

**BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of )  
Active Network, LLC )  
 )  
 ) Docket No. MSBCA 2920  
Under DHR RDFP )  
OS/CSC-15-001-S )

**APPEARANCE FOR APPELLANT:** Eric J. Marcotte, Esq.  
Kyle E. Gilbertson, Esq.  
Washington, D.C.

**APPEARANCE FOR RESPONDENT:** Aretha J. Ector  
Assistant Attorney General  
Baltimore, Maryland

**APPEARANCE FOR  
INTERESTED PARTY:** Joseph J. Dyer, Esq.  
Seyfarth Shaw, LLP  
Washington, D.C.

**MEMORANDUM ORDER AND OPINION BY BOARD MEMBER DEMBROW**

For several years the Maryland Department of Human Resources (DHR) has struggled to complete the competitive negotiation and award of a contract to continue to operate a statewide full service call center staffed by qualified customer service representatives and including interactive voice response capability and a customer relations management system. The latest Request for Proposals (RFP) for DHR's call center was issued July 30, 2014, with proposals due September 22, 2014. Nine (9) proposals were submitted in response to the RFP, two (2) of which were determined to be not reasonably susceptible of being selected for award. The other seven (7) proposals were evaluated by an Evaluation Committee.

Included among the seven (7) competitors ultimately deemed potentially eligible for this contract award were the appellant,

which is the incumbent provider, namely, Active Network, LLC (Active), and the interested party, ICF Incorporated, LLC (ICF), which is the firm recommended for contract award. The technical, financial and overall ranking determined by the Evaluation Committee is reflected by the table below:

Offerors	Technical Ranking	Financial Proposal/Ranking	Overall Ranking
ICF Incorporated, LLC	1	\$19,987,617 / 3	1
Faneuil, Inc.	3	\$20,922,479 / 4	2
Xerox	5	\$18,210,519 / 2	3
Automated Health	2	\$24,997,811 / 6	4
MAXIMUS, Inc.	4	\$23,155,202 / 5	5
CAEI	6	\$17,894,740 / 1	6
Active Network, LLC	7	\$25,725,366 / 7	7

As shown above, ICF received the top technical ranking and, with a price of \$19,987,617, was ranked third (3rd) lowest in the financial ranking of proposals. ICF's price was higher than the low bid by \$2,092,877 but lower than Active's bid by the amount of \$5,737,749. Thus, Active's bid was nearly 30% higher than ICF's and \$7,830,626 higher than the low bid, a price difference of more than 40%.

Tellingly, in the technical evaluation, the low bidder was ranked sixth (6<sup>th</sup>) out of the seven (7) evaluated proposals. Only Active was ranked lower in the technical evaluation, as well as the financial and overall ranking, coming in dead last in all three (3) categories. The cost submitted by the four (4) lowest priced proposals ranged from \$17,894,740 to \$20,922,479. The other three (3) proposals can be fairly classified in a higher priced bracket, ranging in cost from \$23,155,202 to Active's high price of \$25,725,366.

The proposal ranked next best to ICF in technical carried a price tag of \$25 million, almost as high as Active's price. Of course, the technical ranking of the proposals as determined by the Evaluation Committee requires both subjective and objective judgment. But the financial rankings do not. As intimated above, roughly speaking, the seven (7) evaluated proposals fall

into two (2) distinct pricing groups. Four (4) proposals ranged in cost from about \$18 to \$21 million. The other three (3) proposals ranged in cost from \$23 to \$26 million, with appellant being the outlier, the highest priced of all, proposing a cost of nearly a million dollars more than the 6<sup>th</sup> highest priced proposal. Therefore, regardless of the adequacy or accuracy of the technical component of proposal evaluation, DHR is faced with the choice of two (2) disparately priced clusters of potential service providers. The lower priced group of four (4), with an average price of less than \$20 million, might reasonably be considered to be more economical than the more expensive group of three (3) which presented costs in a higher price range, averaging closer to \$25 million.

This bid protest comes before the Maryland State Board of Contract Appeals (Board) for determination of the State's Motion to Dismiss, which is based on the allegation that Active does not have standing to pursue the instant appeal because it is not possible under any circumstances for Active to be in line for prospective contract award. The cases relied upon by DHR for this assertion correctly set forth the principle that a bidder which would not be next in line for award in the event of the disqualification of a lower bidder cannot pursue a bid protest because that entity would still not be awarded the contract even if the allegations set forth in its bid protest were proven to be true and accurate. (See Erik K. Straub, Inc., MSBCA 1193, 1 MSBCA ¶83 (1984); Branch Office Supply, MSBCA 2372, 6 MSBCA ¶540 (2003); Chesapeake Bus and Equipment Co., MSBCA 1347, 2 MSBCA ¶163 (1987).)

