

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Cigna Corporation)
)
) Docket No. MSBCA 2910
Under MTA Contract)
Nos. 1400A-C)

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OPINION BY BOARD MEMBER DEMBROW

This bid protest challenges the propriety of the State's decision to reject all bids and re-issue the solicitation due to deficiencies in the pricing information initially requested, and also the lawfulness of the State's extension of the contract with the incumbent vendor during the period of delay resulting from the defective procurement documents included in the original solicitation.

Findings of Fact

1. On May 22, 2014, the Maryland Transit Administration (MTA) issued three (3) Requests for Proposals (RFPs), identified as MTA RFP Nos. 1400A-C, for the purpose of acquiring administrative services in the nature of management of health care benefits for medical, dental and pharmacy coverage. Three (3) Addenda followed the initial release of the solicitation. The duration of the contract was an initial term of three years followed by two option years.

- (Tr. 141.)
2. The RFP at issue was mistakenly released by MTA without requisite authorization from MTA's procurement control agency, namely, the Department of Budget and Management (DBM). (Tr. 163, 186-187, 301.)
 3. The administration of MTA's self-insured medical, prescription drug, dental and vision program for active union employees, retirees, and their eligible dependents had earlier been awarded to an entity known as CareFirst BlueCross BlueShield (CareFirst), with a contract that expired on December 31, 2014.
 4. By e-mail to MTA dated July 11, 2014, DBM questioned portions of the RFPs including the adequacy of MTA's pricing sheet used for the solicitation. (App. Ex. 14.)
 5. On July 18, 2014, Cigna Corporation (Cigna) submitted its response to the RFPs. Another proposal was submitted by CareFirst of Maryland, Inc., CareFirst BlueChoice, Inc. and the Dental Network, Inc. (a/k/a CareFirst). (Tr. 257.)
 6. It took considerable effort for private vendors to respond to these RFPs. (Tr. 103.)
 7. On August 5, 2014, MTA requested submission of Best and Final Offers (BAFOs). (Tr. 257.) The BAFO form used by MTA was simplistic compared to pricing proposal forms used for comparable financial evaluation of proposals in other RFPs to solicit similar detailed specialized complex services. (State's Ex. 1, 2, 3, 4; App. Ex. 6.) That form failed to include spaces for offerors to indicate total price or any pricing information at all for the two option years of the contract after the initial three-year term. (Tr. 166, 244, 246, 302, 351, 353.) It also failed to include spaces for offerors to reflect trend factors, discount rates, and other important substantive information. (App. Ex. 6, 12; Resp. Ex. 1; Tr. 115, 136, 167, 205, 247, 249, 302, 305, 357.)
 8. The total cost of the CareFirst proposal was approximately

\$63.7 million compared to Cigna's pricing offer to MTA of approximately \$47.6 million, a difference of \$16 million. (App. Ex. 6; Tr. 127.)

9. After review of the technical and financial proposals, on August 21, 2014, MTA recommended award of the contracts to Cigna and sent to Cigna a letter of intent to award. (App. Ex. 7.)
10. On August 25, 2014, CareFirst received an MTA de-briefing.
11. The following day, MTA provided Cigna with contract documents which were promptly executed and returned.
12. On August 29, 2014, CareFirst filed a bid protest objecting to award of the contracts to Cigna. (App. Ex. 8.)
13. On September 3, 2014, MTA denied the bid protest filed by CareFirst. (App. Ex. 9.)
14. On September 11, 2014, CareFirst filed an appeal with the Maryland State Board of Contract Appeals (Board) which was docketed as MSBCA No. 2903 and dismissed by the Board on October 20, 2014 when it was voluntarily withdrawn following MTA's decision to reject all bids.
15. By memorandum dated September 30, 2014 and executed on October 2, 2014 the procurement officer issued an internal MTA document titled Procurement Officer's Determination (POD) which memorialized the failure of the financial pricing forms to "include a full term cost or a bottom line figure in order to properly evaluate" and explaining the need to conduct a new solicitation because the Financial Evaluation Team had evaluated the financial proposals in a manner "inconsistent with the RFP." (App. Ex. 13; Resp. Ex. 15; Tr. 172, 194, 219, 238.) That POD was approved on October 2, 2014 by the MTA Director of Procurement as well as the MTA Administrator. (Tr. 199, 239.)
16. The pricing forms attached to the RFPs did not include any space indicating total cost, though the three-year cost of each proposal could be determined by tallying the costs for

