

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Hunt Reporting Company)
)
) Docket No. MSBCA 2783
Under)
Office of Administrative)
Hearings RFP OAH CR 11-01)

APPEARANCE FOR APPELLANT: Walter D. Murphy, Jr.
Glen Burnie, Maryland

APPEARANCE FOR RESPONDENT: H. Scott Curtis
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Stephen M. Seeger
Washington, D.C.

OPINION BY BOARD MEMBER DOORY

This appeal is denied because the action of the agency's procurement officials were not arbitrary, capricious, unreasonable, or in violation of law.

Findings of Fact

1. The Office of Administrative Hearings (OAH) on March 1, 2011 issued a request for proposals (RFP) for a contractor to provide court reporting services under RFP OAH CR 11-01.

2. RFP Section 1.1 states:

"These services include recording testimony, transcription, and furnishing transcript or other media for administrative hearings and other to-be designated events. Any agency of the State of Maryland may order these

services under any contract which results from this solicitation. The services will be offered and provided in accordance with the specifications and conditions set forth in this request for proposals."

3. The contract that results from this RFP will be an indefinite quantity fixed unit price contract, defined in COMAR 21.06.03.06(2) as, "a contract for an indefinite amount of goods or labor to be furnished at specified times, or as ordered, that establishes unit prices of a fixed price type."
4. A proposal, with both technical and financial components, was due no later than 12:00 p.m. on April 1, 2011 in order to be considered. RFP 1.10.
5. OAH received and reviewed proposals submitted by three (3) contractors, namely For the Record, Inc. (FTR), Hunt Reporting Company (HRC) and JR Investigative Services (JR). JR's technical proposal was deemed insufficient by the Evaluation Committee and was no longer considered.
6. The Evaluation Committee reviewed the technical proposals first, numerically ranking them. Financial proposals were then considered and numerically ranked. Upon completion of both evaluations, the Evaluation Committee ranked each entire proposal as a whole.
7. FTR's Technical Proposal as compared to HRC was ranked the best technically, based on the following findings by the OAH Evaluation Committee:
 - Experience and capabilities by offering more reporters and transcriptionist to OAH and more office staff personnel working as an eight member management team to provide services to OAH. A wider range of experience in working with agencies all across the United States and a greater of volume of transcripts completed in an annual year.

- Court reporters available are both stenotype reporter and voice reporters and all stenotype reporters must have certificates/diplomas in court and conferencing reporting.
- Corporate assets in transcription stations greater than HRC.
- Confidentially [sic] standards stressed more with FTR due to work with DOJ where background checks are done on reporters working on federal contracts.
- A wide range of free/gratis services are offered.
- FTR uses a greater amount of employee reporters and transcriptionists than subcontractors. Evaluation committee finds this as a greater quality control measure for products produced.
- FTR has a proved [sic] history and vast knowledge of OAH having provided court reporting services for eighteen years.

Based on the aforementioned findings, FTR was ranked superior to HRC in the technical evaluation.

8. Financial proposals were then reviewed. HRC was the lowest bidder over a five-year period with a bid of \$647,312. FTR bid \$668,750 which was \$21,166 higher than HRC. A best and final offer was requested of both HRC and FTR. The best and final offer from HRC remained the same as its initial offer. FTR's best and final offer was reduced to \$653,546 which made the difference in offers \$6,234, less than one percent (1%), rendering the financial proposals a virtual tie.
9. The Evaluation Committee decided it wanted a more thorough financial analysis and requested more specific prices for the following services:
 - Transcript from a hearing recorded by a court reporter- 10 day turnaround; 5 day turnaround; and a 3 day turnaround
 - Transcript from a hearing recorded by OAH and CD provided- 10 day

turnaround; 5day turnaround; and a 3 day turnaround

- Daily delivery charge
- Additional copies of transcriptions
- Appearance by court reporter without transcript requested

10. The Evaluation Committee's Summary of financial proposals states:

Looking at both the bid proposals HRC holds a very slight lead over FTR in their overall bid, potentially saving the State approximately \$6,234 over the five years period. It is anticipated that this savings will decrease as OAH evaluates the need for additional copies in transcripts requested in the three and five day turnaround area. FTR scores better in the ten day turnaround which again represents 85% of the total bid. This could potentially offset the savings realized by HRC in the three and five day turnaround area. The Evaluation Committee ranked HRC company as number one strictly on the total dollar amount, but noted financially the two proposals were extremely close and a potential savings with FTR in 85% of the total bid with regard to the 10 day-turnaround area.

