

Docket No. 2126	Date of Decision: 6/30/99
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Dept. of General Services RFP No. DB-024-930-001	
Appellant/Respondent: W.M. Schlosser Company, Inc. Department of General Services	

Decision Summary:

Competitive Negotiation - Bias

Bias or predisposition of an agency toward one offeror will not be attributed to procurement officials based only on inference or supposition.

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of :
: W.M. SCHLOSSER COMPANY, INC. :
: :
Under Maryland Department of :
General Services : MSBCA No. 2126
RFP No. DB-024-930-001 :
:

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OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the appeal of Appellant W. M. Schlosser Company, Inc. ("Schlosser") from the denial of its protest of the award of the contract for construction of the new Baltimore City Juvenile Justice Center to Poole & Kent Company ("Poole & Kent").

Findings of Fact

1. On or about June 2, 1998, The Respondent Department of General Services ("DGS") issued Request for Proposal No. DB-024-930-001 seeking proposals for the construction of the Baltimore City Juvenile Justice Center ("BCJCC") in Baltimore, Maryland. This

240,000 square foot building is intended to provide training, detention, intake and judicial facilities in a central location in Baltimore city.

2. The BCJCC project was on hold for ten years pending selection of a site in a Baltimore community which would permit its construction. The 41st and 45th Congressional Districts in East Baltimore agreed to have the project built in their community in return for a specified amount of local minority labor, MBE subcontractors and other considerations.
3. The RFP stated that award would be made to the firm whose proposal was determined to be the most advantageous to the State, with technical factors set forth in the RFP counting for 60% and price counting for 40%.
4. On June 26, 1998 six offerors including Appellant (Schlosser) and Poole & Kent submitted technical offers, and after discussions, DGS requested Best and Final Offers ("BAFOs") and four bidders, again including Schlosser and Poole & Kent, submitted BAFOs on September 8, 1998.
5. By letter dated September 21, 1998, Schlosser was notified by DGS that it would be recommended to the Board of Public Works ("BPW") for award of the contract in the amount of \$38,544,800.
6. Shortly after the issuance of this letter, however, the Department of Juvenile Justice ("DJJ") Advisory Board, comprised of state senators, delegates and community leaders, questioned Schlosser's intent to comply with community requirements regarding subcontractors and labor for the project. Community representatives stated at a meeting in October 1998,

. . . W. M. Schlosser, did not meet the required technical requirements, had not met with the community's representatives and did not make an

effort to honor previous commitments made by DJJ and DGS to the community. The community representatives stressed that until all of their issues have been addressed, there would be no construction award made to Schlosser or any other contractor.

7. In late November 1998 then-DGS Secretary Eugene Lynch determined pursuant to COMAR 21.04.03.03D(1) to seek a second BAFO following the issuance of an amendment because:

An ambiguity in specifications became apparent, after receipt of the first round of best and final offers, that misled half the offerors to believe they could seek the community outreach efforts and local area based subcontracting requirements after the award of the contract. Because the Department expected community involvement prior to submission of BAFO's and because there may be significant financial impact on a price offer, it is in the best interest of State and the offerors to clarify the specifications with all offerors and require new BAFO's.

8. On December 17, 1998, Schlosser received written notice from DGS that an addendum would be issued to clarify several sections of the RFP and requesting a second round of BAFO's, thereby nullifying the prior recommendation that award be made to Schlosser. Schlosser did not protest.¹
9. On February 3, 1999, DGS issued Addendum No. 10 which reordered

¹Appellant contends it should not be held to have waived any of its remedial rights by its failure to protest the issuance of the second BAFO. However, the record does not reflect that Appellant made any efforts to determine the reasons behind the issuance of Addendum No. 10. In addition, Addendum No. 10 gives sufficient information for grounds to protest, particularly where it is clear that Appellant, who had been given notice of award, would not be awarded the contract unless it was selected following the second BAFO.

the list of evaluation factors to be considered and added some clarifying language. For example, local employment initiatives took precedence over other factors such as the experience and qualifications of the general contractor. In the second BAFO, each offeror was required to name each subcontractor which the offeror intended to use on the project, and informed the offerors that each subcontractor named must be the subcontractor used on the project. The Addendum also announced that "prices in excess of funds available will automatically be deemed outside the competitive range". The Addendum did not change the 60% technical/40% price mix.

