

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Daycon Products Company, Inc.)
)
) Docket No. MSBCA 2919
Under University of Maryland,)
Baltimore RFP No. 87712VP)

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MEMORANDUM ORDER AND OPINION BY BOARD MEMBER DEMBROW

This appeal of a bid protest came before the Maryland State Board of Contract Appeals (Board) for trial on July 28, 2015. At the close of appellant's case in chief, the State moved for judgment and by unanimous determination, the Board granted that Motion, observing that appellant had failed to substantiate its claim that no sufficient cost-benefit analysis had been conducted in the course of the procurement. (Tr. 395.) The instant Memorandum Order and Opinion memorializes that ruling.

The underlying procurement arises from the desire of the University of Maryland, Baltimore to secure on an ongoing basis janitorial supplies and paper products at about two dozen

separate locations in the City of Baltimore. The Request for Proposals (RFP), issued May 24, 2014, required the contractor to obtain janitorial products "from Blind Industries and Services of Maryland (BISM) when specified products are available." (RFP Sec. IA, Joint Ex. 1, pg. 4; RFP Sec. 3B, Joint Ex. 1, pg. 14.) The initial appeal by appellant, Daycon Products Company, Inc. (Daycon), raised objection to the BISM purchase requirement, but that basis of appeal was dismissed by the Board during pre-trial proceedings by ruling from the bench on July 8, 2015 when the Board granted the June 8, 2015 Motion for Partial Summary Decision filed by the Interested Party, Fitch Company (Fitch). (Tr. 96.) As a result, the only substantive issue preserved for trial on July 28, 2015 was the question of whether the University failed to perform the requisite cost-benefit analysis in a legally sufficient manner.

The purpose of the procurement was not only to secure required goods and products, but also the service obligation of obtaining the storage and subsequent delivery of needed products using a system of vendor managed inventory (VMI) by which the contractor assumes responsibility of monitoring on-site supplies to assure that reserve supplies are readily available to fill at least a week's demand, but not so great a quantity of products in storage as to impede storage space limitations. (RFP Sec. III D, Joint Ex. 1, pgs. 16-19.) Appellant, Daycon Products Company, Inc. (Daycon), is a longstanding reputable business highly experienced in VMI, having served as the incumbent contractor to the University for more than the past 15 years, in addition to several other highly esteemed academic institutions such as Johns Hopkins University and the University of Maryland, College Park. The RFP promised that "contract award will be made to the responsible vendor whose proposal best meets the needs of the University as determined by the Procurement Officer." (RFP Sec. I J, Joint Ex. 1, pg. 6.) It further provided, "This RFP and any resulting contract shall be governed by the USM [University

System of Maryland] Procurement Policies and Procedures [UPPP]...,“ which is comparable to the Code of Maryland Regulations (COMAR). (RFP Sec. II C (I), Joint Ex. 1, pg. 9.)

The RFP required that the technical component of proposal evaluation would carry greater weight than the financial element. (RFP Sec. IV F, Joint Ex. 1, pg. 30.) For unrelated procurements by RFP, the Board has ordinarily seen the technical and financial evaluations conducted entirely separate and apart from one another, as occurred here. But the financial evaluation is generally performed based on the actual prices proposed as specified by sum dollar amounts. The technical evaluation team will examine, discuss, and ultimately rate and rank technical proposals, and afterwards, open the financial submittals in order to discover cost disparities. In the unusual circumstance when the highest rated technical proposal is also the least expensive, the evaluation analysis is done. Recommendation for award is made in favor of the proposal that is preferred on both counts. But in the scenario generally encountered, when the best technical option is not the cheapest, the evaluation shifts to the cost-benefit phase of proposal evaluation, during which the State is charged with the responsibility of deciding which proposal, considering both technical and cost differences, is most advantageous. Often a particular dollar value is determined as the proposed cost of that option as set forth in the financial component of submitted proposals. