

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Fidelity Information Services, LLC		Docket Nos. MSBCA 3267, 3280 & 3281
	*	
Under DHS	*	
RFP No. OTHS/EBT-23-017-S		
	*	
Appearance for Appellant		Barry L. Gogel, Esq.
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Appearance for Interested Party		Thomas M. Brownell, Esq.
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OPINION AND ORDER BY MEMBER BARROLLE

The Maryland State Board of Contract Appeals (“Board”) conducted a merits hearing on these consolidated appeals on July 31, 2024 and August 2, 2024. After considering all witness testimony, the admitted exhibits and the arguments made by counsel, the Board sustains the appeals.

PROCEDURAL HISTORY AND FINDINGS OF FACT

The above-captioned bid protest appeals arise out of the recommendation for award by the Department of Human Services (“DHS”) for a contract to Conduent State and Local Solutions, Inc. (“Conduent” or “Interested Party”), for provision of an electronic benefits transfer (“EBT”) system in the State of Maryland. In response to a request for proposals issued on September 19, 2023 for Electronic Benefits Transfer System under Solicitation No.

OTHS/EBT-23-017-S (“RFP”), DHS received only two proposals, from Conduent and Fidelity Information Services, LLC (“FIS” or “Appellant”). Both offerors are experienced EBT system providers with operations in many states throughout the U.S. Conduent was the incumbent contractor on an existing contract with DHS for EBT services.

The RFP required DHS to use the Competitive Sealed Proposals (“CSP”) method found in COMAR 21.05.03 for contract award. The contract duration consists of a 5-year base term with two 2-year renewal options. DHS sought a contractor to:

[M]aintain existing functionality and deliver applicable enhancements and modifications to the statewide electronic benefits transfer (EBT) system for the delivery of Temporary Cash Assistance (TCA), Temporary Disability Assistance Program (TDAP) and Supplemental Nutrition Assistance Program (SNAP) benefits through, Point-of-Sale (POS) devices, online purchasing, and (for cash only) Automated Teller Machines (ATMs).

Exh. 5, RFP §2.1.1 “Contractor Requirements: Scope of Work.”¹

One of the technical requirements for EBT services was to “support Pandemic-EBT (P-EBT) Benefits” under the category of SNAP benefits. The RFP provided that the contractor shall:

D. Support Pandemic EBT (P-EBT) Benefits:

1. P-EBT benefits shall be treated the same as SNAP benefits in terms of issuance, redemption, transaction processing, settlement, and expungement.
2. The EBT Contractor shall set-up and administer P-EBT accounts and benefits. If an EBT account already exists, the State will issue P-EBT benefits to the existing EBT account. If an existing [sic] EBT account does not exist, the State will provide demographic data to set-up the EBT account before issuing P-EBT benefits.

RFP §2.3.1.3.3 “SNAP Benefits.”

¹ A binder containing the RFP, proposals and other documents was admitted into evidence without objection as Appellant’s Exhibit A. Unless otherwise noted, all references to exhibits are to those contained in Appellant’s Exhibit A.

Under Section 6.2, the RFP set forth the evaluation criteria for technical proposals in descending order of importance, with any sub-criteria within each criterion having equal weight.² The “Financial Proposal Instructions & Form” of the RFP contained detailed instructions for offerors regarding the requirements of financial proposals. Prices were to be quoted in Cost Per Case Month (CPCM), which represented “the fully-loaded fixed price to deliver the specified category of services to a single case for one month.” A “case” was defined as “the single unit receiving benefits from one or more programs,” and there were six categories of “billable cases,” one of which was “P-EBT Only CPCM” defined as an “active single case in which only P-EBT benefits post to an account during a month.” RFP “Attachment B-1. Financial Proposal Instructions & Form”, Instruction L.3 (Pricing Categories) at p. 145. Additionally, the instructions provided:

B. All unit prices must be the actual price per unit the State will pay for the specific item or service identified in this RFP and may not be contingent on any other factor or condition in any matter...

...

D. Any goods or services required through this RFP and proposed by the vendor at No Cost to the State must be clearly entered in the Unit Price, if appropriate, and Extended Price with \$0.00.

...

F. Except as instructed on the Financial Proposal Form, **nothing shall be entered on or attached to the Financial Proposal Form that alters or proposes conditions or contingencies on the prices.** Alterations and/or conditions may render the Proposal not reasonably susceptible of being selected for award.