Those cases, however, involve Invitations for Bid (IFBs), not RFPs, which are subject to much more elaborate and comprehensive methods of competitive evaluation of the merits of each proposal. Quite different from a competitive sealed proposal, in a sealed bid competition, also known as an IFB, the specifications are quite detailed and the contract must be

awarded to the lowest bidder. Ordinarily it is comparatively very simple and easy to determine which qualified responsible bidder responding to an IFB has submitted the bid most advantageous to the State because the amount of the bid is all that matters. The contract is awarded to the bidder who offers the price most favorable to the State, in other words, the lowest cost. Maryland Annotated Code, State Finance and Procurement (SF&P) §13-103(e); Code of Maryland Regulations (COMAR) 21.05.02.13.

The evaluation of an RFP, by contrast, requires a thorough and in-depth analysis to determine best value to the State. A RFP may be based on performance objectives, leaving the offeror to develop and propose details of achieving a desired task or goal. The State defines a need or desired outcome and solicits from private sector expertise proposals of the best way of going about handling the challenge or job identified. Substantially broader discretion is extended to the State in determining to whom to award a competitive sealed proposal following an RFP because the standard employed is not just low price, but instead, a combination of both price and features like contractor capability and reliability as well as contract performance processes and assurances. In a sealed proposal competition, as distinguished from a sealed bid competition, the contract award determination is based not only on low price, but in addition, on the overall evaluation of many factors to determine what proposal is judged to be "most advantageous to the State considering the evaluation factors set forth in the request for proposals." SF&P §13-104(f). Like most RFPs, for the RFP at issue here, technical factors received equal weight as financial factors in evaluation and award determination. (RFP, Sec. 5.5.3, pg. 117.)

By implication, when the solicitation is in the nature of an RFP, in the event that a State agency determines to recommend for contract award a proposal that is more expensive than a competing offer, the agency should be able to identify added value

sufficient to justify additional cost. While the Board agrees with appellant in recognizing that the cases cited by DHR are inapposite here, at the nub of the Board's reluctance to permit this protest to proceed is the Board's difficulty conceiving of any scenario under which award of this contract could ever be offered to appellant. Simply put, Active priced itself out of competition, even if it had been ranked the best technical proposal instead of the worst, as occurred.

Appellant's Notice of Appeal is an exhaustive document with extensive exhibits, but it does not seek the disqualification of the other six (6) bidders, nor does it compare Active's proposal to the others, except to note that ICF's price is low. This is not surprising because, except for price and ranking information, appellant is unaware of the contents of its competitors' proposals. Instead, Active alleges that its proposal was not evaluated in accordance with the evaluation criteria set forth in the RFP and that to the extent that the correct evaluation criteria were utilized, they were not applied properly in the course of DHR's evaluation of Active's proposal.

This is merely to say that appellant does not agree with the State's determination that Active should be ranked seventh (7<sup>th</sup>) among the seven (7) competing proposals being considered and evaluated. Besides contending that ICF is not charging enough, appellant boldly claims that it should have been ranked first instead of last. The entire appeal boils down to the assertion merely that Active does not agree with the ranking afforded by DHR. Recent federal case authority has indicated that such an allegation is not enough to pursue a bid protest. In BNL, Inc., B-409450 at pg. 4, 2014 WL 1818046, the Comptroller General stated, "We will not sustain a protest where the agency's evaluation is reasonable, and the protester's challenge amounts to nothing more than disagreement with the agency's considered technical judgments regarding the specific elements of an offeror's proposal." See also Litton System, Inc., B-262099, 95-

2 CPD 261, 1995 WL 717637. DHR might contend that Active is asking the State to pay more for less, while the State's objective is quite the opposite. Good cause is and should be required to postpone yet again a contract award which has already been considerably delayed.

At this stage of the litigation, the Board must assume that Active's assertions are true and correct, and the Board does adopt those assumptions for now, even though all parties would probably concede that it is quite difficult for any appellant to carry its burden of proving by a preponderance of the evidence that a state agency abused its lawful discretion in the evaluation process by ignoring its own assurances to vendors about evaluation factors, or rendering decisions that were arbitrary, capricious, unsupported, or otherwise outside of the considerable latitude afforded to state agencies in the exercise of discretionary judgment. Set aside the fact that Active's proposal was ranked worst instead of best, even assuming the correctness of everything set forth in appellant's protest, the Board finds it inconceivable that DHR would recommend to the Board of Public Works (BPW) the award of this contract to any bidder charging well over \$5 million more than other competitors offering the same approved functional services.

