

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of TELEX COMPUTER
PRODUCTS, INC.

Under Comptroller of the
Treasury Request for Proposals
for Alphanumeric Display
Station (CRT), Terminal Printers
and Terminal Controllers

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) Docket No. MSBCA 1110
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May 25, 1983

Jurisdiction - Maryland law permits an interested party to request a procurement officer's decision to reject all bids and cancel a solicitation. Concomitantly, this Board has jurisdiction to hear and resolve appeals taken from the procurement officer's decision on such protests.

Rejection of All Proposals - A State procurement officer reasonably exercised his discretion in rejecting all proposals and cancelling a solicitation in the State's best interest where (1) the required approval from the Department of Budget and Fiscal Planning could not be obtained for the purchase of data processing equipment, and (2) it appeared fiscally advantageous for agencies using the Comptroller of the Treasury's computer services individually to procure their data processing equipment.

APPEARANCE FOR APPELLANT:

Mr. Jack Serena
Telex Computer Products, Inc.
Baltimore, Md.

APPEARANCE FOR RESPONDENT:

Gerald Langbaum
Assistant Attorney General
Annapolis, Md.

OPINION BY MR. KETCHEN

This is an appeal from a Comptroller of the Treasury (Comptroller) procurement officer's final decision rejecting all proposals in a negotiated procurement for data processing equipment. Appellant maintains that it was not in the State's best interest to reject all proposals and cancel the procurement. The Comptroller contends that its action in rejecting all proposals and cancelling the procurement was reasonable and that, in any event, this Board does not have jurisdiction to review the matter since there was no contract award.

Findings of Fact

1. The Comptroller issued a request for proposals (RFP) on December 11, 1981 for a negotiated procurement of data processing equipment consisting of alphanumeric display stations (CRT), terminal printers and terminal controllers. The resulting contract would have established prices for purchase of an indefinite quantity of data processing equipment under a statewide basic ordering agreement for a thirty-six (36) month period.

2. RFP Section I, Paragraph G provided for proposal evaluation as follows:

"G. Evaluation Committee

A committee made up of State personnel will review all proposals and make recommendations to the Director of the [Data Processing] Division for the selection of the Vendor to supply the equipment and services as stated in this request. Contract awards, if any, are subject to appropriate State approvals. (Underscoring added.)

3. Twelve companies submitted proposals. After eliminating seven proposals on technical grounds, the Evaluation Committee considered proposals submitted by International Business Machines Corporation (IBM), Memorex Corporation, Mohawk Data Systems, Municipal Leasing Corporation, and Telex Computer Products, Inc. (Telex).

4. The RFP permitted vendors to submit proposals for any or all of the nine categories of data processing equipment described therein. The Evaluation Committee ultimately recommended award to IBM for categories 1-2, 6-9, and to both Telex and IBM for categories 3, 4, and 5. A description of these categories of equipment is unimportant to the resolution of this appeal.

5. By letter dated April 26, 1982, the Comptroller submitted the recommendations for award to the Department of Budget and Fiscal Planning as required by Md. Ann. Code, Art. 15A, §23B (1981 Repl. Vol., 1982 Supp.).¹

¹Md. Ann. Code, Art. 15A, §23B provides for coordination of the purchase of data processing equipment as follows:

"The Secretary [of Budget and Fiscal Planning], after consultation with the State Comptroller, shall be responsible for planning and controlling data processing in the several departments and agencies of the State government. The Secretary shall continuously study the data processing function within the State in order to improve its efficiency and economy. All changes effected by any department or agency pertaining to data processing shall first be reviewed and approved by the Secretary for compatibility with existing procedures and equipment. The purchase, lease, or rental of mechanical or electronic data processing equipment for all State departments and agencies shall be reviewed and approved by the Secretary prior to the purchase, lease, or rental." (Underscoring added.)

6. In a letter dated May 13, 1982, the Department of Budget and Fiscal Planning approved the award to IBM for Categories 1-2 and 6-9. However, after further consultation with the Office of the Comptroller, the Secretary of the Department of Budget and Fiscal Planning (Secretary) advised, by letter of July 19, 1982, that he would not approve multiple awards to IBM and Telex for categories 3, 4, and 5. Multiple awards were considered to be improper under COMAR 21.06.03.10.² In the opinion of the Secretary, only Telex was entitled to award for these categories of equipment.

7. In a letter dated August 5, 1982, the procurement officer notified all companies submitting proposals as follows:

"All proposals are being rejected as provided in COMAR 21.06.02.01C. We have determined that this action is in the best interest of the State in that the complexities of trying to serve the various interests and needs of so many agencies with one procurement may cause unnecessary complications in contracting to meet the operational needs of each agency.

It is this office's opinion that any future needs for the type of devices anticipated by this procurement will be handled by the individual departments as needed, if any."