² The technical evaluation factors are : (a) offeror’s technical response to requirements and work plan (sub-criteria omitted); (b) experience and qualifications of proposed staff; (c) offeror qualifications and capabilities, including proposed subcontracts; (d) satisfaction of nonvisual access requirements; (e) economic benefit to the State of Maryland; (f) preference to a contractor that holds a form of insurance that can be used to reimburse a beneficiary for identify fraud or theft; and (g) preference to a contractor that provides identity access protections to protect an eligible beneficiary against identity fraud and theft. RFP §6.2 “Technical Proposal Evaluation Criteria.”

...

- I. All Financial Proposal prices entered below are to be **fully loaded prices that include all costs/expenses associated with the provision of services** as required by the RFP. ...

Id., Instructions B, D, F, I at p. 143 (emphasis added).

The RFP section on proposal format specifically advised offerors to “not amend, alter, or leave blank any items on the Financial Proposal Form or include additional clarifying or contingent language on or attached to the Financial Proposal Form.” RFP §5.4 “Volume II – Financial Proposal.”

Regarding the evaluation of financial proposals, all qualified offerors would be ranked from lowest price (most advantageous) to highest price (least advantageous) based on the total proposal price. RFP §6.3 “Financial Proposal Evaluation Criteria.” The RFP allowed the procurement officer to issue a request for a Best and Final Offer (“BAFO”) from each qualified offeror.

The RFP stated that the procurement officer will recommend award of the contract to the responsible offeror whose proposal is determined to be the most advantageous to the State based on an overall ranking. RFP §6.5.2 “Selection Process Sequence.” In making the award determination, “technical factors will receive greater weight than financial factors.” RFP §6.5.3 “Award Determination.”

On September 28, 2023, DHS held a pre-proposal conference with Mr. Samuel Eduful, the procurement officer for the RFP at the time of its issuance. On December 8, 2023, an amendment to the RFP substituted Mr. Eduful with Mr. Rufus Berry as the procurement officer (the “PO”). The original due date of December 19, 2023 for proposals was amended to January 4, 2024.

On December 19, 2023, FIS submitted its technical and financial proposals to DHS in response to the RFP. FIS' financial proposal quoted \$2.90 for CPCM pricing for P-EBT Only cases, and resulted in a grand total price of \$31,044,098.28.³ FIS' CPCM quote for P-EBT Only items for the base contract term and options terms constituted more than a quarter of its grand total price.

On January 4, 2024, Conduent submitted its technical and financial proposals in response to the RFP. Conduent's financial proposal quoted \$1.44 for CPCM pricing for P-EBT Only cases and showed a grand total price of \$27,687,718.08. Additionally, Conduent's financial proposal stated:

CPCM pricing for P-EBT cases is provided based on the current definition and program requirements for P-EBT as defined by Congress and FNS [Food and Nutrition Service]. Please note, as of May 11, 2023, authorization for P-EBT has terminated. Due to the unknown size, scope and duration of any future pandemic(s), we will work with you to evaluate, define, and price the requirements through the change request process more precisely.

Exh. 15 (Conduent's Financial Proposal dated January 4, 2024) at p. 5.

On January 4, 2024, the PO reviewed the technical proposals and then forwarded the proposals to an evaluation committee ("EC") with Conduent's proposal to be evaluated first. In late January 2024, the PO sought clarifications from both offerors. Also, FIS and Conduent each submitted exceptions to the RFP to the PO. None of the clarifications or exceptions related to the CPCM for P-EBT Only cases. On February 1, 2024, the PO and the EC held separate oral presentations with FIS and Conduent.

On February 6, 2024, after opening the offerors' financial proposals, the PO sent separate BAFO requests to FIS and Conduent. On February 8, 2024, FIS submitted a BAFO with a slightly reduced grand total price of \$30,717,421.68 but still included the same quote of \$2.90

³ FIS' financial proposal also included transition-in costs that were not reflected in Conduent's financial proposal.

for CPCM pricing for P-EBT Only cases. On February 8, 2024, Conduent submitted a BAFO which reduced its grand total price to \$19,982,015.28 (by nearly 28%) by reducing its quote for CPCM pricing for P-EBT Only cases to \$0.00. Moreover, Conduent’s BAFO now included the following language (“Disputed Language”):

The “no-charge” CPCM pricing for P-EBT cases is based specifically on the delivery of services according to the program as originally authorized through The Families First Coronavirus Response Act of 2020, as well as the definition and program requirements for P-EBT in Maryland as of May 2023. Please note that as of May 11, 2023, authorization for the P-EBT has been terminated. Due to the unknown size, scope, and duration of any future pandemic(s), we will work with you to evaluate, define, and price any new requirements through the change request process.