In order to have standing sufficient to pursue a bid protest, an appellant must not only allege that the State did something improper; it must also be able to demonstrate that, had the impropriety not occurred, that that particular offeror would have been awarded the contract. Here, because of the price disparity alone, Active cannot make a *bona fide* contention that it would have been recommended for contract award in the absence of the errors allegedly committed by the State in its technical evaluation of Active's proposal. How much better equipment and staffing could appellant possibly offer to the State to justify the expenditure of the substantial extra monies it seeks to be paid by DHR as compared to all of the other offerors? In

reality, for reasons unknown except to the DHR Evaluation Committee, Active's proposal was deemed to be lacking, or at least it was ranked seventh (7th) best out of seven (7) proposals, while ICF's technical rating was considered unsurpassed by any of the other six (6). Assuming *arguendo* that DHR's evaluation was indeed incorrect and that Active's technical proposal was better than all the others, rather than worse than all the others, the fact remains that the State's resources are not unlimited. Quite the contrary, state funds are extremely constrained. Active's financial proposal must account for half of its overall ranking and it is unquestionably ranked worst of seven (7) competing proposals in that category. In this RFP, DHR has plenty of options, and none of them require the expenditure of the enormous sum of money proposed by appellant to be paid to continue the incumbent's services. Given the fierce competition that occurred in the context of this solicitation, it is nearly impossible to imagine a scenario in which DHR would elect to award to Active a costly new contract for the call center services it now provides.

Imagine the following simplistic but illustrative analogy: Two students, named Active and ICF, are enrolled in the same school taking the same two classes, namely, technical and financial. The two students are competing against one another for the highest overall rating and because the two courses carry equal weight, half of the students' overall grade point average (GPA) is determined by the grade in each class. ICF receives a grade of "A" in the technical course, and a grade of "C" in the financial course, for an overall GPA of 3.0, the highest in the school. Active receives an "F" in both courses, for a GPA of 0.0, the lowest in the school, but protests its grade for the technical course only. The professor re-evaluates the assessment and, against all odds, ultimately agrees with every single argument put forward by Active in its request to change its grade for the technical course. Eventually, not only is Active given

exactly the relief it requests, namely, an "A" in the technical course instead of an "F," the professor assigning grades goes above and beyond Active's prayers for relief and decides that the grading curve is thereby skewed so that ICF's former grade of "A" is now reduced to a "B." So in the final revisited analysis, ICF receives grades of "B" and "C" while Active receives scores of "A" and "F." In this hypothetical, ICF ends up with a GPA of 2.5 while Active earns a GPA of only 2.0. ICF still wins the competition, regardless of the grade changes in one (1) of the two (2) courses which carry the same weight. This result occurs after giving to Active the benefit of all doubt, as the Board has done in the instant Opinion.

In the absence of Maryland State precedent in government procurement law, counsel for ICF, the interested party as prospective contract awardee, argues that the Board should grant the State's Motion to Dismiss by adopting the standard applied by the General Accounting Office (GAO), which counsel characterized at the hearing as exceeding the small likelihood of Active being able to achieve contract award, asserting that in order to be considered to be an aggrieved party with standing to protest, the appellant must be able to show "that there is a reasonable possibility that the protestor has a substantial chance for award." (Tr. Pg. 29, lines 14-15, 18-19.) "Reasonable possibility" of a "substantial chance" is indeed the language used in Calnet, Inc., B-42558.2 at pg. 2, 2010 CPD 130B, in which the Comptroller General of the United States establishes a litmus test for standing, stating, "Prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's action; in effect, a protester must show that, but for the agency's actions, it would have had a substantial chance of receiving the award." Identical language also appears in Innovative Solutions & Support, Inc., B-405658 at pg. 7, 2011 CPD P 274.



The Board is convinced that in order to have standing, an appellant must do more than merely differ with the State's evaluation determination. Where there is no reasonable possibility of an appellant receiving contract award even if successful in its protest appeal, appellant lacks standing to pursue an appeal. A legitimate appellant must be able to allege facts not only supporting a reversal of the State's determination as unfair and incorrect, but also facts sufficient to support the allegation that that particular appellant may have received the contract award if the State's mistakes had not taken place. Here, even if Active were ranked first in the technical component of proposal evaluation, the State still enjoyed the option of achieving considerable cost savings by awarding the contract to other fully acceptable competing vendors of the same services solicited. Under no circumstance could DHR recommend award of the contract to Active to obtain best value to the State. As a result, it would constitute a costly waste and disservice for the Board to permit this appeal to proceed to hearing on the merits. That is because even if Active were to prevail on all of the facts and claims set forth in its appeal of DHR's technical evaluation, it is extremely unlikely, if not impossible, that appellant could achieve contract award because of its price. That is why Active lacks standing.

