

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of The Reverend Charles)
T. Cephas a/k/a C.C.P.I and)
Ms. Darlene Sanders)
) Docket Nos. MSBCA 2004 & 2012
Under SHA IFB Contract No.)
5272021499)
)

July 11, 1997

Bid Protest - Interested Party - Non-bidder - There is no requirement to submit a bid as a jurisdictional condition to a review of a pre-bid protest on the merits by the Procurement Officer and by the Board of Contract Appeals.

APPEARANCE FOR APPELLANTS: None

APPEARANCE FOR RESPONDENT: Linda D. Strozyk
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellants timely appeal the denial of their bid protests that certain of the specifications and requirements and the scope of the captioned procurement discriminate against minority business enterprises.

Findings of Fact

1. These consolidated appeals involve pre-bid opening protests that certain of the requirements set forth in the captioned State Highway Administration (SHA) Invitation for Bids (IFB) for the operation of three drawbridges in Talbot County were drawn to exclude minority business enterprises and to favor non-minority Contractors.
2. Specifically, the Appellants allege, inter alia,¹ that: (1) The requirement for bid, performance and payment bonds as set forth in the IFB discriminates against male and female minority

¹ Reverend Cephas' pre-bid protest was filed with SHA on February 14, 1997 and bid opening was postponed from February 27, 1997 until March 27, 1997. Ms. Sanders' pre-bid protest was received by SHA on March 25, 1997.

business enterprises. (2) The IFB specification requirement that only authorized personnel be permitted in the drawbridge bidgetenders houses discriminates against married contractors who may have spouses, children and other family. (3) The IFB specification requirement for the contractor's bidgetenders to obtain approval under a certified training program conducted by SHA or its representatives prior to operating a drawbridge unlawfully interferes with a contractor's right as an independent contractor to train its own personnel.

(4) The requirement that only authorized personnel be permitted in the drawbridge bidgetender houses and the bidgetender training requirement create an employer/employee relationship between the contractor and SHA in violation of federal tax laws. (5) The requirements for bonding, training and restricted bidgetender house access discriminate against female and minority business enterprises and were drafted to favor non-minority contractors. (6) The three drawbridges were included in one contract, rather than three separate contracts, as was the past practice, to increase the cost to allow bonding (under COMAR 21.06.07.01B) for contracts expected to exceed \$100,000.00, thereby impacting small minority businesses who might have difficulty obtaining bonding to be competitive.

3. Bid opening occurred on March 27, 1997. Ms. Sanders did not submit a bid. The Reverend Charles T. Cephas a/k/a C.C.P.I. submitted (under the name of Charles Cephas Enterprises) the low bid of \$99,975.00. Two other bids were received; one for \$258,450.00 and one for \$351,424.44. The SHA engineers' estimate for the cost of the work was \$290,000.00.
4. In the Procurement Officer's final decision on the protest of Ms. Sanders, the Procurement Officer declined to discuss Ms. Sanders' protest on the merits finding that Ms. Sanders lacked standing to protest because she did not submit a bid. The Agency Report likewise noted lack of standing concluding that Ms. Sanders is not an "interested party" under COMAR 21.10.02.01B(1). This Board finds, however, that there is no requirement to submit a bid as a jurisdictional condition to a review of a pre-bid protest on the merits by the Procurement Officer and by this Board. Such a conclusion we believe is mandated by a harmonious reading of all of the protest provisions of Chapter 02, Subtitle 10 of Title 21. See Helmut Guenschel, Inc., MSBCA 1434, 3 MSBCA ¶211 (1989) at pp. 7-8; William F. Wilke, Inc., MSBCA 1162, 1 MSBCA ¶61 (1983). However, the essentials of the merits of Ms. Sanders' protest were discussed in the Agency Report and thus the position of the SHA Procurement Officer on the grounds of protest advanced by Ms. Sanders is set forth in the written record in these consolidated appeals. We could remand the matter to the Procurement Officer for a specific determination of the merits of Ms. Sanders' protest. We decline, however, to remand the matter because we find that the Attorney General has set forth the agency's position (i.e., the position of the Procurement Officer and reviewing authority on the merits of the protest) in the Agency Report and do not believe based on this record that the further delay that a remand would involve to achieve technical compliance with COMAR is appropriate. In this regard we note that Ms. Sanders did not file comment on the Agency Report nor appear in person or through an authorized representative at the date and time scheduled for hearing the consolidated appeals.
5. The Reverend Cephas did submit comment on the Agency Report but did not appear in person or through an authorized representative at the date and time scheduled for hearing of the consolidated appeals. The written comment filed by Reverend Cephas reiterated the arguments advanced in Reverend Cephas' protest that the specifications regarding access to the bridge tenders house were overly restrictive, that the bonding requirements were

improper, and that the training requirements created an impermissible employee/employer relationship. However, no evidence to support these assertions was provided with the comments.

6. The Agency Report for each appeal addresses the various grounds of pre-bid opening protest lodged by Ms. Sanders and Reverend Cephas. Because the Appellants did not appear at the date and time set for hearing, the consolidated appeals are decided on the written record.