10. Simultaneously, DGS and DJJ sought additional funds for the project from the General Assembly, asking for an increase in the funds of approximately \$3 million.
11. On February 18, 1999, DGS issued Addendum No. 11 which changed the second BAFO submission date to March 1, 1999 and informed offerors that a list of MBE subcontractors was required to be submitted within ten days of notice of award.
12. On March 1, 1999, Schlosser and Poole & Kent submitted second BAFO's. On March 4, 1999, the DGS procurement officer decided to recommend Poole & Kent for award in the amount of \$41,089,319 (\$1,004,319 more than Schlosser's price), in large part because the DGS Evaluation Committee ranked Poole & Kent's minority and local labor force participation higher than Schlosser's. Poole & Kent offered (1) greater overall Minority Business Enterprise participation and greater Baltimore City MBE participation, and (2) Poole & Kent's proposal was more concrete and detailed regarding how Poole & Kent would comply with the three Local Employment initiatives of the RFP (a local

labor employment program, an apprenticeship training program, and youth construction skill training program).

13. On April 2, 1999, DGS advised Schlosser that it was not selected to perform the project, and that it would be awarded to Poole & Kent. Schlosser was debriefed on April 9, 1999. The debriefing was suspended, and completed on April 23, 1999. Schlosser filed its protest which is the subject of this appeal on April 28, 1999.
14. Prior to a final agency decision on this protest, DGS sought the Board of Public Works ("BPW") approval of award of the contract to Poole & Kent, and the BPW approved the award. Subsequently, the Circuit Court for Baltimore City denied Appellant's Motion for a Temporary Restraining Order and Preliminary Injunction regarding award of the contract.

Decision

Appellant first argues that contrary to COMAR 21.05.03.03(A)(5), DGS used an unstated evaluation factor (that higher consideration would be given for greater MBE participation) in arriving at its decision to award to Poole & Kent. The Board agrees that factors not specified in the RFP or amendments thereto may not be considered. See § 13-104 State Finance and Procurement Article; COMAR 21.05.03.03(A)(5) (factors not specified in the request for proposals may not be considered).

The Respondent and Poole & Kent argue that the very nature of the method of procurement used here, competitive sealed proposals, served as notice to offerors that greater credit could be received for exceeding minimal requirements. Be that as it may, however, the record is clear that the evaluation factor was apparent in the solicitation. Section D, paragraphs 2B and 2C of Addendum No. 10 put bidders on notice that greater or lesser combinations of MBE

participation could receive greater or lesser credit. The requirement is that a **minimum** of 20% participation be listed; it does not state that 20% participation is required, and therefore the Board finds that it was clear, particularly where the MBE and local labor force criteria were listed as the most important criteria, even exceeding the experience of the contractor, that the more MBE and local labor shown, the more credit the bidder would receive. Compare Mid Atlantic Vision Service Plan, Inc., MSBCA 1368, 2 MSBCA ¶173 (1988).

Appellant further argued that Schlosser interpreted Addendum No. 11 to mean that the selected contractor could revise its MBE subcontractor's list for 10 days following award that this led him to offer only 20.1% when he could have offered 26%. However, under Section D2E of Addendum No. 10 (which was not affected by Addendum No. 11), each offeror was required in its second BAFO to name each subcontractor which the offeror intended to use on the project, and was told that "all Offerors will be required to name only one subcontractor per each major discipline and each subcontractor named must be the subcontractor used on the project." Therefore substitution would not be permitted, and neither Poole & Kent nor Schlosser would be permitted to alter their MBE subcontractor participation after award, except, pursuant to Addendum No. 11 (Appellant's Exh. 9), insofar as the MBEs might be removed as a result of the State electing certain deduct alternates.

Where, in lieu of a numerical scoring scheme², the State chooses to rank specific evaluation factors in order from highest to lowest, it is not inappropriate for the evaluators to give more credit for any given evaluation factor, to an offeror who proposes to provide more than the minimum requirement set forth in the evaluation factor.

²COMAR 21.05.03.03(A)(4) states: Numerical rating systems may be used but are not required.

It is apparent that the State must have, pursuant to COMAR 21.05.03.01, determined that competitive sealed bidding could not be used because specifications could not be prepared that would permit an award based solely on price, or competitive sealed bidding was not practicable or advantageous to the State and there was a compelling reason to use the source selection methodology permitted by procurement by competitive sealed proposals. Thus, the State had determined, by its choice of the competitive sealed proposal mechanism, and the weighting of technical factors (60%) over price (40%), which decisions were not protested by Schlosser, that subjective factors were of particular importance.

In the instant case, with regard to the determination that award to Poole & Kent was more advantageous to the State than would be an award to Schlosser, the DGS Evaluation Committee and the Procurement Officer considered the responses given in the area of MBE and local labor.

