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BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2376	Date of Decision: 01/05/04
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification:	Under Dept. of Human Resources RFP No. CSEA/PR-04-001S
Appellant/Respondent:	Maximus, Inc. Department of Human Resources

Decision Summary:

Negotiated Procurements - Evaluation - Discussions - Discussions must be held with all offerors in the competitive range. Thus, if discussions are conducted, the State cannot continue unilateral discussions with one offeror and allow that offeror to make material changes in its proposal without affording some opportunity to the other offerors whose proposals are in the competitive range.

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In The Appeal of Maximus, Inc.)
)
) Docket No. MSBCA 2376
Under Dept. of Human Resources)
RFP No. CSEA/PR-04-001S)

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This bid protest appeal by Appellant arises out of the Department of Human Resources' (DHR or Department) recommendation of award for a contract to Policy Studies, Inc. (PSI), the Interested Party, for privatization of child support services in Baltimore City and Queen Anne's County.¹ Appellant asserts in its protest and appeal that: (1) PSI's change of location for performance in Baltimore City is a material change to its proposal constituting a "bait and switch"

¹This is the fourth bid protest appeal filed by Appellant. The first three, MSBCA 2351, 2357 and 2370, were consolidated for hearing, heard, and denied in an opinion issued on October 31, 2003, which is incorporated herein by reference and made a part hereof.

tactic; (2) DHR improperly continued discussions with PSI after DHR had ceased discussions with Appellant regarding transition and change of location; and (3) the Department did not produce documents related to PSI's transition activities.

Findings of Fact

1. During the Fall of 2002, the Child Support Enforcement Administration (CSEA), a unit within DHR, began drafting a request for proposals (RFP) to continue privatization of child support services in Baltimore City and Queen Anne's County.²
2. CSEA issued an RFP on March 4, 2003 and thereafter issued several addenda.
3. On March 4, 2003, the Evaluation Committee (Committee), that had been formed to evaluate proposals, received copies of the RFP, evaluation instructions, and duties and responsibilities of evaluators. A pre-proposal conference was held on March 14, 2003. By the April, 2003 proposal due date, proposals were received from Appellant, the incumbent contractor, and PSI.
4. The Committee held its first meeting on April 10, 2003. Committee members received instructions, technical proposal checklists, technical evaluation ranking sheets, reference check forms and confidentiality statements. An overview of the evaluation process was provided by the Procurement Officer and the Department of Budget and Management representative to the Committee.
5. The Committee reviewed Appellant's proposal, and, using a checklist, identified areas needing additional information or clarification. The Committee then reviewed the PSI proposal and identified areas needing additional information or clarification. Discussion Issue notices were sent on April 25, 2003 to both offerors with a due date for response of April 29, 2003. On April 29, 2003, the Committee reviewed Appellant's response to the discussion issues and identified additional areas needing clarification. The Committee also reviewed PSI's response to the

²The prior history of privatization of child support services is briefly described in the Board's decision in MSBCA 2351, 2357 and 2370.

discussion issues and identified additional areas needing clarification.

6. Separate discussion meetings were conducted with Appellant and PSI on the issues and responses. Both were advised that a request for a Best and Final Offer (BAFO) would be issued to provide offerors an opportunity to provide written responses to the additional information provided that was not documented in the original proposal or discussion issue responses.
7. The Committee finalized the technical evaluation, ranked technical proposals, and opened and evaluated financial proposals. The Committee determined areas requiring clarification or adjustment. The Committee individually contacted representatives from each offeror and advised them that financial proposals were reviewed, and the Committee discussed issues to be addressed in clarifying or adjusting price offers. The representatives were told that each BAFO should address contents of the discussion related to the financial offer. Both Appellant and PSI submitted a BAFO.
8. As a result of the final evaluation of the offerors' proposals, the Contract was recommended to be awarded to PSI. In a letter dated May 15, 2003, Appellant was notified by the Department that its financial and technical proposals were not the top ranked. Therefore, Appellant was not recommended for award of the Contract. Several protests and appeals by Appellant followed.
9. Appellant filed the instant (fourth) protest on October 6, 2003. The Department denied the protest on October 20, 2003. Appellant filed the instant appeal with the Board on October 30, 2003.

