

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Kennedy Services, LLC

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Under

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Maryland State Board of Elections

Docket No. MSBCA 3064

RFP No. D38B7400012

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OPINION AND ORDER BY MEMBER STEWART

Based upon the undisputed material facts, the Board concludes that the Procurement Officer's ("PO") determination that the proposed awardee of the contract was eligible for award was unlawful and unreasonable because the offeror's proposal clearly demonstrated that it could not meet in full the required 30% Minority Business Enterprise ("MBE") participation goal.

UNDISPUTED MATERIAL FACTS

On August 22, 2017, the Maryland State Board of Elections ("SBE") issued Request for Proposals Solicitation No. D38B7400012, Election Staffing Services ("the RFP"), which was amended on September 1, 2017, to change the proposal due date from October 4, 2017, to September 28, 2017. There were nine (9) other amendments to the RFP, which consisted of providing the list of attendees at the Pre-Proposal Conference held on September 7, 2017, and eight (8) sets of questions from prospective offerors and answers provided by the SBE. The purpose of the RFP is set forth in Section 2.1.1:

The State Board of Elections (SBE or the Agency) is issuing this RFP **to obtain professional temporary staffing resources** for a variety of positions for three (3) upcoming election cycles. The base period covers the 2018 election cycle, and the two option periods cover the 2020 and 2022 election cycles. The Requirements (Section 2.3) detail the experience necessary for these positions. (emphasis added).

Section 1.1 of the RFP sets forth the minimum qualifications for offerors and requires in Section 1.1.1 that "[w]ithin in the last five (5) years, the Offeror shall have three (3) years of

professional staffing experience,” and in Section 1.1.2 that “[w]ithin the last five (5) years, the Offeror shall have recruited and placed at least 100 temporary resources on a single contract simultaneously.” The main responsibility of the contractor awarded the contract is set forth in Section 2.3 of Section 2 – CONTRACTOR REQUIREMENTS: SCOPE OF WORK:

2.3.2 Resource Recruitment, Engagement, and Management

The Contractor shall be responsible for the recruitment of personnel resources as election support individuals for SBE for the roles set out in Section 2.3.3. Recruitment activities include finding candidates, vetting candidates for the positions for which they are applying, interviewing candidates, and making offers to the selected candidates. (emphasis added).

Section 2.3.3 sets forth two categories of staffing to be provided by the contractor, “Mandatory Staff” and “Other Staff that may be required.”¹ Section 2.3 also sets forth specific requirements for the individuals who will fill the staff positions, and among those requirements mandates that “each individual shall report to the assigned base work location and complete tasks assigned by appropriate delegating authority, including LBE’s management, election judges, SBE’s regional manager, and SBE management....”

Section 2.2.3 of the RFP requires:

All individuals hired under this contract must complete SBE’s training program and, before deployment, demonstrate an understanding of the topics covered during the training. Individuals that cannot demonstrate an understanding of the material will not be deployed. SBE’s training program for the different types of employees will be held at various locations throughout the State. Individuals will be compensated for the hours spent in training. (emphasis added).

¹ The Mandatory Staff required by Section 2.3.3.1 includes: LBE [“Local Board of Elections”] Technician, LBE Support Technician, Logic & Accuracy (L&A) Tester, and Field Support Technicians for Early Voting and Election Day. Section 2.3.3.2, “Other Staff that may be required” includes: Voter Outreach Staff Resources, Trainers, Trainer Coordinator, Administrative Assistant, Greeter, Documentation Specialist, and SBE Support Technician.

Section 4.26 of the RFP required an overall Minority Business Enterprise participation goal for subcontractors of 30% of the total contract dollar amount. Each offeror was required to include with its Proposal a completed MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule (Attachment D-1A) (hereinafter the “D-1A”) that identified each subcontractor that would perform work under the contract and the percentage of the total contract value that each subcontractor would contribute toward the total contract price. Alternatively, an offeror could request a waiver if the offeror was unable to achieve the MBE participation goal.

Section 4.26.4 of the RFP required each offeror to verify that each MBE identified in the D-1A is appropriately certified under the correct North American Industry Classification System (NAICS) codes, thereby allowing it to perform the committed work. The D-1A instructions provide that only those specific products and/or services for which a firm is certified in the MDOT Directory can be used for purposes of achieving the MBE participation goals, and that if a contractor is unable to achieve the MBE participation goal, then it must request a waiver. Otherwise, the Bid will be deemed not responsive, or the Proposal will be determined to be not susceptible of being selected for award.

Offerors were required to submit technical and financial proposals as separate volumes. The Financial Proposal was required to contain all price information in the Financial Proposal Form, which was attached as Attachment B-2, based on the instructions provided. Prices would be entered in two parts: hourly rate and administrative costs. As such, fully loaded hourly rates and totals would be calculated based on the rates entered in the Financial Proposal Form.² The Financial Proposal Form set forth in Attachment B-2 Price Form (hereinafter the “Price Form”) was an Excel

² This instruction is in accord with Section 2.1.5:

spreadsheet formatted to perform automatic calculations of line item pricing and the Total Proposed Price using pricing information inserted by an offeror. For each staffing position, the offeror would enter the “Hourly Direct Rate per individual” and the “Portion of Administrative Costs (background checks, badging, other costs) to add to the hourly rate.” Pursuant to Section 6.5 of the RFP, the technical and financial proposals of each offeror were to be evaluated and ranked separately, and the contract would be awarded as set forth in **Section 6.5.3 Award Determination:**

Upon completion of the Technical Proposal and Financial Proposal evaluations and rankings, each Offeror will receive an overall ranking. The Procurement Officer will recommend award of the Contract to the responsible Offeror that submitted the Proposal determined to be the most advantageous to the State. In making this most advantageous Proposal determination, **technical factors will receive equal weight with financial factors.** (emphasis added).

SBE received four (4) proposals in response to the RFP.³ Appellant Kennedy Services, LLC (“Kennedy”), ISN Corporation (“ISN”), and another company submitted proposals that were reviewed by the evaluation committee. The prices submitted by each of the three (3) offerors were:

<u>Offeror</u>	<u>Total Proposed Price</u>	<u>Hourly Direct Rates</u> ⁴	<u>Administrative Costs</u> ⁴
ISN	\$17,706,055	73.34%	26.66%
Company A	\$18,874,817	72.68%	27.32%
Kennedy	\$19,320,955	68.59%	31.41%

The evaluation committee ranked Kennedy’s Technical Proposal first and ISN’s second. ISN’s Financial Proposal was ranked first while Kennedy’s was ranked last. The evaluation committee

Except as noted herein, the Contractor will bill fully loaded rates per hour that Include 1) hourly direct rate and 2) **administrative costs associated with providing the required personnel. These costs include badging, background checks, and documents to be provided to SBE but exclude lodging, mileage, and certain meals.** Lodging, mileage, and certain mileage are separate from the hourly rates and will be directly reimbursable to the Contractor as detailed in Section 2.3.7. (emphasis added).

³ One of the proposals submitted was later deemed non-responsible and ineligible for award.

⁴ As a percentage of Total Proposed Price.

unanimously ranked ISN's proposal first overall. Accordingly, the PO selected ISN as the proposed awardee of the contract.

On November 9, 2017, SBE notified Kennedy of its non-selection and provided a debriefing requested by Kennedy on November 16, 2017. Kennedy filed its First Bid Protest with the PO on November 20, 2017, protesting the proposed award of the contract to ISN. Kennedy contended that ISN's Price Form demonstrated that it was not capable of meeting the 30% MBE participation goal and that the PO should have deemed ISN's proposal not susceptible of being selected for award.

According to ISN's D-1A, Steel Point Solutions, LLC ("Steel Point") was the only MBE firm that ISN identified that would be used to meet the RFP's MBE subcontractor participation goal of 30%. Steel Point is an information technology company that is certified in the MDOT MBE Directory to perform Administrative Management and General Management Consulting Services as defined by NAICS Code 541611, which would include the types of administrative services required by the scope of work in the RFP.⁵

Steel Point is not certified in the MDOT MBE Directory to perform "Temporary Help Services" under NAICS Code 561320, which consists of supplying workers to client businesses for limited periods of time to supplement the working force of the client. According to the NAISC, under this Code, the individuals provided are not employees of the client, but the client directly supervises the temporary workers at the client's work sites.⁶

⁵ Steel Point is certified in the MDOT MBE directory to perform work under several other NAISC Codes that are not encompassed in the scope of work set forth in the RFP: 541511 – Custom Computer Programming Services; 541512 - Computer System Design Services; 541519 - Other Computer Related Services (Specifically: Computer Hardware Consulting and Systems Integration and Design Services); and 611420 - Computer Training.