Decision

The central issue that the protests filed by the Appellants raise for determination by this Board is whether the Procurement Officer acted within his discretion in determining that the authorized personnel restriction, training and bonding requirements of the contract are in the best interest of the State and are necessary to meet the State's minimum needs without unreasonably restricting competition. The Board also must determine if the State improperly included three drawbridges in one contract rather than procure operator services for each drawbridge separately.

Appellants assert that the restriction in the specifications that only authorized personnel may be permitted in the bridge-tenders house is a violation of the "privilege of a contractor to control his operation" and violates the "constitutional and religious right of the contractor, bridge attendants, and their visitors." Appellants note that this provision will limit the attendants from having visitors in the bridgetender's house including their spouses, children and family.

The record reflects that the Procurement Officer reasonably determined that it is in the best interest of the State to include the requirement in the contract special provisions that only authorized personnel (i.e. bridgetenders) will be permitted in the bridgetender house. The Procurement Officer found that the presence of unauthorized individuals in the bridgetender's house creates unacceptable risk of harm and liability and that this requirement is not unduly restrictive of competition as alleged by these Appellants. The Agency Reports reflected that the scheduling of work shifts is not restricted in any manner by the contract specifications and is within the control of the contractor. The contractor is thus free to provide relief shifts so that an attendant may have a lunch break outside the bridgetender house. The provision simply requires that only authorized personnel operate the bridge and be permitted in the bridgetender house. Such requirement has not been shown on this record as not being necessary to meet the State's minimum needs or to unreasonably restrict competition. See Xerox Corporation, MSBCA 1111, 1 MSBCA ¶48 (1983); Helmut Guenschel, Inc. MSBCA 1434, 2 MSBCA ¶211 (1989) at pp. 9-11; COMAR 21.04.01.02A.

The Procurement Officer rejected Appellants' assertion that the requirement that all attendants receive bridge operation and safety training is an unreasonable requirement and unduly restricts the contractor's control of its employees.

The record reflects that the Procurement Officer reasonably found that the requirement that all bridgetenders receive training in the basic operation of the bridge as well as emergency and safety procedures is in the best interest of the State. A drawbridge attendant is responsible for the public safety of the drawbridge. The record reflects that the Procurement Officer reasonably determined that the training requirement enhances public safety and does not interfere with the daily operation

of the contract nor interfere with the contractor's control of his employees. Although employees of the Reverend Cephas currently operate one of the drawbridges included in this contract, the State may determine, consistent with its minimum needs, that for safety and liability reasons, it wishes to assure that each bridge attendant is not only aware of the basic operation of the bridge but also has received basic training in emergency and safety procedures. The Agency Reports reflected that once an employee has received the required training and has passed the safety test, the daily control and management of employees is the responsibility of the contractor and Appellants have submitted no proof that there is anything in the training requirements which interferes with the contractors daily management of its employees and the means by which contract specifications are met.

The Appellants have not met their burden to show that such training requirement is not necessary to meet the State's minimum needs or unreasonably restricts competition. See Helmut Guenschel, Inc., supra at pp. 9-11; COMAR 21.04.01.02A.

Finally Appellants protest the bonding requirements on this contract and request that the State waive said requirements. The contract requires acceptable security for bid performance and payment bonds as stated in COMAR 21.06.07.01B.

Appellants assert that bonding requirements promote unfair trade practices, discriminate and eliminate competitive bidding and eliminate start-up business enterprises from being able to compete competitively because of the impossibility of getting bonded due to the bonding company's asset requirements.

The issue before this Board is whether the requirement for bonds on a contract expected to exceed \$100,000.00 unreasonably restricts competition. Under Maryland procurement law, the Procurement Officer has broad discretion in drafting specifications to meet the State's minimum requirements provided such requirements do not unreasonably restrict competition in contravention of the State's policy of fostering maximum practical competition. Admiral Services, Inc., MSBCA 1341, 2 MSBCA ¶159 (1987). The record reflects that the Procurement Officer had determined it was in the State's best interest to require bonds on this contract, particularly in the event of default. The State argues in the Agency Report that it has limited resources and a default by the contractor without the protection of a performance bond would involve expense to the State. There is no evidence in the record to suggest that this argument may be an unreasonable premise for including bonding requirements in the IFB.

While bid, performance, and payment bonds may not be required for service contracts under \$100,000.00, the legislature has determined that it is proper for the State to consider including such bonding requirements in service contracts expected to exceed \$100,000.00. State Finance and Procurement Article, §13-216(d). There is absolutely no evidence in the record to suggest that the State determined to combine the three drawbridges into one contract rather than bid each drawbridge separately in order to increase the cost of the contract above \$100,000.00 so as to authorize the bonding requirements to eliminate minority business participation. Appellants have not met their burden of proof in this regard.

For the foregoing reasons the appeals are denied. Wherefore, it is Ordered this 11th day of

July, 1997 that the appeals are denied.

Dated: July 11, 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 2004 & 2012, appeals of The Reverend Charles T. Cephas a/k/a C.C.P.I. and Ms. Darlene Sanders under SHA IFB Contract No. 5272021499.

Dated: July 11, 1997

Mary F. Priscilla
Recorder