- each of the first three years for which cost information was elicited.
17. The defective and deficient pricing forms should have been corrected before release of the RFPs. (Tr. 246, 251.)
 18. The defective and deficient pricing form should have been corrected as a part of the BAFO request. (Tr. 244.)
 19. MTA's determination to reject all proposals and re-issue the solicitation was a mutual determination of MTA, DBM, and representatives of the Board of Public Works (BPW). (Tr. 162, 249, 326-328, 344.)
 20. Without providing any details, by correspondence dated October 2, 2014, MTA notified proposers only that "it is in the State's best interest to reject all proposals and re-advertise this solicitation." (App. Ex. 10; Tr. 284.)
 21. The sudden rejection of its proposal late in the procurement process after it had been recommended for award and sent contract documents for execution came as a complete surprise to Cigna. (Tr. 124.) The Cigna representative responsible for Cigna's proposal to MTA testified that out of an experience of managing approximately 150 government contract proposals in seven states, she had never before encountered a cancellation of a solicitation after notification of award. (Tr. 125.)
 22. Besides the pricing form, the initial solicitation was also defective in that the three (3) MTA unions had not been afforded the opportunity of reviewing the procurement as required by their collective bargaining agreements (CBA). (Tr. 179, 254-256, 270.)
 23. Initially, the CBA violation was not mentioned by MTA as a cause of its decision to reject all proposals, though it was cited in MTA's November 12, 2014 denial of Cigna's bid protest referenced below. (App. Ex. 15.)
 24. On October 8, 2014, Cigna protested the rejection of all proposals, requesting that MTA reinstate its recommendation

- for award of the contracts to Cigna.
25. In order to maintain MTA employee health insurance coverage in full force pending the new solicitation, on November 3, 2014, MTA requested that BPW award a one-year extension or "bridge" contract to CareFirst, continuing its services through the end of calendar year 2015.
 26. On November 10, 2014, Cigna protested the proposed one-year extension of the CareFirst contract.
 27. On November 12, 2014, MTA denied Cigna's protest after which Cigna immediately filed the instant appeal with the Board. (Tr. 213.) Later the same morning, BPW approved a one-year contract for CareFirst to continue to provide for health coverage administrative services for MTA from January 1, 2015 until December 31, 2015. (App. Ex. 15.)
 28. The one-year extension contract included administrative fees to CareFirst in the amount of \$3,923,889. (App. Ex. 11.)
 29. At the BPW meeting of November 12, 2014, the Comptroller and State Treasurer made comments and inquiry critical of the proposal to extend the CareFirst contract for another year without the benefit of competitive bidding. (BPW Transcript, 11/12/14 at 64-65.)
 30. The new solicitation for MTA's health care coverage administrative services included pricing forms that were much more comprehensive and thorough than the pricing sheets or BAFO forms used in the initial solicitation. Specifically, the new pricing forms were prepared with the assistance of an expert consultant in the specialized field of procurement of administrative services to manage payment of health care benefits. (Tr. 308.) The revised forms included trend factors used to project future costs, as well as spaces for offerors to state such items as negotiated discount rates from average wholesale pricing (AWP) of pharmaceutical manufacturers and discounts from physician provider networks. (Tr. 364.) Variation in those discount

rates accounts for very wide price disparities in the cost of health care. (Tr. 370.) The revised pricing forms for the new solicitation consist of dozens of pages for submission of a number of tables of financial information. (Resp. Ex. 2, 4; Tr. 147.)

31. Rather than cancelling and reissuing the solicitation, if the State had elected to issue a second BAFO promulgating a sufficiently detailed pricing form, Cigna could have completed such a form in about a week. (Tr. 132, 354, 366.)
32. A two-day hearing was concluded on June 29, 2015.