Decision

The following issues need to be determined in this fourth protest and appeal:

- A. Was PSI's change of location for performance in Baltimore City a material change to its proposal constituting an impermissible "bait and switch" tactic?
- B. Were discussions improperly held with PSI regarding transition and change of location after discussion with

Appellant ceased?

C. Did the Department improperly not produce documents related to PSI's transition activities?

We shall discuss these issues in the order set forth above.

The charge of "bait and switch" by Appellant regarding PSI's Baltimore City location is without merit. Bait and switch is a concept in procurement involving improper offeror conduct. The elements of bait and switch which may render a contract award improper are as follows: (1) the awardee making a specific representation in its proposal; (2) the agency relied on this representation in evaluating the proposal; and (3) it being foreseeable that the awardee would not perform according to the representation. See Future-Tec Management Systems, Inc.; Computer & Hi-Tech Management, Inc., B-283793.5, B-283793.6, Comp. Gen., Mar 20, 2000; Combat Systems Development Associates Joint Venture, B-259920.6, Comp. Gen., November 28, 1995.

The RFP required the location of the Baltimore City facility to be "near a major transportation hub." PSI's technical proposal, dated April 8, 2003, reflects that PSI had initiated discussions with Appellant's current Baltimore City landlord at the headquarters facility used by Appellant at 200 North Howard Street in Baltimore City and that PSI anticipated that it would be able to quickly reach an agreement to move into the existing space and relocate after the first year of the project. PSI further indicated that it would move to finalize the lease. However, in response to Question 5 of the PSI BAFO dated May 9, 2003, PSI indicated it had been able to reduce its facilities costs over the contract period by relocating the main facility in Baltimore City to a different location rather than the current contract location. The exact location was not disclosed prior to the conclusion of the evaluation process on May 14, 2003.³ After the evaluation process was concluded and Appellant was notified by letter dated May 15, 2003 that it was not selected, PSI advised DHR that it

³As discussed below, the Committee and the Procurement Officer had been advised during discussions that PSI was also negotiating for space at the Stewarts Building and the Blaustein Building as well as 200 North Howard Street.

would operate its Baltimore City facility in the Blaustein Building located at 1 North Charles Street. This location borders two major public transportation arteries and is two blocks from the Circuit Court for Baltimore City courthouse. Nevertheless, PSI did express its intention to relocate the Baltimore City office to a different location in its May 9, 2003 BAFO, prior to conclusion of the evaluation process and the decision to recommend PSI for award. This change by PSI was permissible because the State is permitted to attempt to obtain the most advantageous price during discussions and BAFOs. COMAR 21.05.03.03C. PSI was able to obtain a facility at another location for its Baltimore City operation at a lesser cost. In the BAFO process, offerors were allowed the opportunity to determine cost savings. PSI did not employ a "bait and switch" tactic because the Committee learned of this permissible change in writing in PSI's May 9, 2003 BAFO. PSI expressed its intention to change the main facility location during the evaluation process, and that intention was accepted by the Committee and the Procurement Officer as part of PSI's BAFO. This possible change in PSI's location was also orally addressed during discussions with PSI that occurred prior to the submission of its May 9 BAFO. The other locations mentioned by PSI at the oral discussions besides the Howard Street location, all of which were acceptable to the Procurement Officer and the Committee, were the Blaustein Building and the Stewarts Building. There simply was not an extension of the evaluation process from which Appellant was excluded.

We will now discuss Appellant's allegation of improper discussions with PSI after the evaluation process had ended. We have noted above that there was not an extension of the evaluation process from which Appellant was excluded. Appellant alleges that DHR improperly continued discussions with PSI after it had ceased discussions with Appellant. Those ongoing discussions, if they had occurred, would represent an improper extension of the evaluation process from which Appellant was excluded. If discussions are conducted, the Government cannot continue unilateral discussions with one offeror and allow that offeror to make material changes in its proposal without affording the

same opportunity to the other offerors whose proposals are in the competitive range. This maxim applies to both pre- and post-award communications with offerors. To the extent that post-award communications are involved, such communications must be analyzed to determine if they would have a bearing on the pre-award competitive negotiation process. See Baltimore Motor Coach Company, MSBCA 1216, 1 MSBCA ¶ 94 (1985) at p. 9; Transit Casualty Company, MSBCA 1260, 2 MSBCA ¶ 119 (1985) at p. 48; COMAR 21.05.03.03C(3). See also Matter of KPMG Peat Marwick, LLP, B-259479.2, 95-2 CPD ¶ 13, Comp. Gen., May 9, 1995.