Exh. 18 (Conduent’s BAFO dated February 9, 2024) at p. 8.

On March 26, 2024, DHS’ Director of Procurement, Ms. Nneka Willis-Gray, issued an Evaluation Summary and Recommendation of Award (the “Recommendation”) to DHS Secretary Rafael López. She explained that the EC members unanimously agreed that both FIS and Conduent were reasonably susceptible of being selected for award, but that the PO and the EC recommended award to Conduent. Further:

If approved, the procurement unit will notify the awarded and non-awarded Offerors and request documentation from the successful offeror to obtain the contract documentation to move forward with requesting approval to submission for the Board of Public Works approval.

If further discussions are needed, the Procurement Officer will be available.

If disapproved, the procurement unit will move forward with gathering documentation to support that cancellation of the solicitation is fiscally advantageous to the State or otherwise in the State’s best interests . . .

The Recommendation included the following chart summarizing the technical, financial, and overall rankings of FIS and Conduent.

Offeror	Technical Proposal Ranking	Financial Ranking	BAFO Ranking	Overall Ranking
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Conduent State and Local Solutions, Inc.; Washington, DC	1	\$27,687,718.08 (1)	\$19,982,015.30 (1)	1
Fidelity Information Services, LLC; Milwaukee, LLC	2	\$31,762,098.28 (2)	\$31,335,421.68 (2)	2

On April 10, 2024, the PO sent a letter advising FIS that it was not recommended for award. The letter informed FIS of its ranking and explained that, although FIS’ proposal was found to be reasonably susceptible of being selected for award, “this RFP was highly competitive and FIS’ pricing for the Contract was the highest.”

On April 15, 2024, the PO held a debriefing with FIS during which he noted that FIS’ financial proposal was 36% higher in cost than Conduent’s financial proposal.

Exh. 24 (Debriefing Conference Sheet dated April 15, 2024) at p. 3.

On April 17, 2024, FIS filed its first bid protest, alleging that DHS’ evaluation failed to adhere to the RFP’s selection process and criteria; failed to treat offerors equitably; failed to consider FIS’ experience and showed bias in favor of Conduent; and further, Conduent’s grand total price demonstrated, *inter alia*, a failure to satisfy the RFP’s scope of work. On April 29, 2024, the PO denied the protest.

On May 31, 2024, FIS filed its second bid protest based on grounds it says it discovered in the Agency Report filed by DHS in the appeal of the first protest. FIS alleged that Conduent’s financial proposal was unlawfully conditional; DHS’ technical evaluation committee evaluated technical and financial proposals simultaneously after receiving each offeror’s BAFO; and DHS misattributed weaknesses to FIS’ technical proposal. On July 22, 2024, the PO denied the second bid protest.

On June 28, 2024, FIS filed its third bid protest raising additional failures by the PO to adhere to the RFP's technical evaluation criteria and a conflict of interest regarding one of DHS' proposal evaluation consultants. FIS also alleged that the PO was biased because in the Recommendation, he "explicitly threatened to cancel the solicitation if award to Conduent was disapproved." On July 22, 2024, the PO denied the third protest.

All three denials of the protests were timely appealed to the Board and consolidated. Prior to the merits hearing in these appeals, on July 3, 2024, DHS sought and obtained approval of its award recommendation from the Board of Public Works ("BPW").

The PO was the only witness to testify at the merits hearing. Appellant also submitted an affidavit in lieu of testimony by Mr. Cary Jeffers, FIS' Director of Product, Government Division.

STANDARD OF REVIEW

In appeals concerning bid protests, an appellant must show by a preponderance of the evidence that a procurement officer's actions were biased, arbitrary, capricious, unreasonable, or in violation of law. Absent this showing, a procurement officer's decision will not be overturned. *See Montgomery Park, LLC v. Maryland Dep't of General Servs.*, MSBCA No. 3133 (2020) at 36 – 27, *rev'd on other grounds, Montgomery Park, LLC v. Maryland Dep't. of Gen. Servs.*, 254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023); *Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6.

