

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

Docket No. 2401	Date of Decision: 05/11/04
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification:	Under DHCD IFB #S00R 4200013 Asset Management: Physical Site Inspections
Appellant/Respondent:	DCMT/ISC Dept. of Housing & Community Development

Decision Summary:

Evaluation - Unacceptable Technical Offer - Multi-Step Competitive Sealed Bidding - A determination that a technical proposal submitted under multi-step competitive sealed bidding is unacceptable is a matter within the sound discretion of the procurement officer.

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BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of DCMT/ISC)
)
)
Under DHCD IFB #S00R 4200013) Docket No. MSBCA 2401
Asset Management: Physical Site)
Inspections)
)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Jan M. Bryant
Assistant Attorney General
Crownsville, Maryland

APPEARANCE FOR INTERESTED PARTY: None
(Tidewater, Inc.)

OPINION BY CHAIRMAN HARRISON

Appellant, Design Construction Management Team, Inc./Inspection Services Consulting, Joint Venture, timely appeals from a decision of the Maryland Department of Housing and Community Development (DHCD) which denied its bid protest under the captioned solicitation regarding the Procurement Officer's determination that Appellant was not reasonably susceptible of being selected for award based on a finding that its technical offer was unacceptable.

Findings of Fact

1. The Division of Credit Assurance (DCA) is a division within DHCD and is responsible for monitoring the physical condition and management performance of multi-family projects financed by DHCD for the purpose of providing decent, safe and affordable housing. Due to the large number of multi-family projects in its portfolio, DCA lacked the staff to adequately monitor the projects. Accordingly, on November 25, 2003, DHDC issued the

above captioned Invitation for Bids (IFB) seeking firms experienced in physical property site inspection of multi-family housing projects to submit bids to inspect the multi-family projects in its portfolio. The procurement method used for this solicitation was a multi-step competitive sealed bidding as described in COMAR 21.05.02.17; to wit: a two-phase process in which bidders submit unpriced technical offers or samples, or both, to be evaluated by the State and a second phase in which those bidders whose technical offers or samples, or both, have been found to be acceptable during the first phase have their price bids considered.

2. DHCD received a number of bids in response to the IFB including one from Appellant.
3. Five bidders were deemed to be reasonably susceptible for award based upon information contained in the technical packages they submitted in compliance with the solicitation requirements.
4. The Procurement Officer, in consultation with the evaluation committee that evaluated the bidders' technical offers, deemed that Appellant did not meet the minimum qualifications necessary to be considered. Appellant was one of two bidders whose technical offer was deemed to be unacceptable and in a letter dated January 14, 2004 its price bid was returned to the company unopened.
5. The five bidders whose technical offers were deemed to be acceptable were notified of the date and time for the public bid opening and on January 16, 2004 price bids were opened. Tidewater, Inc. located in Columbia, Maryland was the low bidder.
6. The Procurement Officer recommended Tidewater, Inc. as the selected vendor to the agency head's designee who approved the proposed recommended award.
7. Prior to filing its protest, Appellant contacted the Procurement

Officer and requested an explanation of the reason its technical proposal was deemed to be not acceptable. Appellant also requested a review of its proposal in order to discover its perceived weaknesses and to better understand how to improve its response to future solicitations.

8. The Procurement Officer arranged with Appellant to have a conference call. Prior to the conference call the Procurement Officer sent Appellant a brief summary of some of the comments of the evaluation committee. During the conference call which occurred on January 20, 2004 the Procurement Officer discussed with Appellant ways to improve future responses to solicitations and its perceived failure to meet the minimum qualifications for this procurement.
9. In a letter dated January 22, 2004, Appellant filed its protest with DHCD asserting the following grounds:

On behalf of the DCMT/ISC joint venture, I wish to file an official protest and request a contracting officer decision on your office denying opening DCMT/ISC price proposal for the subject procurement. My request is based on the following:

1. The four (4) reasons for rejecting our bid, as stated in your proposal evaluation summary, was not relevant to our technical ability to perform or meet your minimum requirements as outlined in your RFP.
2. You stated in our debriefing conference that our references were checked during the evaluation period and prior to your decision to deny our price proposal. In follow up with the one reference you spoke with, we learned that contact was not made until we received our rejection notice and after we scheduled a debriefing conference call. This is particularly troubling because your evaluation comments focused on the problem you had with our references.
3. Your comment that "the thrust of our firm experience is not inspection" was upsetting and

confusing, given that we submitted over fifty (50) related projects in the joint venture portfolio. Your comment also implied that architecture and engineering firms are not involved in inspections. This suggested that our proposal was not professionally considered.

