

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Peek, LLC		Docket No. MSBCA 3248
	*	
Under Maryland Department of Commerce		
Solicitation No. T00R3601829	*	
Appearance for Appellant	*	Toya S. Carmichael, Esq.
		Washington, DC 20019
	*	
Appearance for Respondent		William J. Chen, Esq.
	*	Assistant Attorney General
		Baltimore, Maryland 21202
* * * * * * *	*	* * * * *

OPINION AND ORDER BY MEMBER KREIS

The Board conducted a merits hearing in this Appeal on January 24, 2024. After considering all witness testimony, the admitted exhibits, and the arguments made by counsel, the Board denies the Appeal.

PROCEDURAL HISTORY AND FINDINGS OF FACT

On April 4, 2023, the Maryland Department of Commerce (“Respondent” or “Commerce”) issued a Request for Proposals (“RFP”) seeking one or more contractors to manage and administer the Maryland Small Business Development Financing Authority (“MSBDFFA”) Program. The purpose of the MSBDFFA Program is to “promote the viability and expansion of businesses owned by economically and socially disadvantaged entrepreneurs,” and is designed to assist eligible businesses in obtaining adequate financing on reasonable terms that otherwise would not be available to them through normal financing channels because they do not meet the established credit criteria.

The RFP contemplated that the successful awardee(s) would assume management responsibilities of the MSBDFFA Program loan portfolio and “use funds appropriated to MSBDFFA

to make loans, investments, loan guarantees, and surety bonds to eligible applicants.” *Id.* at 13.

The RFP required a responsive offeror to have the following minimum qualifications:

The Offeror must have at least (5) five years of experience providing capital to small, minority-owned, women-owned, and disadvantaged borrowers within the last five (5) years. As proof of meeting this requirement, offerors shall provide with it [sic] Proposal three (3) small businesses (company’s name, address and contact information) for which the offeror has provided Financial or Investment services within the last five (5) years.

RFP § 1.1 (Offeror Minimum Qualifications), at 7. Further, under the Scope of Work:

2.1.3 The Department intends to make multiple awards as a result of this RFP. The Department seeks proposals from entities interested in managing one or all four functional areas of the MSBDFA Program. The selected Contractor(s) will assume management of one or all four of the existing MSBDFA portfolio and use funds appropriated to make loans, investments, loan guarantees, and surety bonds to Eligible Businesses. ...

2.2 Background, Purpose, and Goals

...

The MSBDFA Fund consists of premiums for guaranteeing loans under [Economic Development Article] § 5-525(a), premiums for guaranteeing equity investments under § 5-525(b), repayment of principal of interest on direct loans under § 5- 525(c), proceeds from the sale, disposition, lease, or rental of collateral for direct loans or loan guarantees made under § 5-525; and all other receipts. ... MSBDFA’s financing activity is supported through the repayment of loans, generation of interest income and the collection of fees.

Additionally, the four functional areas of the MSBDFA Program were described, in relevant part, as follows:

- A. **Contract Financing Program (CFP)** ... CFP provides financial assistance to Eligible Businesses in the form of direct loans and loan guarantees. ...
- B. **Guaranty Fund Program (GFP)** ... GFP provides financial assistance to Eligible Businesses in the form of loan guarantees and interest rate subsidies for loans made by financial institutions. ...
- C. **Surety Bond Program (SBP)** ... SBP assists eligible small businesses in obtaining bid, performance or payment bonds necessary to perform on contracts where the majority of funds are provided by a government agency, public utility company or private entity. SBF directly issues bid,

performance or payment bonds or guarantees a surety's losses incurred as a result of the contractor's breach of a bid, performance or payment bond. ...

- D. **Equity Participation Investment Program (EPIP)** ... Financial assistance is provided with loans, loan guarantees, and equity investments.
...