Decision

Appellant alleges that two improprieties occurred in the course of the State's procurement activity described above: (1) MTA's rejection of all proposals, and (2) BPW's approval of a one-year extension of the CareFirst contract. As correctly noted by Cigna counsel, Maryland procurement law is intended to accomplish some very important public policy objectives including, "ensuring fair and equitable treatment of all persons who deal with the State Procurement system," "providing safeguards for maintaining a State procurement system of quality and integrity," and "getting the maximum benefit from the purchasing power of the State." Maryland Annotated Code, State Finance and Procurement Article (SF&P) Sec. 11-201(a). These objectives are accomplished by the obligation of competitive bidding. SF&P §13-102.

State agencies should go to great effort to avoid having to cancel a solicitation after it is issued. When abused, such a practice may undermine confidence in the procurement system by creating the perception of favoritism or bias. Unnecessary bid rejection also discourages participation when private entities become fearful that the considerable effort required to develop and present a sound and successful response to an RFP will be afterwards rendered pointless. That is why cancellation of a solicitation is permitted only upon the authority of the head of

a unit of State government.

Provided only that the decision is approved by a department secretary, the Code of Maryland Regulations (COMAR) Sec. 21.06.02.02C(1) allows very broad agency discretion to permit rejection of all proposals after opening but before award "when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest." The same COMAR provision provides several examples of when it may be appropriate and permissible to reject all proposals, including among them when "[p]roposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable." Here, the pricing sheet used for the initial solicitation was deficient. Cigna characterizes those deficiencies as merely formatting shortfalls, and indeed they were, but they were nonetheless very extensive shortfalls requiring elaborate modification.

In order to facilitate a full financial evaluation of proposals for health care administrative services, it is necessary for the evaluating authority to know a number of cost factors. They include the providers' guaranteed negotiated discount rate from pharmaceutical manufacturers as well as discounts negotiated with health care practitioner networks. The trend factor is also vital to be included in proposal evaluation because that determines the likelihood and amount of cost increases. None of this information was elicited by the pricing forms that were attached to the original RFPs for these services. Those defects rendered the pricing sheets materially defective and deficient, in addition to the absence of any pricing information at all for the two option years of the contract. It simply was impossible for anyone to undertake a thorough and fair financial evaluation of competing proposals using the simplistic forms attached to the initial RFPs.

The Board is sympathetic to appellant's contention that the

severe defects set forth in the initial pricing sheet could and should have been cured by a second BAFO, rather than cancellation of the entire solicitation. That may have saved the State some \$16 million. But the fact that the Board comes to the same conclusion as Cigna about the preference of implementing a cure by BAFO rather than cancellation and reissuance of a solicitation is not to suggest that MTA was without authority to make the alternative election of proposal rejection rather than seeking correction by BAFO. In hindsight, it is easier to conclude that the State should have taken extraordinary steps to preserve the opportunity of substantial cost savings by steering award of this procurement to the initially identified lower priced offeror, but at the time that all of the defects in the pricing sheet were first identified, MTA was without the benefit of input from the specialized expert consultant who subsequently assisted the State in rendering an accurate projection of cost advantages by seeking additional financial information using much more thorough and comprehensive pricing forms. The Board cannot conclude that it was unlawful, nor unreasonable, nor an abuse of agency discretion, for MTA to have opted to cancel the solicitation and publish entirely new RFPs with pricing sheets seeking greater and more detailed cost information than that which was permitted by the initially developed pricing forms.

As asserted by appellant's counsel, the federal case relied upon by counsel for appellant, Mori Assoc. v. U.S., 102 Fed. Cl. 503, 520 (Fed.Cl. 2011), does stand for the proposition that "once offerors have submitted proposals, the fair treatment owed them...includes a prohibition against the arbitrary cancellation of solicitations." But here, the cancellation of the solicitation was anything but arbitrary. It was based on good cause. As expressly reflected in the court's opinion, Mori stands only for the principle that a decision to reject all proposals "must be rational." *Id.* at 543-544. Appellant does not allege that MTA's decision to reject all bids was not

rational. That determination therefore must be sustained.