This action was taken, in part, because the Secretary did not approve the award to both IBM and Telex for equipment categories 3, 4, and 5. (Tr. 40). In addition, the procurement officer decided that he could not accurately estimate the actual data processing needs and costs of data processing equipment for the thirty-six month contract term for the 30 agencies using

²COMAR 21.06.03.10 provides:

"When a multiple award is made, all State agencies shall order all of their actual normal requirements for the specified supplies or services from contractors awarded the contract. A multiple award may be in the State's best interest when an award to two or more bidders or offerors for similar products is needed for adequate delivery, service, availability, or for product compatibility. In making a multiple award, care shall be exercised to protect and promote the principles of competitive solicitation. Multiple awards may not be made when a single award will meet the State's needs without sacrifice of economy or service."

the Comptroller's computer services which is required by the Board of Public Works policy for contracts over \$100,000. (Tr. 26-27, 39, 43). He also determined that the individual agencies could purchase their data processing equipment less expensively based on their assessment of needs and agency budgets. (Tr. 30). In this regard, the procurement officer concluded that he had no control over the contracting authority of these agencies and thus could not require them to purchase from a basic ordering agreement. (Tr. 43). For these reasons, the procurement officer determined that it was fiscally advantageous and in the State's best interest to reject all proposals and cancel the solicitation.

8. On August 12, 1982, Appellant sent a letter to the Comptroller's office protesting the decision rejecting all proposals and cancelling the solicitation.

9. By letter dated August 30, 1982 Appellant's protest was denied on the ground that there was no award and thus no action subject to protest pursuant to COMAR 21.10.02.

10. Appellant filed a timely appeal with the Board.

Decision

We initially will address whether a party has the right to protest a decision rejecting all bids and cancelling the solicitation. In this regard, COMAR 21.10.02.02A provides that:

"An interested party may protest to the respective procurement officer representing the State agency against the award or the proposed award of a contract for supplies, services, maintenance, or construction." (Underscoring added.)

Since the term "award" is defined in COMAR 21.01.02.06 as ". . . the decision by a procurement agency to appoint or present a purchase agreement or contract to a vendor," the Comptroller contends that there is no right to protest a decision to reject all bids.

The issue the Comptroller raises is the same as that considered in Solon Automatic Services, Inc., MSBCA 1046 (January 20, 1982) at p. 10, rev'd on other grounds, Solon Automated Services, Inc. v. University of Maryland, Miscellaneous Law No. 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982). There, as here, it was argued that neither the procurement officer nor concomitantly the Board had been authorized by the Legislature to consider a protest concerning the rejection of all bids. In Solon, the Board expressly held that:

"The regulations thus implement Article 21 and cannot limit the procedural and substantive rights conferred by statute.

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Where the law and regulations pertaining to each step in the procurement process are not followed or applied reasonably, a prospective bidder may be prejudiced. In view of this, and in contemplation of the purposes and policies expressed by the

Legislature in §1-201 of Article 21, the Board concludes that an unqualified right to file a bid protest exists whenever an interested party considers that a State procurement officer has omitted to adhere to the legal and procedural requirements essential to the procurement process, or otherwise has failed to exercise reasonably the discretion provided therein. Since Solon's appeal addresses the issue of whether UMBC adhered to the law and regulations in rejecting all bids, it unqualifiedly falls within the scope of the Board's jurisdiction." (Footnotes omitted). Solon, supra, at pp. 10-12.

Maryland procurement regulations are consistent with this conclusion. For example, COMAR 21.10.02.01B defines a protest as ". . . any dispute relating to the solicitation, selection, or award of a State contract." With regard to disputes concerning improprieties in the solicitation apparent before bid opening or the closing date for receipt of initial proposals, COMAR 21.10.02.03A further provides that protests ". . . shall be filed before bid opening or the closing date for receipt of initial proposals." Obviously, from these provisions, it is clear that the promulgators of the regulations have interpreted Maryland law to provide the same broad right to protest as we found existed in Solon.

We turn now to the decision to reject all proposals and cancel the solicitation. Rejection of proposals and cancellation of a solicitation is permitted by Md. Ann. Code, Article 21, §3-301³, and by COMAR 21.06.02.01C, which states as follows:

(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 officer, with the approval of the agency head or his 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 State agency no longer requires the supplies, services, maintenance, or construction;

* * *

(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; . . .

The determination of whether it fiscally is advantageous or otherwise in the State's best interest to reject all proposals and cancel a solicitation has been left to the collective discretion and judgment of the procurement officer

³Article 21, §3-301 provides:

"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 interest 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."

and agency head. Under Maryland law, this Board only may review the exercise of such discretion to ascertain whether it was fraudulent or so arbitrary as to constitute a breach of trust. See Hanna v. Board of Education of Wicomico County, 200 Md. 49, 51, 87 A.2d 846, 847 (1952); Biddison v. Whitman, 183 Md. 620, 624-25, 39 A.2d 800, 801, 802 (1944).

Here, without approval by the Secretary of Budget and Fiscal Planning, the procurement officer, by law, could not make an award in equipment categories 3, 4 and 5. (Findings of Fact No. 5). Also, the Comptroller's office no longer required the data processing equipment in the sense that it did not know what the State's needs or costs would be, and had no control over the purchasing authority of the State agencies using its computer services. (Findings of Fact No. 7.) In this regard, the procurement officer reasonably determined that it would be fiscally advantageous for these agencies individually to procure their data processing equipment. (Findings of Fact No. 7). Appellant, on the other hand, affirmatively stated that it did not believe the decision rejecting all bids and cancelling the solicitation was fraudulent, or that it amounted to a breach of trust. (Tr. 13). Similarly, Appellant did not contend that the decision was unreasonable, but merely that in its opinion the State's best interest was in awarding a contract to Appellant. Under these circumstances, we conclude that the procurement officer reasonably exercised his discretion in rejecting the proposals and cancelling the procurement. Compare Inner Harbor Paper Co., MSBCA 1064 (September 9, 1982) at p. 5.

For the foregoing reasons, therefore, the appeal is denied.