Not only did they determine that Poole & Kent offered a greater percentage of MBE participation, but that Poole & Kent's proposal was more concrete and detailed regarding how Poole & Kent would comply with the three local employment initiatives in the RFP. Schlosser promised to fulfill the requirements of the RFP but provided less detail as to exactly how its proposed programs would work. In addition, Schlosser's offer promised only to start implementing its promises in the future. By contrast, Poole & Kent's offer provided greater details as to how its three local employment initiatives would function. Poole & Kent also provided information showing that it had already expended substantial effort to establish its proposed programs and had even begun trying to recruit participants. Since this conclusion had a rational basis in fact, it cannot be disturbed.

Appellant recognizes that bias will not be attributed to procurement officials or those engaged in a procurement process based on inference or supposition. B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶ 58 (1983); Information Control Systems Corp., MSBCA 1198, 1 MSBCA ¶ 81 (1984).

However difficult it may be to prove the motivation of state procurement officials, an appellant seeking to establish that its competitive position was affected, nevertheless bears the burden of proof. Baltimore Motor Coach Company, MSBCA 1216, 1 MSBCA ¶94 (1985); Transit Casualty Company, MSBCA 1260, 2 MSBCA ¶119 (1985). In support of its duty to meet its burden of proof, Appellant asserts that it has proved the following points set forth here in bold:

1. The DJJ advisory Board caused DGS to reverse its recommendation of award to Appellant on September 17, 1998.

Testimony directly bearing on this allegation was given by Mr. Eugene Lynch, former Secretary of DGS, currently serving as deputy Chief of Staff in the Governor's Office. Mr. Lynch's testimony, which the Board found to be credible, had the effect of denying the Appellant's allegation, and affirmatively asserting that the decision to withdraw the award recommendation of Sept. 1998 and the request of second Best and Final Offers was predicated on a DGS' belief that offerors did not understand what the community outreach provision of the RFP actually required of them in terms of their offers, and their relationship with the Advisory Board and the community.

2. Addendum No. 10 was not issued to clarify RFP requirements but to appease the DJJ advisory board. The testimony of Secretary Lynch and the testimony of the Procurement Officer, John Cook, both of which we find to be credible, confirm that Addendum No. 10 was issued to clarify RFP requirements including apparent confusion regarding expected outreach efforts as set forth in the RFP.

3. **The DGS Evaluation Committee was on notice that the DJJ Advisory Board was opposed to the selection of Appellant for the contract award.** Mr. Carl Fox, whose testimony we find to be credible, and who was a member of the DGS Evaluation Committee, attended an October 17, 1998 meeting of the DJJ Advisory Board and generated an email regarding the meeting in which the concern of the Advisory Board was made apparent. This email was shared with four other members of the Evaluation Committee, one of whom had also been in attendance at the DJJ Advisory Board meeting. The evidence does not reflect, however, that the Evaluation Committee was thus apprised of any specific hostility towards selection of Appellant, but rather shows that the Committee was concerned, regardless of awardee, that outreach efforts be met.

4. **DGS and DJJ sought additional funding after Amendment No. 10 had been issued in the amount of \$5 million dollars in order to ensure award to Poole & Kent, who Appellant alleges, was pre-selected for award prior to the issuance of Addendum No. 10.** Mr. Fox and Mr. Cook gave testimony concerning this allegation, to the effect that additional funding was sought without regard to any particular offeror, or price to be offered thereby, and that the reason for the request for additional funding was to ensure adequate funds for construction of a proper facility. We find such testimony credible.

5. **DGS made no effort to justify paying an additional \$1 million to Poole & Kent for the project, simply in order to avoid any conflict with the DJJ Advisory Board.** On the contrary, this Board finds from the testimony of the DGS witnesses, including the testimony of the present Secretary of DGS, Ms. Peta Richkus, that the selection procedure following a second BAFO was in accord with the selection procedures set forth in the RFP, that the evaluation was conducted in a consistent manner in accordance with the order of

importance of evaluation factors set forth in Addendum No. 10, and the amendment thereto, Addendum No. 11, which emphasized the importance of MBE participation.

Neither singularly nor considered as a whole does the testimony and written record concerning the above five points sustain Appellant's position that its competitive position was adversely affected by evaluator bias or agency predisposition. Accordingly, the appeal is denied.

Wherefore, it is Ordered this ____ day of June, 1999 that the appeal is denied.

Dated: 6/30/99

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

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 2126, appeal of W.M. Schlosser Company, Inc., under DGS Request for Proposals No. DB-024-930-001.

Dated:

Mary F. Priscilla
Recorder