With respect to the one-year extension of the CareFirst contract approved by BPW on November 12, 2014, appellant relies upon the authority of an opinion from the Maryland Court of Appeals known as Baltimore v. Bio Gro, 300 Md. 248, 477 A.2d 783, 1984 Md. LEXIS 412 (1984). That case involved a two-year contract with the City of Baltimore, with the opportunity of a two-year contract extension conditioned upon "mutual agreement between the City and the contractor." During the initial two-year term, the parties agreed to extend the contract for two more years at the same price, but later the City filed a declaratory judgment action in the Circuit Court to determine the validity of the contract extension, which the trial court determined was void because it violated the requirement of competitive bidding.

Citing Browning-Ferris Ind. v. City of Oak Ridge, 644 S.W.2d 400 (1982), the rationale for the Circuit Court decision was based on the view that if further negotiations are necessary to be conducted between the parties prior to the parties' reaching agreement on contract extension, technically speaking, as a matter of law, the original contract is not really extended; instead, the initial contract expires and a new contract begins, which triggers the obligation of competitive bidding. Our Court of Appeals affirmed the trial court, citing a case very similar to the one at bar, namely, Miller v. State, 73 Wash.2d 790, 440 P.2d 840 (1968), in which the State solicited open competition to purchase a product and thereafter annually negotiated one-year extensions without subjecting the procurement to further competitive bidding.

The ruling in Bio-Gro, *supra*, was the subject of BPW Advisory 1998-3, which stated, "The only type of option that the State may exercise in lieu of a new procurement - is one where 'no negotiation [is] involved because the State alone holds the power to extend the contract' and the terms of the option period are set forth in the original bid (or proposal)."

As also pointed out by the Maryland high court's reliance on Savage v. State, 75 Wash.2d 618, 453 P.2d 613 (1969), there is a significant distinction between a predetermined option to extend a contract and a negotiated extension of the term of a contract. In the event of the exercise of an option to extend a contract, no new contract is created. Under the definite provisions of the original contract, the State may act unilaterally in determining whether or not to extend the contract term. The vendor identified by competitive bidding does not enjoy the opportunity to elect not to continue performance. By contrast, if the party contracting with the government enjoys the right to decline to perform or to insist on a different rate of compensation through negotiations with the government, those negotiations, if successful by agreement of both parties, give rise to a new contract, for which competitive bidding may be mandated by law. See also City of Lakeland v. Union Oil Co., 352 F.Supp. 758 (M.D.Fla. 1973); Hillsborough Co. v. Taller & Cooper, Inc., 245 So.2d 100 (Fla.App. 1971); Post v. Gillespie, 219 Md. 378, 149 A.2d 391 (1959); Bevilacqua v. Clark, 377 Pa. 1, 103 A.2d 661 (1954). As pointed out by the Maryland Court of Appeals in Savage, *supra*, "the use of private negotiations to award government contracts invites favoritism, extravagance, fraud and corruption."

The arrangement agreed to by MTA and CareFirst which is the subject of the instant appeal is just such an agreement. No competitive bidding was permitted. In accordance with the dictates of appellate authority in Maryland, it is clear to the Board that, with respect to the opportunity of providing the administrative services solicited by MTA in May 2014, the State was obliged by statute to allow competition, either by competitive sealed bids or competitive sealed proposals. SF&P §§13-102 & 13-104. That was not done by MTA. As a result, appellant's complaints in this regard are well-founded. The BPW action approving and authorizing the new contract with CareFirst

on November 12, 2014 was *ultra vires* and therefore void as contrary to statute.

SF&P §12-101 affords to BPW the power to control procurement by units of State government. But that is not to imply that BPW may take action in violation of law. There are, of course, exceptions to the requirement of competitive bidding as a precursor to the validity of State contracting. The principal exemption from that mandate is for emergency procurements pursuant to SF&P §13-108. Emergency contracts are irregular but not highly unusual. It has been commonplace in the past for the State to resort to emergency procurements to avoid lapses in the provision of essential services when a solicitation is delayed for any number of multifarious causes. But the CareFirst contract authorized by BPW on November 12, 2014 was not posited as an emergency procurement, enabling MTA to circumvent the requirement of competitive bidding.