Three timely proposals, including one from Peek, LLC ("Appellant" or "Peek"), were opened on June 21, 2023. The evaluation committee ("EC") met to review the proposals on July 17, 2023. The EC consisted of three members who are experts in the field of finance, two of whom worked in financing at MSBDFFA. In the Technical Proposal Strengths and Weaknesses Forms ("Evaluation Forms") completed by the EC, various members noted that Appellant's proposal "does not demonstrate an understanding of the MSBDFFA program components and how they operate," and "does not demonstrate direct, hands-on experience administering or operating a loan fund." *See* Joint Exhibit 4 (Evaluations Forms).

On July 18, 2023, the Procurement Officer ("PO") Brenda Lee emailed Peek her determination that it was "not reasonable [sic] susceptible of being recommended for award," adopting the findings and justifications of the EC. Ms. Lee stated that Peek's proposal "does not illustrate a comprehensive understanding of the work requirements," and "lacks significant experience in direct lending[.]"

On July 20, 2023, Peek emailed the PO a Notice of Protest/Reconsideration Request ("Protest") stating that the PO acted arbitrarily, capriciously, and unreasonably in finding that Peek's proposal was not reasonably susceptible of being recommended for award. Peek claimed the PO wrongfully disregarded Peek's actual direct lending history, State Small Business Credit Initiative expertise, program knowledge, clients that met the stated requirements for minimum capital deployed, and citations to originated loans when she found that Peek lacked sufficient direct lending experience and understanding of the work requirements.

On July 26, 2023, the PO emailed Peek asking for the direct phone numbers of three additional references found on the resume of C. Earl Peek, Managing Partner of Peek, LLC, which was submitted as a part of Appellant's proposal. The original references provided by Appellant in response to the RFP, Rockstar Prep for Kids, LLC, Grace Management & Construction, LLC, Paniagua's Enterprises, Inc. and AvDyne Aeroservices, LLC, did not show that Appellant provided direct lending services. Therefore, the PO asked for the direct phone numbers of Don Graves, Jr., Doyle Mitchell, Jr., and Alan C. Young, who were references listed on Mr. Peek's personal resume, to determine whether the inadequate original references could be supplemented. Appellant provided the requested information later that same day. The PO made multiple attempts to contact the additional references but was able to reach only one, Doyle Mitchell, Jr., who stated that he had worked with Mr. Peek so long ago that he was not able to provide any accurate or meaningful information.

On September 7, 2023, Respondent denied Peek's Protest, finding that the PO did not act arbitrarily, capriciously, or unreasonably in finding Peek's proposal was not reasonably susceptible of being recommended for award. On September 22, 2023, the contract was recommended for award, in parts, to the other two offerors.

Peek timely noted its appeal to the Board on September 8, 2023. At the merits hearing on January 24, 2024, Appellant called three witnesses: C. Earl Peek, Managing Partner of Peek, LLC; Brenda Lee, former Director of Contracts and Procurement and the PO; and Signe Pringle, the Deputy Secretary for the Department of Commerce. Respondent called two witnesses: Celester A. Hall, Program Manager, Office of Finance Programs Maryland Department of Commerce and Darla Michelle Garrett, Director of Accounting and Administration Maryland Department of Commerce.

STANDARD OF REVIEW

A procurement officer's decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See Hunt Reporting*, MSBCA No. 2783 (2012).

DISCUSSION

The Board finds that the Procurement Officer did not act arbitrarily, capriciously, or unreasonably in determining that Appellant's proposal was not reasonably susceptible of being recommended for award. Appellant's proposal failed to meet the minimum requirements of the RFP and, as Mr. Peek admitted, did not demonstrate that Appellant had significant direct lending experience within the last five years.

A key issue in this case was whether the RFP required offerors to have significant direct lending experience. According to Celester A. Hall, Program Manager within the Office of Finance Programs, the MSBDFFA is primarily a loan program and is "probably one of the most complex financing mechanisms in the department." Mr. Hall testified that direct lending is the single most important part of the MSBDFFA program. He further testified that the terms "providing capital," "direct loans," and "loans" mentioned throughout the RFP are all references to direct lending, and that anyone well-versed in the financing industry would have understood the RFP as requiring direct lending experience.