DECISION

Appellant asserts that DHS' award recommendation to Conduent was arbitrary, capricious, unreasonable or in violation of law and/or biased because: (1) the evaluation of the financial proposals violated State procurement law and the RFP in material respects; (2) the

recommendation for award, as written, was contrary to law and biased; and (3) the evaluation of the technical proposals was fatally flawed. We agree with Appellant with respect to the first two arguments, and therefore sustain the appeals.

1. Conditional Language in Conduent’s BAFO.

Appellant asserts that the Disputed Language in Conduent’s BAFO was a condition on its “CPCM P-EBT Only Cases” price quote that rendered Conduent’s proposal ineligible for award. We agree.

The objective law of contract interpretation in the bid protest context requires consideration of the language in the RFP as well as the language in the proposal being challenged. *See TransCore, LP*, MSBCA 2485 (2005); *see also Eisner Communications, Inc.*, MSBCA 2438, 2442 & 2445 (2005) at 32 (explaining that a contract award cannot be made based on a BAFO that is not acceptable as submitted).

The RFP required offerors to provide fully-loaded fixed prices for all required items, including the CPCM pricing for P-EBT Only cases. Additionally, the RFP prohibited offerors from placing any conditions or contingencies on their financial proposals.

Both Conduent’s January 4, 2024 financial proposal and its BAFO contained the following language:

Due to the unknown size, scope and duration of any future pandemic(s), we will work with you to evaluate, define, and price the requirements through the change request process more precisely.

When asked about the Disputed Language at the hearing, the PO testified that Conduent would be held to the \$0.00 price for CPCM P-EBT Only cases because the State can reject any requests for change orders. *See July 31, 2024 Hearing Transcript (“Hr’g Tr.”) Vol I. at 123:1-25; 124 – 125:17.*

Q: Are you saying that regardless of circumstances ... under the contract that's awarded Conduent will not charge the State for any pandemic services, Pandemic EBT services, regardless of whether the requirements for that pandemic differ from [sic] what's in its proposals?

A: I don't see how it's different because we – the State will hold who shall ever the vendor to the price that they propose.

Id. at 122:16-25.

The RFP did not contain a specific definition of “P-EBT.” In its BAFO, Conduent limited its “no charge” price quote for P-EBT cases to those “based specifically on the delivery of services according to the program as originally authorized through The Families First Coronavirus Response Act of 2020, as well as the definition and program requirements for P-EBT in Maryland as of May 2023.”

The PO admitted that the RFP did not include a definition of P-EBT as limited by the Disputed Language. *Id.* at 126:5-17; 132:10-23;135:6-136:23. Additionally, the PO conceded that the RFP did not seek prices for a past pandemic, e.g., the Coronavirus pandemic of 2020. *See id.* at 119:5-14. By accepting the Disputed Language in Conduent's BAFO, DHS, in essence, allowed Conduent to include its own definition of “P-EBT” services which ultimately became part of the Contract. *Id.* at 140:25-141:2. It appears to the Board that DHS agreed to accept a “no charge” price for past services no longer needed and to-be-negotiated prices for future services that may be needed, in the event of other pandemics arising during the term of the contract. This does not sound at all like a fully-loaded fixed price.

Here, Conduent's BAFO included pricing that is contingent upon a definition of P-EBT of its own making and the availability of price and/or scope of work negotiations concerning P-EBT services after contract award. The PO's belief that the State can always choose to reject future requests for change orders misses the point. The Disputed Language negates any intent by Conduent to be bound to its \$0.00 CPCM pricing for P-EBT Only cases as required by the RFP.

In fact, the conditional language included with Conduent's initial financial proposal, even with the \$1.44 quote for CPCM P-EBT Only cases, should have rendered Conduent ineligible for award, based on the requirements of the RFP.

The PO's failure to recognize the Disputed Language as a condition on pricing that rendered Conduent's BAFO ineligible for award led to further missteps in the evaluation process, in that the BAFOs of Conduent and FIS were never compared, as FIS puts it, "apples to apples." To illustrate, FIS alleges that excluding CPCM pricing for P-EBT Only cases from the initial financial proposals would have resulted in FIS' grand total price to be \$2.25 million dollars lower than Conduent's grand total. The PO testified that he did not perform this calculation. The PO also testified that he did not perform any calculation to determine which proportion of the differential between the BAFOs is attributable to the CPCM P-EBT line item. *See Hr'g Tr. Vol I. at 248:19-24; 249:3-250:1.* Without determining the mathematical accuracy of Appellant's assertions, the more significant point here is that the agency's decision to award to Conduent ultimately came down to price, because both technical proposals were, according to the PO, "equally matched."