Certain expedited but special obligations attach to emergency procurements, such as obtaining "as much competition as possible under the circumstances," limiting the quantity and duration of the emergency procurement, and reporting to BPW in writing the cause of the emergency procurement. SF&P 13-108(b). MTA may still request of BPW authorization to enter into its agreement with CareFirst as an emergency procurement, but that question is not before the Board because MTA does not attempt to justify the procurement that is the subject of this appeal as an emergency procurement. The Board notes only that the presence of an "emergency" in the ordinary sense and meaning of that word was certainly present on November 12, 2014, when MTA employees were at risk of losing health insurance coverage without a contract extension in place. Whether a legitimately qualified "emergency" existed under the restricted definition set forth in COMAR 21.01.02.01B(36) is a different issue which the Board does not here address. See Appeal of Trinity Svcs. Group, Inc., MSBCA Nos. 2917, 2931 & 2935 (June 30, 2015).

For the reasons set forth above, the Board must and hereby does grant the instant appeal, rendering as null and void the contract between MTA and CareFirst approved on November 12, 2014. At the same time, mindful of the substantially damaging service disruption that could be caused by this action, sensitive to the prospective desire or intention of MTA to take future steps to modify or legitimize its contract with CareFirst, and in light of the fact that the contract hereby voided was approved by BPW, this Opinion and Order is stayed until December 31, 2015.

WHEREFORE, it is by MSBCA this 16th day of July, 2015, ORDERED, that this appeal be and hereby is GRANTED.

Dated:

7/16/15

/s/

Dana Lee Dembrow
Board Member

I Concur:

/s/

Michael J. Collins
Chairman

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 2910, Appeal of Cigna Corporation Under MTA Contract Nos. 1400A-C.

Dated:

7/16/15

/s/

Michael L. Carnahan
Clerk

IN THE CIRCUIT FOR BALTIMORE CITY

PETITION OF THE MARYLAND TRANSIT ADMINISTRATION *

FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS OF JULY 16, 2015 *

IN THE CASE OF THE APPEAL OF CIGNA CORPORATION MSBCA 2910 *

Under MTA RFP No. 1400A-C *

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MARYLAND STATE BOARD OF CONTRACT APPEALS

* CASE NO. 24-C-15-004256//AA

* * * * *

ORDER

Upon consideration of the arguments presented, and for the reasons stated on the record, it is this 16th day of February, 2016,

ORDERED, that the decision of the Maryland State Board of Contract Appeals in MSBCA No. 2910 be affirmed in part and reversed in part. The Court found that Cigna Corporation would be subject to a Motion for Judgment due to their lack of response under Maryland Rule §7-204. However, the Petitioner Maryland Transit Administration withdrew the Motion for Judgment in favor of a substantive ruling.

BE IT FURTHER ORDERED, that the decision of the Maryland State Board of Contract Appeals in MSBCA No. 2910 be affirmed as to that part that sustains the action of the Petitioner Maryland Transit Administration rejecting all bids relating to the solicitation MTA RFP No. 1400A-C; **AND**

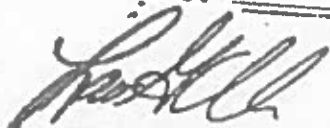
BE IT FURTHER ORDERED that the decision of the Maryland State Board of Contract Appeals in MSBCA No. 2910 be reversed as to that part that declares the Board of

Public Works action approving the extension of the existing contract between the Maryland Transit Administration and Carefirst as *ultra vires* and rendering the contract null and void.

Shannon E. Avery
Judge's Signature Appears
On Original Document

The Honorable Judge Shannon Avery
Judge, Circuit Court for Baltimore City

TRUE COPY
TEST



LAVINIA G. ALEXANDER, CLERK