⁶ North American Industry Classification System. (2017). United States: Executive Office of the President, Office of Management and Budget, pp. 492-493.

On December 11, 2017, the PO formally denied Kennedy's First Bid Protest. Kennedy filed its Notice of Appeal, along with a Motion for Summary Decision, to the Board appealing the final decision of the PO on December 19, 2017. Respondent filed a Cross-Motion for Summary Decision with the Board on December 20, 2017. Neither Appellant nor Respondent requested a hearing on their respective motions.

SUMMARY DECISION STANDARD

In deciding whether to grant a Motion for Summary Decision the Board must follow COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor or the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

STANDARD OF REVIEW FOR BID PROTESTS

To prevail on an appeal of the denial of a bid protest, an appellant must show that the agency's action was biased or that the action was arbitrary, capricious, unreasonable, or in violation of law. *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Comty Servs., Inc.*, MSBCA 2302 at 8, 5 MSBCA ¶ 523 at 5 (2002)).

DECISION

Neither of the parties contend that a material fact is in dispute. Rather, the Board must resolve two legal issues: (1) whether an offeror's proposal that clearly shows that it cannot meet the MBE participation goal in the solicitation renders the offeror's D1-A inaccurate, and (2) if so, does the PO have discretion to determine that the offeror's proposal is susceptible of being selected for award?

Appellant contends that ISN's D1-A was inaccurate because Steel Point is not certified to perform the temporary staff services under the appropriate NAISC Code, even if it is certified to perform administrative services under another. The RFP instructions for the D1-A are clear. Instruction No. 4 directs an offeror to confirm, using the MDOT MBE Directory, that a firm they intend to list on the D1-A is certified in the appropriate NAICS Code to perform the requisite scope of work. Instruction No. 4 requires that "only those specific products and/or services for which a firm is certified in the MDOT Directory can be used for purposes of achieving the MBE participation goals." Instruction No. 9 further warns that if an offeror is unable to achieve the goal, then it must request a waiver; otherwise, the Bid will be deemed unresponsive, or the proposal will be deemed not susceptible of being selected for award.

The SBE argues that Steel Point is not required to be certified for NAICS Code 561320 "Temporary Help Services" to meet ISN's 30% MBE participation goal because ISN is the company that is providing the temporary staffing services and Steel Point will be used for its requisite technical expertise. The Board disagrees. If ISN's Price Form had reflected administrative costs (defined in Section 2.1.5 as costs associated with providing the required personnel, including badging, background checks, and documents to be provided to SBE, but excluding lodging, mileage, and certain meals) that were equal to or exceeding 30% of the Total Proposed Price, then the Board

would agree with SBE's contention because Steel Point is certified under NAICS Code 541611 to provide "Administrative Management and General Management Consulting Services."

However, ISN clearly indicated in its Price Form that 73.34% of the total dollar value of the contract consists of direct hourly wages that would be paid to temporary staffers, who will be provided to SBE to work under the direction of and be trained by SBE. That only leaves 26.66% of the total dollar value of the contract dedicated to provide administrative services. Steel Point is not certified to provide temporary staffing services, but is certified to provide administrative services. The instructions for completing the D-1A require that Steel Point be certified in the appropriate NAICS Code for its work to count towards the MBE participation goal. Even if Steel Point performs the entire scope of work encompassing the administrative work under the RFP, it still falls short of the 30% MBE participation goal.

SBE does not contend that ISN made an error or mistake in its Financial Proposal or Price Form, nor does SBE dispute any of Kennedy's calculations. Rather, SBE contends that Steel point "could provide over 50 percent, dollarwise, of the services required" by the RFP. SBE erroneously describes the RFP's scope of work in its Cross-Motion when it characterizes the RFP as "seek[ing] precisely the IT services that Steel Point provides." The RFP's scope of work does not require (other than administrative services) any of the other services Steel Point is certified under NAICS to provide: custom computer programming; computer system design services; computer hardware consulting and systems integration and design services; and computer training. In contrast, as emphasized by Kennedy, the RFP, in Sections 2.1.1, 2.2.2, 3.2.2, and Attachment B-1, repeatedly describes the contract deliverables as "professional temporary staffing resources," "temporary resources," "temporary employee[s]," and "temporary staff." The Price Form seeks pricing for recruiting and placing "individuals" in each "role" (within the category of Mandatory or Other Staff)

they are to function, and does not request pricing for any information technology services or training from the contractor.

