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Protesting the Cancellation of an IFB

Joseph C. Kovars
410-347-7343
jckovars@ober.com

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A recent decision highlights the difficulties a contractor faces in protesting a decision to cancel an Invitation for Bids (IFB), at least in Maryland. The case grew out of a large highway construction project being advertised by the Maryland Transportation Authority (MdTA). The IFB contained confusing bid requirements for subcontractor participation goals for Minority Business Enterprises (MBEs). In one place in the bid documents it said that the woman-owned MBE goal was 7%. A later bid addendum, however, stated that the goal was 10%. To make matters worse, the addendum was itself somewhat confusing.

While the low bidder, American Infrastructure-MD (AI), submitted a bid with a 7% woman-owned MBE package, all the other bidders bid with 10% MBE participation. At first, MdTA considered allowing AI a late (post-bid) modification of its bid. Just before making an official award, however, MdTA changed its mind and decided to cancel the IFB, fix the specifications and re-bid the project. AI protested the decision to the Maryland State Board of Contract Appeals. It argued that MdTA used the confusion in the IFB as a pretext not to award the contract to AI.

Our firm represented the second low bidder who supported MdTA's decision. The Board agreed with our client's position and denied AI's protest.

The State has wide discretion, the Board held, to decide whether to reject all bids. The standard is extremely high. In order to be reversed, the agency's exercise of its discretion "must be shown to be so tainted as to suggest fraud or breach of trust." In this case, the facts supported the agency's decision. Indeed, the Board held that the MdTA's decision to reject all bids and fix the IFB was the only reasonable action to take under the circumstances.

An interesting wrinkle in the case is that, by Maryland regulation, the Board has no jurisdiction to decide a protest with an MBE issue. Here, however, the problem was not whether the MBE goals were met by a bidder, but whether the IFB was defective and could be cancelled by the agency because of internal inconsistencies. The latter kind of case is within the Board's jurisdiction.

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In sum, bidders on Maryland projects should realize that the standard to challenge the cancellation of an IFB is much higher than on federal projects. In contrast to Maryland, the federal courts and the GAO are more likely to review carefully an agency cancellation decision, in order to prevent an "auction" when the project is re-bid.

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