Darla Michelle Garrett, Director of Accounting and Administration for the Department of Commerce, testified that direct lending is a significant part of the MSBDFFA program, stating: "It's what the program does." Additionally, Ms. Garrett testified that the terms "providing capital," "direct loans," and "provide loans" mentioned throughout the RFP are all synonymous with direct lending as commonly used in the financial industry.

Ms. Lee, who was the PO for this RFP, had retired from State service prior to the merits hearing in this matter. During the hearing, Ms. Lee's recollections concerning the RFP were hazy, at best. Other than broad statements that the procurement involved the MSBDFA Program, the PO could not recall any specific terms of the RFP and, upon examination by Appellant's counsel, incorrectly testified that the RFP does not specify direct lending or hands-on experience administrating/operating a loan fund as a requirement. As such, she was unable to articulate why the EC evaluated Appellant's proposal based on those criteria. In addition, she admitted that she did not review Appellant's Technical Proposal in its entirety.

On cross examination, Ms. Lee revised her testimony and stated that, while the RFP does not strictly contain the words "direct lending," the terms "provide direct loans" and "provide capital" could be found throughout the RFP, including in the minimum qualifications, and that those terms mean the same thing as direct lending. Although she admitted not having reviewed the entirety of Appellant's Technical Proposal, the PO testified that she read what she felt was necessary for her to understand the proposal, including the experience, the proposed staff, the references, and the executive summary. Based on her work with the EC, it was the PO's understanding that direct lending experience was a requirement of the RFP. Ms. Lee further testified that, even though she was the PO, she relied on the expertise of the EC members in their evaluation of the technical proposals and adopted their recommendations regarding award of the contract.

Ms. Pringle, the Deputy Secretary for the Department of Commerce, testified that she had a discussion with the PO and then was presented with a summary decision memo. In deciding to uphold the PO's denial of the Protest, she relied on the information provided to her by the PO because the PO works closely with the subject matter experts on the EC.

On behalf of Appellant, Mr. Peek testified regarding his extensive experience in commercial banking, credit administration, loan collections, presenting to loan committees, and providing financial services to minority-owned, as well as women-owned, firms and small businesses. Although Mr. Peek testified that he had provided direct lending services for Industrial Bank through 2008 and for Truist Bank through 2010, there was little to no other evidence of him providing direct lending services to anyone since that time. Finally, Mr. Peek testified that Peek, LLC did not provide direct loans for any of the original four references provided in Appellant's Technical Proposal.

Having considered and weighed the testimony of all witnesses, the Board finds that Appellant failed to prove by a preponderance of the evidence that the PO was biased, or that her decision was arbitrary, capricious, unreasonable, or unlawful.¹ We agree with the PO, Mr. Hall and Ms. Garrett that "providing capital" and "make loans" are synonymous with "direct lending" for purposes of the RFP, and that direct lending is a significant portion of the MSBDFA program. Further, the RFP itself specified, in defining the four functional areas, that financial assistance is to be provided with "direct loans," "loan guarantees," "interest rate subsidies for loans," and "equity investments." It would not be unreasonable to interpret these terms to fall under the broad category of "direct lending."

Although Appellant's counsel did an admirable job of confusing the PO into incorrectly stating that the RFP did not mention direct lending, that momentary lapse in memory was adequately refreshed on cross examination. Furthermore, Mr. Peek admitted at the hearing that Peek, LLC had not provided direct lending services for any of the four references listed in its

¹ While the PO's testimony that she did not read Appellant's Technical Proposal in its entirety is somewhat troubling, the Board does not find that this rises to the level of requiring an automatic finding that the PO's decision was arbitrary or capricious, given her testimony regarding her heavy reliance on the advice of EC members, whom she considered experts in the field.

I concur:

 /s/
Sonia Cho, Chairman

 /s/
Michael L. Carnahan, Jr., 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 contested cases.

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 ten 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 hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3248, Appeal of Peek, LLC under Maryland Department of Commerce Solicitation No. T00R3601829.

Date: February 15, 2024

/s/
Ruth W. Foy
Clerk