11. The final Evaluation Summary states:

The Evaluation Committee considered the combined technical proposal and the financial proposal of each Offeror to determine the most advantageous overall proposal to OAH. The numerous superior points of FTR over HRC in the technical proposal, along with FTR's financial proposal in the ten day turnaround for court reporting and transcriptions, combined with an eighteen years knowledge of experience in dealing with OAH is the best and most advantageous offer received and is recommended the award.

12. On August 9, 2011, the OAH procurement officer advised the President of HRC, that the Department of Budget and Management (DBM) had recommended to him that FTR be the

successful bidder and that DBM came to that conclusion because they felt that FTR has "more resources." The RFP did not specify a minimum or maximum number of personnel necessary to perform the contract. FTR was recommended for award of the contract.

13. A bid protest was filed by HRC on August 11, 2011 to OAH.
14. In an August 24, 2011 letter, OAH issued a final decision denying HRC's protest. HRC protested on two grounds: 1) that it was the low bidder and did not receive extra points for that ranking; and 2) that it has an adequate staff to perform services, so the extra staff offered by FTR is irrelevant.
15. A notice of appeal was filed by HRC on September 2, 2011 to the Maryland State Board of Contract Appeals (Board).
16. On September 28, 2011 an Agency Report was filed. On October 11, 2011, HRC filed Comments on the Agency Report and on the same date filed a request for a hearing before the Board.
17. On November 30, 2011 a Notice of Appearance of Counsel was filed on behalf of FTR as an interested party.
18. A hearing was held on December 1, 2011.

Decision

Appellant bid on an RFP for court reporting services issued by OAH. Appellant was low bidder, with a bid of \$6,234 less than that of FTR over the five (5) year term of the contract, a difference amounting to less than one percent (1%) between the two bids. Appellant argues that it could provide adequate resources to perform the contract and that it was the low bidder. These two reasons are the grounds for the appeal before the Board.

HRC contends that it can perform the court reporting and ancillary services required by the RFP even though it has fewer staff than FTR, the interested party. Further, HRC discusses the

advantage of different types of court reporting, such as stenomasking versus stenotyping.

In any appeal of a bid protest, the burden lies with Appellant to show that the agency's action was biased or that the action was arbitrary, capricious, unreasonable, or in violation of law. Delmarva Community Services, Inc. MSBCA 2302, 5 MSBCA ¶2302 (2002). There was no allegation of bias proffered.

The RFP was reviewed by the Evaluation Committee carefully. The Evaluation report summary, as recited in part above, consisted of a five-page detailed comparison of both bids. The evaluation was comprehensive, and the Evaluation Committee was reasonable in the manner by which it arrived at its recommendation for award of the contract.

The Board has recognized and held that, "Procurement officials may award a contract to a higher priced, technically superior proposal if it is determined that the higher priced, technically superior proposal is also the proposal most advantageous to the State." Delmarva Community Services, Inc. MSBCA 2302, 5 MSBCA ¶2302 (2002), *see also*, United Technologies Corp and Bell Helicopter, Textron, Inc., MSBCA 1403 and 1407, 3 MSBCA ¶201 (1989), Information Control Systems Corporation, MSBCA 1198, 1 MSBCA ¶81 (1984).

Appellant has the burden of proving that the award of the contract herein is contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion. Delmarva, op cit. "Mere disagreement with the judgment of the evaluators assigned to the evaluation panel for the procurement is insufficient to show that the evaluation of proposals is unreasonable." AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987). Appellant may disagree with the evaluators' recommendation but that alone does not meet the burden necessary. No evidence was presented that would demonstrate any unreasonable or arbitrary actions by the procurement officials.

The Board has consistently held, that it will not supplant its judgment for that of the agency. See, Hensel Phelps Construction, MSBCA 1167, 1 MSBCA ¶68 (1984), Eisner Communications, Inc., MSBCA 2438, 2443 and 2445, 6 MSBCA ¶560 (2005), ACS State Healthcare, LLC., MSBCA 2474, 6 MSBCA ¶564 (2005).

Furthermore, the Board has no way to make an independent judgment to compare these proposals because the two competing proposals were not entered as evidence. The Board will not second guess the procurement official and Evaluation Committee which examined these proposals. The evaluation process and the detailed Evaluation Report demonstrate that careful and close examination was made and there was no evidence of unreasonable, arbitrary, capricious or illegal behavior in this procurement.

For the foregoing reasons, the appeal is denied.

Wherefore it is Ordered this _____ day of February 2012 that the appeal of Hunt Reporting Company is denied.

Dated:

Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
Chairman

Dana Lee Dembrow
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 2783, appeal of Hunt Reporting Company under Office of Administrative Hearings RFP OAH CR 11-01.

Dated:

Michael L. Carnahan
Deputy Clerk