10. By agency final decision dated February 25, 2004, DHCD addressed the issues raised in Appellant's protest as follows:

For reasons stated below, I do not sustain your protest but, find that the Department acted properly in reaching the decision to determine your bid was not reasonably susceptible for award.

Basis of Protest and DHCD response:

- (1) **BASIS:** The four (4) reasons for rejecting our bid, as stated in your proposal evaluation summary, was not relevant to our technical ability to perform or meet your minimum requirements as outlined in your RFP.

Response: *The IFB, Part IV, defined the minimum qualifications necessary for a bidder to be determined a qualified bidder. There was insufficient information presented in the proposal to evidence the required experience as outlined in Section 4.1 of the IFB, "Inspectors sent by the firm to perform this work must have performed comprehensive physical property site inspections for at least five (5) years, and must have experience in inspecting Housing Finance Agency multi-family housing projects financed by State or Federal housing programs. Experience in inspecting other multi-family housing similar to the Department's will also be considered."*

Further, Section 5.3D of the IFB required the submission of 3 current clients and at least one client in the file of physical site inspections of multi-family housing. The records of the procurement do not evidence that the references provided by the joint venture were able to confirm their contractual relationship with the joint venture.

- (2) **BASIS:** You stated in our debriefing conference that our references were checked during the evaluation period and prior to your decision to deny our price proposal. In follow up with the

one reference you spoke with, we learned that contact was not made until we received our rejection notice and after we scheduled a debriefing conference call. This is particularly troubling because your evaluation comments focused on the problem you had with our references.

Response: *The records of the procurement indicate that the evaluation team participated in a conference call with Mr. Billy Cogman of Kairos Development Corporation, the first reference listed in the joint venture's technical package, on January 13, 2004. This date being prior to January 14, 2003, the date of the letter notifying the joint venture of the determination of not being reasonably susceptible of being selected for the award, I find no basis for the second point of the protest.*

- (3) **BASIS:** Your comment that "the thrust of our firm experience is not inspection" was upsetting and confusing, given that we submitted over fifty (50 related projects in the joint venture portfolio. Your comment also implied that architecture and engineering firms are not involved in inspections. This suggested that our proposal was not professionally considered.

Response: *All documentation evidences that the proposal was given equal consideration by the evaluation committee and the procurement officer along with all other proposals received.*

11. Appellant appealed the agency final decision to this Board on March 5, 2004.
12. No comment on the Agency Report was filed and no party requested a hearing.

Decision

This Board will uphold final agency decisions regarding the acceptability of proposals unless such decisions are arbitrary, capricious or arrived at in violation of law. As the Board noted in the appeal of APS Healthcare, Inc., MSBCA 2244, 5 MSBCA ¶504(2001) at p. 9:

We have often observed that the Board does not second guess an evaluation of a proposal, but merely concerns itself with whether a reasonable basis exists for the conclusions and results reached or determined. Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368(1994) at p. 5, citing Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA ¶ 94(1985); Transit Casualty Co., MSBCA 1260, 2 MSBCA ¶119(1985). See also, Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116(1985), at p. 12 "Identification of those proposals that are acceptable, or capable of being made acceptable, is a matter within the reasonable discretion of the procurement officer"; and Baltimore Motor Coach Co., *supra*, at p. 10 "When evaluating the relative desirability and adequacy of proposals, a procurement officer is required to exercise business and technical judgement. Under such circumstances, a procurement officer enjoys a reasonable degree of discretion and, for this reason, his conclusions may not be disturbed by a reviewing board or court unless shown to be arbitrary or arrived at in violation of Maryland's Procurement Law."

We find that the same principles apply to the evaluation by the State of an unpriced technical offer or sample pursuant to COMAR 21.05.02.17 under multi-step competitive sealed bidding. Accordingly, we must determine whether the Procurement Officer's decision that the Appellant's technical offer was not acceptable was arbitrary, capricious or arrived at in violation of law.

The record reflects that the Procurement Officer's determination (and DHCD's subsequent concurrence) that Appellant's technical offer was not acceptable was based on two principal reasons.

The Respondent DHCD first argues that the technical package submitted by Appellant did not meet one of the minimum qualifications articulated in the IFB which required that inspectors sent by the firm to perform the work have performed comprehensive physical property site inspections for at least five (5) year, and have experience in inspecting Housing Finance Agency multi-family projects financed by State or Federal housing programs.

Appellant outlines its qualifications and experience in Tab 2 of its technical package or offer. While Appellant indicates that the principals in the joint venture have over 30 years experience in design and construction management, it fails to articulate experience

in comprehensive physical property site inspections. The IFB specifies that inspectors sent to perform the work have a minimum of five years experience in the field of comprehensive physical property site inspections. However, Appellant's technical package does not reflect that Appellant already employs inspectors with such experience or promise that inspectors that it recruits or trains will have such experience. Appellant did not comment on the Agency Report nor request a hearing. Based on the state of the record the Board must conclude that the discretionary decision that Appellant's technical proposal was not acceptable appears to have been based on a rational reason related to the necessary qualifications a bidder needed to have or commit to obtain in order to demonstrate its ability to perform the services required by the IFB. Thus, based on this record, we do not find that the Procurement Officer's rejection of Appellant's technical package and DHCD's subsequent concurrence as reflected in the agency's final decision of February 25, 2004 was arbitrary or capricious or arrived at in violation of law.

Secondly, DHCD argues and the record reflects that the technical package submitted by Appellant failed to provide the necessary information about clients as required in the IFB, Section 5.3D Technical Package Content - References. Section 5.3D provided that "[b]idders shall provide the name, addresses, and telephone numbers of at least (3) current clients, including a contact person, that may be contacted as references, and at least one client (not necessarily current) in the field of physical site inspections of multi-family housing. DHCD reserves the right to call any known former or current clients". The references provided did not confirm a contractual relationship with the Appellant nor did the references confirm that the Appellant had the required experience in performing comprehensive physical property site inspection. Additionally, of the references provided in the technical package, only one could be verified by the evaluation committee. The telephone number for one of the references

was incomplete; another telephone number was in fact a facsimile number. When the evaluation committee contacted another listed reference, the Annapolis Housing Authority, the committee was told that the contact person listed by Appellant was no longer an employee and that no one currently at the Annapolis Housing Authority could give a reference for Appellant. Finally, one reference was one of the employees Appellant designated as key personnel to perform the required services of the IFB.

In its protest, Appellant asserts that the one reference DHCD actually spoke with was not contacted until after the Procurement Officer had made the decision that Appellant's offer was not acceptable. According to the Agency Report submitted pursuant to COMAR 21.10.07.03, the procurement file¹ does not support this assertion. The procurement file is asserted to reflect that the evaluation committee contacted a Mr. Billy Cogman of Kairos Development Corporation on January 13, 2004 and that the determination that Appellant's technical package was not acceptable was made the next day, January 14, 2004.

The experience requirements set forth in the IFB were central to the services sought and the lack of adequate response to these requirements in Appellant's offer made the technical package unacceptable and thus supports the rejection of Appellant's bid.

Appellant finally asserts in its protest that its technical offer allegedly detailing inspection experience was not seriously considered. Respondent counters in the agency final decision and in the Agency Report that the procurement process for this IFB was conducted in a fair and impartial manner and that all responses received were given due consideration by the evaluation team. The evaluation team consisted of the Director of DCA, and two supervisors

¹ A comprehensive procurement file containing information regarding the procurement is required to be maintained. See e.g. COMAR 21.05.01.06; COMAR 21.05.01.07; COMAR 21.06.02.05.

from the same division. Respondent asserts in the Agency Report that (1) each member of the evaluation team is a professional and gave time and attention to the information presented in the technical portion of the bids and (2) only after this careful consideration did the evaluation team find that Appellant's technical package was not acceptable. Appellant has not met its burden to show that such assertions by the State are not true.

In conclusion, the decision to reject Appellant's bid on grounds that its technical offer was not acceptable has not been shown by Appellant on this record to be arbitrary, capricious or arrived at in violation of law. Accordingly, the Board will deny the appeal.

Wherefore, it is Ordered this day of May, 2004 that the appeal is denied.

Dated:

Robert B. Harrison III
Chairman

I 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 2401, appeal of DCMT/ISC under DHCD IFB #S00R 4200013 Asset Management: Physical Site Inspections.

Dated:

Loni Howe
Recorder