is defined as a procurement contract requiring appropriation for more than one (1) fiscal year. MD. State Fin. & Proc. Code Ann. §13-217(a). There are two conditions for approval of a multi-year contract. First, estimated requirements of the State must be reasonably firm and continuing over the contract period. Second, the procurement unit must determine "the multi-year contract will serve the best interest of the State by encouraging effective competition or otherwise promoting economy in State procurement." Md. State Fin. & Proc. Code Ann. §13-217(c). A multi-year contract terminates automatically by operation of law if there is not sufficient money appropriated in any fiscal year. Md. State Fin. & Proc. Code Ann. §13-217(d).

Multi-year contracts are allowed under §13-217(b), subject to standards set by the Board of Public Works and regulations of the primary procurement unit. MVA is a unit within the Department of Transportation. The Department of Transportation is a primary procurement unit with respect to its construction contracts and architectural and engineering contracts. Md. State Fin. & Proc. Code Ann §§11-101(1)(4), 12-107(b)(4). However under §12-107 (b)(4), the Board of Public Works retains jurisdiction over service and maintenance contracts for the Department of Transportation. This means the Board of Public Works is the primary procurement unit for this contract, which is a service contract.

According to the Board of Public Works regulations on multi-year contracts, one objective of the multi-year contract is:

to promote economy and efficiency in procurement . . . by increasing competitive participation in procurements which involve special production or high phase-in/phase-out cost during changeover of service contractors.

COMAR 21.06.03.09B. Similarly COMAR 21.06.03.09A makes a multi-year contract appropriate

when it is in the best interest of the State to obtain uninterrupted services extending over more than one fiscal period, when the performance of the services involves high start-up costs, or when a changeover of services contractors involves high phase-in/phase-out costs during a transition period.

(emphasis supplied)

The Addendum issued in the captioned procurement served to clarify the specifications and contract periods for all interested bidders. Prospective bidders were told the estimated payments and fees were approximately \$900,000 for a 1-year period. They were also told the add-on percentage rates for 3 years would be averaged and that the contractor submitting the “lowest overall add-on percentage rate” would receive the award. Prospective bidders were told they must adhere to the quoted add-on percentage rate for each year of the contract.

Based on the record before this Board (stipulated by the parties to be complete), it would appear that the estimated requirements for the captioned multi-year contract are reasonably firm for the first year and may reasonably be expected to stay the same in subsequent periods (years). Upon its reading of the language of the instant IFB and Addendum, Appellant argues that it is not possible to ascertain from the IFB for any period (year) how many individuals in each particular pay classification set forth would be used and thus the estimated requirements are not reasonably

firm such as to permit use of a multi-year contract. The Board determines, however, that neither Md. State Fin. & Proc. Code Ann. §13-217(c)(1)(ii) nor COMAR 21.06.03.09D(1)(a) require the level of specificity argued for by Appellant. Thus, the Board finds that the Procurement Officer reasonably viewed the estimated requirements of the contract to be firm and continuing where only the total number of employees and classifications were set forth.

By definition, a multi-year procurement is one requiring appropriations for more than one fiscal year. Md. State Fin. & Proc. Code Ann. §13-217(a). By law, if sufficient money is not appropriated "for any fiscal year," a multi-year contract automatically terminates. Md. State Fin. & Proc. Code Ann. §13-217(d). The Legislature has anticipated that appropriations for multi-year contracts may not continue from year to year and a State official may be removed for spending in excess of appropriations. Md. State Fin. & Proc. Code Ann. §7-234. The Legislature has nevertheless provided for multi-year contracts subject to funding availability. We find no defect in the expression of such limitation as set forth in this IFB.

The MVA Procurement Officer properly determined that Abacus was the low bidder under clearly defined methodology for determining the low bid that was not challenged until after bids had been opened. Accordingly, the appeal is denied.

Wherefore, it is Ordered this 23rd day of September, 1996 that the appeal is denied.

Dated: September 23, 1996

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 1958, appeal of Tate Personnel Services, Inc. under MVA Bid No. MVA HQ-96145-S.

Dated: September 23, 1996

Mary F. Priscilla
Recorder