The record does not support Appellant's allegation that discussions with PSI continued concerning the Facilities and Transition criteria after discussions with Appellant were terminated. The record suggests that PSI did not "identify potential office space" until May 19, 2003 and that PSI did not expect to design its facility layout and floor plan until May 28, 2003. Indeed, it was still working on these tasks as late as June 3, 2003. However, PSI had submitted a generic plan covering these activities and the logistics thereof with its proposal, and it had notified the Department orally and in writing that a move to one of two other locations, both of which met the RFP criteria, would occur. Such notification occurred prior to the conclusion of the evaluation process. The record does not support Appellant's allegations that the Department improperly continued discussions with PSI after it had ceased discussions with Appellant. The record also does not support Appellant's allegation that PSI's abandonment of its initial plan to move into the 200 North Howard Street facility would have had a material effect on the technical rankings of the offerors' proposals, specifically the Facilities and Transition Plans criteria. In fact, the record reflects that the Procurement Officer and the Committee were aware of such possibility prior to the conclusion of the evaluation process. Thus, the technical rankings cannot reasonably be found to have been affected because PSI's BAFO, with the expressed intent to change the facility location, was considered by the Committee in ranking the proposals. The proposed

change of location set forth by PSI in its May 9 BAFO was acceptable to the Committee and the Procurement Officer as part of its BAFO.

The post-award communications identified in this appeal are permissible communications dealing with contract implementation details and do not rise to the level of matter essential to the fairness of the pre-award competitive negotiation process.

The record does not support Appellant's allegation that the Department engaged in discussions or negotiations with PSI that were not similarly afforded to Appellant.

Finally, we conclude that the Department did not improperly fail to produce documents related to PSI's transition activities. Appellant alleges that the Department failed to produce all documents related to PSI's commencement of transition activities before award of the Contract (December 17, 2003) and the May 15, 2003 determination by the Department to seek approval of an award of the Contract to PSI. Appellant focuses on documents attached to the Department's October 20, 2003 final agency action denying the protest dealing with a move to the Blaustein Building. The documents produced by the Department's protest denial on October 20, 2003 were not related to the evaluation of the subject procurement. The record reflects that these documents are related to transition activities that the Department had initiated with PSI subsequent to the May 15, 2003 notification of the recommended award of the Contract. Appellant's request for documents in its appeals in MSBCA 2351, 2357 and 2370 related to the procurement and evaluation process. It appears it was not until Appellant submitted its fourth protest that any request was received by the Department related to PSI's transition activities. The record reflects that the Department did produce thousands of pages of documents requested by Appellant that related to the protests and appeals of the award of the Contract to PSI. The transition activities of PSI were not included in the document production because the activities are post-evaluation and post-recommendation for award. Based on the record, it appears that the Department has provided to Appellant in the consolidated appeals in MSBCA 2351, 2357 and 2370 all of the documents related to the

evaluation of proposals and recommendation for award.

Appellant's instant protest and appeal contains a letter dated September 22, 2003 from Capitol Strategies, LLC to State Senator John J. Hafer. The letter indicates PSI's progress on implementing the transition of the privatization Contract. Capitol Strategies, LLC identifies PSI as its client. The Department did not have access to this letter and thus could not have included it in the released documents. Therefore, the assertion by Appellant that the Department failed to produce documents is not substantiated with reference to this document either, and we also note that such document did not relate to the evaluation of proposals and recommendation for award.

For the foregoing reasons, the appeal is denied. Wherefore, it is Ordered this day of January, 2004 that the appeal is denied.

Dated:

Robert B. Harrison III
Chairman

We Concur:

Michael W. Burns
Board Member

Michael J. Collins
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 2376, appeal of Maximus, Inc. under Dept. of Human Resources RFP No. CSEA/PR-04-001S.

Dated:

Michael L. Carnahan
Deputy Recorder