Had Active's price been lower than ICF's, this appeal could proceed to hearing because the possibility would exist that Active could ultimately be awarded the contract. Had Active's price been in the same price range as ICF's, this appeal would not be ripe for dismissal. Had appellant interposed a legitimate and timely challenge to the State's financial model for bid evaluation, it would also be improper to dismiss its appeal at this juncture based upon lack of standing. But no claim is raised with respect to the accuracy of the evaluated bid prices. The fixed financial costs offered in response to this RFP are known and precise. They are not subject to interpretation or

modification. One is higher than another by a certain amount. Indeed, in December 2014, DHR went through two (2) rounds of Best and Final Offers (BAFOs). There is no possibility of price reductions at this time. The opportunity for an offeror to lower costs was closed months ago when Active's final price was set as a sum considerably greater than ICF's, and for that matter, every other offeror as well.

The Board is not persuaded by appellant's argument that the interested party is not charging enough. The State is and should be adamant in its effort to achieve good services at the lowest possible price. Appellant's contention in this regard really goes not to the price itself, but instead, to its suspicion that the low price offered by ICF may be an indication that ICF's staffing levels are insufficient or that ICF's implementation plan is otherwise deficient. But Active does not know ICF's staffing levels or any of the other components of its bid. Any belief in that regard is purely speculative. DHR does have ICF's information about staffing and all of the other features of its proposal, and DHR still determined, regardless of price, that ICF's proposal was substantially better than Active's. It is illuminating to note that two (2) other bidders submitted financial proposals less than ICF's proposal. While the two offerors of lower prices than ICF received low technical rankings of fifth (5<sup>th</sup>) and sixth (6<sup>th</sup>), there is no indication that either of those proposals failed to comply with the minimum specifications set forth in the RFP. All seven (7) of the proposals were deemed susceptible for award. ICF's pricing proposal can hardly be considered unreasonably low, when two (2) other satisfactory proposals were lower.

Appellant's reliance on Board precedent is also misplaced, if only slightly. In the Appeal of Baltimore Motor Coach Co., 1 MSBCA ¶94, MSBCA 1216 (1985), it is correct that the Board concluded that a fourth (4<sup>th</sup>) ranked appellant claiming that it was unfairly treated did indeed have standing because it was

potentially in line for contract award if it succeeded in proving its allegations that the entire evaluation process was patently unfair, affecting the State's evaluation of all five (5) of the competing vendors. Though that appeal was ultimately denied on the merits, the Board ruled in that case that appellant had standing to pursue the appeal, stating, "Appellant's competitive position and perhaps its right to an award will have been affected. We cannot say, therefore, that Appellant was not aggrieved by the...evaluation methods, or that it is not an interested party." That is not the allegation in the appeal at hand, in which Active claims essentially that its poor evaluation was unfounded and incorrect, without regard to the correctness of the evaluation of competitors. In addition, Baltimore Motor Coach Co., Id., makes no mention of disparate pricing affecting the likelihood of appellant's ability to secure contract award, which is central to the Board's decision to dismiss this appeal.

Similarly, In the Appeal of Mid-Atlantic Vision Service Plan, Inc., 2 MSBCA ¶173, MSBCA 1368 (1988), the Board ruled that the third (3<sup>rd</sup>) ranked proposal did not lose the right to appeal for failure specifically to challenge the accuracy of the ranking of the proposal ranked second (2<sup>nd</sup>), and therefore next in line for award, ahead of appellant. In Mid-Atlantic, Id., appellant claimed from the outset "that all offerors were not accorded equal treatment" (pg. 19) in that some offerors were afforded the opportunity of structuring co-payments into their cost proposals, which affected the ranking of proposals, while appellant was led by the terms of the RFP to conclude that co-payments were not permitted. Such an allegation by necessity challenges the validity of all proposals and thereby imparts standing upon appellant because Mid-Atlantic Vision Service Plan, Inc. could legitimately contend that if the assertions in its appeal were proven correct, its proposal could be deemed the favored offer. In Mid-Atlantic, Id., the gist of the bid protest had a direct impact on financial ranking, but in the instant case, there is no

challenge or question raised regarding the financial ranking of the seven (7) competitors seeking to operate DHR's call center.

The Board takes seriously its responsibility to safeguard and protect the rights of all aggrieved parties to due process in the exhaustion of administrative remedies established by law to permit certain persons to raise and prove claimed errors in state procurement decision-making. But only interested parties can be aggrieved and thereby exercise that right. Because Active cannot correctly assert that it would be next in line for contract award in the event that its complaints concerning its technical ranking are proven true and correct, appellant lacks standing to pursue this appeal. For all of the foregoing reasons, the State's Motion to Dismiss should be and hereby is GRANTED, and as a consequence, it is further,

ORDERED this \_\_\_\_\_ day of June, 2015, that the instant appeal be and hereby is DENIED.

Dated:

\_\_\_\_\_  
Dana Lee Dembrow  
Board Member

I Concur:

\_\_\_\_\_  
Michael J. Collins  
Chairman

\_\_\_\_\_  
Ann Marie Doory  
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 2920, appeal of Active Network, LLC Under DHR RDFP OS/CSC-15-001-S.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk