

Docket No. 2143	Date of Decision: 11/30/99
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Office of Administrative Hearings RFP OAH-CR-001-00	
Appellant/Respondent: Free State Reporting, Inc. Office of Administrative Hearings	

Decision Summary:

Negotiated Contracts - Evaluation Criteria - Technical Proposals in a procurement by competitive sealed proposals must be evaluated pursuant to the evaluation criteria set forth in the RFP.

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of :
:
FREE STATE REPORTING, INC., :
: Docket No. 2143
Under Office of Administrative :
Hearings RFP OAH-CR-001-00 :
:
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OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the appeal by Free State Reporting, Inc., ("Free State") from the denial of its protest by the Office of Administrative Hearings ("OAH") that it was not informed in the Request for Proposals of a preexisting bias for stenotype court reporting over electronic court reporting, and therefore was not deemed qualified on its technical proposal to advance to consideration of its financial proposal.

Findings of Fact

1. In March 1999, the OAH issued a Request for Proposals¹ ("RFP")

¹ According to COMAR 21.05.03.01, a request for proposals (as opposed to an invitation for bid) should be used for the procurement of human, social, cultural or educational services and real property leases, and be used for other procurements (such as the instant one), where the procurement officer, with the written approval of the agency head or designee, determines that competitive sealed bidding cannot be used because

1) Specifications cannot be prepared that would permit an

for Court Reporting Services, including the recording of testimony, transcription, and the furnishing of transcripts and computer disks for administrative hearings and other events. The Offerors were to make a two-volume submission; one for their technical proposal and the second for their price proposal.

2. The RFP specified, inter alia, that technical proposals should address, at a minimum,

1. Methods of verbatim recording and backup. (Is stenotype machine, steno-mask, etc., used? Is the method used superior to that used by others? How is back-up, if any, used? Is it necessary or desirable? Is computer assisted transcription available? Routinely used?)

* * *

3. Quality control. Methods, systems procedures, and practices that are used to assure accuracy and quality of the end product and of each step in the process of recording and transcription.

3. State Finance and Procurement Article §13-104(b)(2)(ii) & (iii) require that "a request for proposals shall include a statement of . . .(ii) the factors, including price, that will be used in evaluating proposals; and (iii) the relative importance of each factor." Tracking the statute, COMAR 21.05.03.02A sets forth the content that must be included in a Request for Proposals, including, inter alia, (2) The evaluation factors and an indication of the relative importance of each evaluation factor, including price.

award based solely on price; or
2) Competitive sealed bidding is not practicable or is not advantageous to the State and there is compelling reason to use the source selection methodology set forth in this chapter.

4. According to the RFP, Section V, Evaluation and Selection Procedure, A. Evaluation Committee,

All proposals received by the submission deadline will be evaluated by an Evaluation Committee. The Committee may request technical assistance from any source.

The Committee will review each proposal for compliance with the mandatory feature requirements in Section III (Specification) and with all other mandatory requirements of this procurement. Failure to comply with any mandatory requirement will normally disqualify a vendor's proposal. Proposals requiring clarification from a vendor before a decision on their qualifications can be reached by the Committee may be categorized as potentially qualifying until clarification is obtained, or until the Procurement Officer reaches a final determination concerning qualifications of the proposals. Minor irregularities in proposals which are immaterial or inconsequential in nature may be waived whenever it is determined to be in the State's best interest.

5. According to the RFP, the price proposal would only be reviewed if the technical proposal were considered "qualified", i.e., if it attained at least 75% of the total possible points:

B. Technical Evaluation

The Committee will conduct an initial evaluation of the technical merit of each qualifying proposal. **This evaluation will be made on the basis of the criteria listed on the enclosed evaluation form.** To be considered qualified, a proposal must attain at least 75% of the total possible points. (Emphasis supplied)

6. The evaluation form referred to in B. Technical Evaluation, above, and which was utilized by the Evaluation Committee in reviewing the proposals, stated the following:

**OFFICE OF ADMINISTRATIVE HEARINGS
 BID PROPOSALS - COURT REPORTING
 EVALUATION CRITERIA**

<u>DESCRIPTION</u>	<u>WEIGHT</u>
BASIC REQUIREMENTS	30 %
OTHER REQUIREMENTS	5 %
PROCESS OF TRANSCRIPTION	5 %
QUALIFICATIONS, EXPERIENCE AND NUMBER OF PERSONNEL	5 %
MANAGEMENT CAPABILITIES	3 %
QUALITY CONTROL	6 %
STANDARDS AND PRACTICES FOR HIRING AND TRAINING OF PERSONNEL	6%
 TECHNICAL TOTAL	 60%
 PRICE	 <u>40%</u>
TOTAL SCORE	<u>100%</u>

SCORING:
 EXCELLENT - 10 POINTS
 VERY GOOD - 7 POINTS
 SATISFACTORY - 5 POINTS
 FAIR - 3 POINTS
 POOR- 1 POINT

BIDDERS MUST MEET 75% OF TOTAL POINTS ON THE
 TECHNICAL PROPOSAL TO QUALIFY FOR CONSIDERATION FOR
 THE CONTRACT.

7. In error, this form apparently was not sent to potential offerors with the proposal solicitation package. The Procurement Officer testified that he believed that the form was later provided at the pre-bid conference on March 16, 1999, or by facsimile or mail.
8. However, of the five offerors, it is clear from testimony that Appellant, the Interested Party For the Record Inc., and Walls Reporting, Inc. never received a copy of this statement of the applicable evaluation criteria. Counsel for Appellant proffered that to his knowledge, one offeror, Deposition Services ("DSI"),

at this time has a copy of the document in its files, but it is unknown when that copy was received.

9. Despite the statement in Section B that **"this evaluation will be made on the basis of the criteria listed on the enclosed evaluation form"**, no offeror protested the absence of this document prior to the opening of proposals, much less requested a copy of the document.
10. The RFP, did however, indicate that "technical merit will be greater than financial.", and that the selection procedure for the procurement requires that the initial technical evaluation be completed before consideration of a vendor's pricing proposal. (See Finding of Fact Nos. 5 and 12).
11. If Appellant (or any other offeror) wished to protest the absence of the evaluation factors, the protest was required to have been made prior to the proposal submission deadline. COMAR 21.10.02.03.A.
12. Five proposals were received on March 30, 1999, and were evaluated by an evaluation committee comprised of four evaluators, a panel which included administrative law judges. Each evaluator was provided with a score sheet and evaluation form on which he was to record his comments and observations of the proposals. The offerors were ranked by the evaluators as follows: on a weighted point scale, a total of 24 points was available to each technical proposal. Since a bid must attain 75% of the points available in order to qualify for review of the price proposal, 18 points were required to remain in competition.

BIDDER	WEIGHTED SCORE
For the Record, Inc.	23.67
Walls Reporting, Inc	22.23
Free State Reporting, Inc.	13.94

Deposition Services, Inc.	12.40
York Reporting	7.62

13. As can be seen from the above table, For the Record and Walls Reporting were the two bids which secured sufficient points to advance to the price phase of the procurement. While For the Record received mostly 10's from the evaluators in the various categories, Appellant received 7's, 5's and 3's². On May 14, 1999 Free State was advised that it had not achieved the required 75% score and that the contract had been awarded to another vendor. That other vendor was For the Record, which had scored the maximum permissible points in five of the seven areas set forth on the Evaluation Form at Findings of Fact No. 6 above. A second vendor, Walls Reporting, also passed the 75% cutoff for points on the technical evaluation. It is noted that both of these offerors offered primarily stenotype services.
14. On June 8, 1999, Appellant was given a debriefing. At that meeting, Appellant was advised that the evaluators had been persuaded that the use of stenotype or steno-mask provided a superior service than the use of electronic recordings, and that during the evaluation, those vendors providing stenotype services received more points for providing that service. Appellant was also informed that it was ranked lower than the winning offeror in other factors, including quality control, qualifications and experience of personnel.

²As noted above, the evaluators were permitted to score as follows: Excellent - 10 Points; Very Good - 7 Points; Satisfactory - 5 Points; Fair - 3 Points; Poor- 1 Point. The evaluators were not permitted to award 2, 4, 6, 8, or 9 points.

15. By letter dated June 15, Appellant submitted its protest to OAH, asserting that the request for proposals did not indicate that providing solely or primarily stenotype services was required for technical acceptability.
16. On July 12, 1999, OAH denied Free State's protest. The Procurement Officer stated the following in his denial letter of July 12, 1999:

The RFP did not require that the proposals rely primarily or solely on stenotype services, and technical proposals were not disqualified if they did not rely primarily or solely on stenotype services. However, in evaluating the proposals for the purpose of determining which services would best meet the OAH's needs, and which services were superior and assured accuracy and quality, the evaluators gave higher scores to those offerors who included stenotype services.

As the evaluation criteria indicated, scoring ranged as follows: 10 points for excellent; 7 points for very good; 5 points for satisfactory; 3 points for fair; and 1 point for poor. In evaluating how well each offer met the basic requirements, including superiority of methods used and quality control, the evaluators gave better scores to offers that included stenotype services as well as electronic recordings. It has been the experience of the administrative law judges including those evaluators who are law judges, that transcripts prepared from stenotype are more accurate and complete; stenographers are more likely to ask witnesses to speak up and to request verification of spellings. Moreover, reading back questions or prior testimony is quicker with stenotype than with electronic recordings.

Finally, absence of stenotype services with respect to basic services and quality control was not the sole basis on which Free State's proposal was rated lower than that of other offerors. Free State did not score as well as other offerors in other categories, for example qualifications and experience of personnel and the provision of additional services to the customer gratis.

Conclusion

As procurement officer, I have concluded that Free State's protest should be wholly denied. As the RFP clearly indicated, each offeror was asked to identify the types of verbatim recording services used, including back up services, and to explain why the services offered were superior to others. The preference given by the evaluators to offers including stenotype services was not arbitrary; it was based on first-hand experience. Apparently, Free State's explanation of the superiority of its services, which did not include any stenotype services, did not convince the evaluators.

17. This appeal timely followed.

Decision

There are two issues that the Board must look at to determine this appeal. First, we must look to the impact of the failure of the OAH to provide the evaluation criteria document referenced in the RFP and utilized by the evaluation committee to all offerors in this solicitation. Second, we address the original claim by Appellant that there existed a bias for stenotype recording at the agency, and that this fact was not disclosed as a potential evaluation factor.

As noted in the findings of fact above, the Office of Administrative Hearings failed to provide to the offerors the evaluation criteria which were utilized by the evaluation committee in reviewing those offers submitted. This fundamental omission was obvious on its face, since the RFP specifically referred to a document enumerating evaluation factors which was not included with the solicitation package. Incredibly, no offeror protested this violation of law prior to the submission of bids as required by COMAR 21,10.02.03A. In the absence of a pre proposal opening protest, and in

the absence of fraud or criminal misconduct, therefore, this Board does not have jurisdiction to review this ground of appeal.³

The Board has likewise found that it lacks jurisdiction in other instances of failure by an appellant to meet jurisdictional requirements, despite the fact that the State has obviously violated the law. See PTC Corporation and Ion Track Instruments, Inc., MSBCA 2027, 5 MICPEL ¶430 (1998). COMAR requires protests based upon alleged solicitation improprieties to be filed before the closing date for receipt of initial proposals. COMAR 21.10.02.03. Failure to bring a timely protest divests this Board of jurisdiction. Wilbanks Technologies Corp., MSBCA 2066, 5 MSBCA ¶440 (1998) (appeal dismissed where protest related to alleged improprieties in an RFP was not brought prior to the due date for receipt of initial proposals); ATI Systems and Federal Signal Corp., MSBCA 1911, 1913, and 1918, 5 MSBCA ¶387 (1995); Century Elevator, Inc., MSBCA 2125, 5 MSBCA ¶_____ (July 1, 1999) *citing* Merjo Adv. & Sales Promo. Co., MSBCA 1948, 5 MSBCA ¶396 (1996) (protest based upon alleged improprieties in a solicitation that are apparent before bid opening must be filed before bid opening).

Here, the RFP advised potential offerors that "[t]his evaluation will be made on the basis of the criteria listed on **the enclosed evaluation form**. Agency Report Exhibit 1 at 25 (emphasis added). According to Free State, it did not receive the attachment. Therefore, Free State's protest on this ground is an impropriety which should have been apparent to Free State from the solicitation itself. Stated another way, Free State's alleged inability to prepare its proposal in accordance with the factors which were considered by OAH arises from

³We are aware that the General Procurement Law and COMAR Title 21 require that a request for proposal include the factors that will be used in evaluating proposals and the relative importance of each factor and that a procurement that violates the General Procurement Law and COMAR may result in a void contract.

the fact that Free State failed to raise the issue prior to submitting its proposal. The absence of the evaluation sheet, in the face of the clear reference in the RFP, raised a patent ambiguity for which Free State was obligated to request clarification. Helmut Guenschel, Inc., MSBCA 1434, 3 MSBCA ¶211 (1989). As the absence of evaluation factors would have been obvious to Free State, the appeal of any protest related to the absence of the evaluation factors (and their relative importance) may not be considered on the merits. Thus, the Board does not have jurisdiction to consider this appeal, see COMAR 21.10.02.03C (providing that such a late protest may not be considered) and it must be dismissed. ISMART, LLC, MSBCA 1979, 5 MICPEL ¶417(1997). Crystal Enterprises, MSBCA 1971, 5 MICPEL ¶407 (1996).

Appellant states, however, that it is not protesting a solicitation impropriety. It acknowledges that it could have submitted such a protest, but chose not to do so, and states that its protest now is that the State did not evaluate equally based on the specifications as **were** set forth. In support of this contention it cites COMARK Federal Systems, B-258343, 1998 U.S. Comp. Gen. (1998). To avoid the consequences of failure to timely protest the absence of the evaluation factors (depriving this Board of jurisdiction), the Appellant argues that the absence of the evaluation form relegated the Agency to evaluating all proposals (i) solely on the basis of the solicitation's specifications, (ii) by considering all specifications, leaving none out of the evaluation, and (iii) by considering all specifications as equal. The Board does not find this argument persuasive, but even if it were, if all factors were treated equally, the decision to award to For The Record, Inc., would have likely remained the same.

As stated in COMARK, supra, once an agency decides by issuing an [RFP] to shift to the vendors the burden of selecting items on which to quote, the agency must provide some guidance about the selection

criteria, in order to allow vendors to compete intelligently. It must indicate, at a minimum, the basis on which the selection is to be made, including for example, the relative importance of technical factors versus financial factors. This minimum requirement the OAH met, by setting forth the 75% threshold⁴, the fact that technical would count for more than financial, and by setting out in detail those areas of interest that it wished the offerors to address in their technical proposals. Here, the testimony and record reflect that the evaluators reasonably scored the proposals in accordance with their individual judgment and the information set forth in the RFP. Each of the evaluators individually and independently reached the same results. Free State's proposal did not meet the 75% threshold for further consideration. Assuming arguendo that all factors were required to be scored equally, this Board does not conclude that OAH abused its discretion in rejecting Appellant's technical proposal.

The protest over which the Board has jurisdiction was on grounds

⁴Appellant raises another ground of protest for the first time on appeal. While we do not substitute our judgment for that of the procurement officer, we note that the procurement officer devised an evaluation point scoring system based on point scores of 1, 3, 5, 7 and 10, which would have precluded acceptance of a technical offer which scored 7 in all evaluation categories, and would have been described by evaluation criteria as "very good". Whether the preclusion of "very good" technical offers from consideration on price in negotiated procurements where technical merit is ranked higher than price (in this procurement, 60/40) is not an issue before the Board, since it was raised for the first time on appeal and the Board does not have jurisdiction over issues not timely raised before the procurement officer. The procurement officer testified at the hearing on cross examination that the exclusion of "very good" offers from further consideration because of the range of scores assigned and the requirement that an offer score 75% on technical factors (as proposed by the Department of Management and Budget without regard to the scoring mechanism) had not occurred to him until the question was posed by counsel for the Appellant during cross examination.

that there was an undisclosed bias for stenotype recording at the agency. Appellant argues that "a preexisting preference for stenotype services was never explained in the Agency solicitation" and thus that this preference is a basis for finding that the Agency violated Maryland law and that the award to For The Record should be set aside. After careful review of the evaluator's hand written notes (documents subject to a protective order) and after hearing the testimony of the Procurement Officer, and reviewing his procurement officer's decision, this Board finds that the development of an apparent preference for stenotype reporting, after receipt and review of several proposals which set forth reasons why their product was superior, would not be fatal to the procurement. The process is by its nature a subjective process. See, B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶ 58 (1983) at page 10.

Where the RFP does not articulate the approach, product technology or methodology to achieve its objectives, it is impossible for the State to anticipate every relevant characteristic of the potential offers, and thus the State cannot assign evaluative weights to such unknown characteristics. Rather than determining in advance the advantages of A over B, the State invited the offerors to argue the advantages of their particular methodology. Then, as was argued by the Interested Party,

the procurement officer and technical evaluators must exercise their subjective judgment as to which proposals satisfy the State's objectives and then quantify their subjective judgments to determine which proposal best meets those needs. This can only be done through use of broad criteria, not potentially limiting standards.

See, Morton Management, Inc., GSBICA No. 9828-P-R, 90-1 BCA ¶22608 (January 12, 1990), where the GSA Board found that "in formulating its specifications . . . the agency included adequate information to enable offerors to make 'reasoned judgments as to how they can best satisfy

the Government's needs." Evaluators cannot be faulted (or second-guessed) for arriving, after review of all the proposals, at a determination that stenotype vs. electronic reporting is more advantageous to the State.⁵

In the end, Appellant Free State scored significantly lower than For the Record, and even adjusting for an alleged bias with regard to basic requirements would not yield a score sufficiently high to cross the 75% threshold which was set out in the RFP. The appellant must demonstrate that but for the alleged error, there was a "substantial chance that [it] would receive an award -- that it was within the zone of active consideration." CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 15754-75 (Fed. Cir. 1983). Where adjustment of the protestor's scores to correct alleged wrongs does not result in a substantial chance of award, the protest cannot be sustained. Kunkel-Wiese, Inc., B-233133, 89-1 CPD P 98 (Jan. 31, 1989).

Accordingly, this appeal is denied.

Wherefore, for the foregoing reasons, this appeal is denied this _____ day of November, 1999.

Dated:

Candida S. Steel
Board Member

⁵Indeed, where an agency can demonstrate that its minimum needs require one solution versus another, this Board will not interfere with such discretionary determination. Xerox Corporation, MSBCA 1111, 1 MSBCA ¶48 (1983). Thus, if the OAH had solicited competitive bids for court reporting services limited to stenotype reporting rather than this negotiated procurement, on this record, the Board most likely would have upheld the method of procurement. (The record further reflects that the Appellant would have been prepared to provide stenotype services.)

I concur:

Robert B. Harrison III
Chairman

Randolph B. Rosencrantz
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 Opinion in MSBCA 2143, appeal of Free State Reporting, Inc., under OAH RFP No. OAH-CR-001-00.

Dated:

Mary F. Priscilla
Recorder