2. Improper Threat of Cancellation in the Recommendation for Award

COMAR 21.06.02.02 permits an agency to reject all proposals after opening proposals but before award, with the approval of the appropriate Department head or designee, when the agency determines that cancellation is fiscally advantageous or otherwise in the State's best interest. One of the permissible reasons for such a cancellation is when "all other acceptable bids or proposals are at unreasonable prices." COMAR 21.06.02.02C(g).

There were only two options presented to the DHS Secretary in the Recommendation: (1) approve the award to Conduent; or (2) disapprove the award to Conduent, then cancel the RFP.

Although FIS' technical proposal was determined to be reasonably susceptible for award, there was no mention of FIS as an alternative should the Secretary disapprove the award to Conduent.

Although the PO testified that the 36% higher price tag of FIS' BAFO could not be justified,⁴ this was an assessment of price by comparison only to Conduent's BAFO, and there is no evidence that the PO ever found FIS' BAFO to be "unreasonable." If he did, there was no mention of it in the Recommendation. Moreover, as we have found, Conduent's BAFO was not eligible for award under the RFP due to the Disputed Language. Because both offerors were deemed to be susceptible for award, the absence of FIS as an alternative awardee implies bias in favor of Conduent. In short, the Recommendation read: Conduent or nothing.

While Conduent was ranked superior to FIS, the PO testified that the two offerors were "equally matched" technically. Furthermore, it is less than certain that Conduent's BAFO would have been considered the most fiscally advantageous price had the quoted prices for P-EBT Only cases been backed out of both offerors' BAFOs for a more "apples to apples" comparison.

Even in competitive bid procurements where low price is the only criterion for selection, this Board has not hesitated to apply the procurement law even when it requires rejecting the lowest bid. This is because the procurement law has numerous purposes other than just obtaining the lowest price for the state in every circumstance.

TransCore, LP, MSBCA 2485 (2005) at 15-16. "[E]nsuring fair and equitable treatment of all persons who deal with the State procurement system" is also a main purpose of Maryland's procurement law. Md. Code, State Fin. & Proc. § 11-201(a)(2). We find that the absence of any mention of FIS as an alternative awardee – albeit potentially more expensive – presented a misleading picture of all options that were available for approval by the Secretary, and we agree with Appellant that the Recommendation showed evidence of bias in favor of Conduent.

⁴ The PO testified that the financial cost of FIS' proposal was his reason for not recommending award to FIS in the alternative to Conduent, stating, "as the procurement officer I felt [sic] wasn't fair for the State to pay additional millions of dollars for the same service." July 31, 2024 Hearing Transcript Vol I. at 239:2-26; 247:6-15.

3. Flawed Technical Evaluation

Based on our conclusions with respect to the above two grounds for protest, we do not need to reach a decision on the merits of Appellant's third argument that Respondent's evaluation of the technical proposals was fatally flawed. By way of observation, however, we note that the PO's testimony concerning how the overall evaluation was conducted in this procurement was nebulous at best. He could not articulate how the various required technical criteria were evaluated, other than to say that they were reviewed by the EC in the order in which they were listed in the RFP. He was unable to provide any details concerning how technical proposals were given more weight than financial proposals, even though that is what the RFP required. Had the propriety of the technical evaluation been the only issue for this Board to consider, it seems doubtful that the procurement conducted in this case would have passed scrutiny, based on the evidence presented.

For the reasons stated above, the Board concludes that Appellant, Fidelity Information Services, LLC, met its burden of showing by a preponderance of the evidence that the Procurement Officer's actions were biased, arbitrary, capricious, unreasonable, and otherwise in violation of law. The Board sustains Appellant's consolidated appeals.

ORDER

Based on the foregoing, it is this 30th day of August 2024, hereby:

ORDERED that these consolidated appeals are hereby SUSTAINED.

/s/
Senchal Dashiell Barrolle, Esq.
Member

I concur:

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 Nos. 3267, 3280 & 3281, appeals of Fidelity Information Services, LLC under Department of Human Services RFP No. OTHS/EBT-23-017-S.

Dated: August 30, 2024

/s/
Michael A. Dosch, Jr.
Deputy Clerk