The RFP contemplates that the contractor will recruit a qualified individual for each staffing category, and that once that individual temporary employee has been administratively processed (badged, undergone a background check, and completion of correct documentation), then the temporary employee will be provided to SBE for training, and if found suitable by SBE, put to work under SBE's direct supervision. For example, the RFP requires a LBE Technician as one of the Mandatory Staff positions under Section 2.3.3.1. Section 2.3.5 lists the qualifications of a LBE Technician: graduated from an accredited high school or possess a high school equivalency certificate; have a minimum of two (2) years of work experience relating to computer networking, setting up and maintaining computers and peripheral devices, troubleshooting computer hardware and software issues, and knowledge of Microsoft Office software (including Word and Excel); be able to lift at least fifty-five (55) pounds; and be able to work evening and weekend hours. An individual either meets the RFP requirements for LBE Technician when recruited or not. It is then up to SBE to train the individual and determine whether the individual will meet its needs or whether the individual will "not be deployed."

SBE fails to appreciate the fact that its own RFP is for the procurement of temporary staffing services and not information technology services and training. The undisputed facts are that Steel Point is not certified to perform temporary staffing services, which comprises just over 73% of the total contract value; it is only eligible to count the remaining administrative services toward its MBE participation goal, which is just under 27% of the total contract value. As such, ISN's Proposal falls short of meeting the 30% participation goal because 27% is less than the 30% goal. The PO cannot ignore the instructions of the D1-A and count Steel Point's work on services it is not certified to

perform. Specific requirements or criteria in a RFP may not be ignored. *Walbert Partnership*, MSBCA No. 1633, 3 MICPEL ¶ 300 (1992). The Board must conclude that the PO was unreasonable in determining that ISN's D-1A was accurate.

Since the Board concludes that ISN did not accurately complete the D1-A, we must also conclude that, by law, the PO did not have the discretion to select ISN for award of the contract. COMAR 21.11.03.09C(6) provides:

The failure of an offeror to accurately complete and submit the MBE utilization affidavit and the MBE participation schedule shall result in a determination that the proposal is not susceptible of being selected for award.

In *Infosys Public Services, Inc.*, MSBCA No. 3003 at 6 (2017), this Board held that:

[COMAR 21.11.03.09C(6)] is specific and clear: an offeror is required to **accurately** complete both the MBE utilization affidavit and the MBE participation schedule. The failure to do so **shall** result in a determination that the proposal is not susceptible of being selected for award. (emphasis in original).

The Board must conclude, based on the undisputed facts, that the PO's determination that ISN was eligible for being selected for award was unreasonable and unlawful.

ORDER

ACCORDINGLY, based on the foregoing, it is this 28th day of December, 2017, hereby:

ORDERED that Appellant's Motion for Summary Decision is GRANTED; and it is further

ORDERED that Respondent's Cross-Motion for Summary Decision is DENIED; and it is further

ORDERED that this case is remanded to the PO for reconsideration and award of the contract to one of the remaining responsive and responsible offerors.

/S/
Michael J. Stewart, Esq.
Board Member

I concur:

/S/
Bethamy N. Beam, Esq.
Chairman

/S/
Ann Marie Doory, Esq.
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 No. 3064, Appeal of Kennedy Services, LLC, under Maryland State Board of Elections RFP No. D38B7400012.

Dated: 12/28/2017

/S/
Michael L. Carnahan
Clerk

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Kennedy Services, LLC

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Under

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Maryland State Board of Elections
RFP No. D38B7400012

Docket No. MSBCA 3064

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AMENDED ORDER

This Board's Order dated December 28, 2017 is hereby amended as follows: it is this 29th day of December, 2017, hereby:

ORDERED that Appellant's Motion for Summary Decision is GRANTED; and it is further

ORDERED that Respondent's Cross-Motion for Summary Decision is DENIED; and it is further

ORDERED that this case is remanded to the Procurement Officer for award of the contract to the remaining responsible offeror whose Proposal is determined to be the most advantageous to the State considering the evaluation factors set forth in the RFP.

/s/
Michael J. Stewart, Esq.
Board Member

I concur:

/s/
Bethamy N. Beam, Esq.
Chairman

/s/
Ann Marie Doory, Esq.
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Amended Order in MSBCA No. 3064, Appeal of Kennedy Services, LLC, under Maryland State Board of Elections RFP No. D38B7400012.

Dated: 12/29/2017

/S/
Michael L. Carnahan
Clerk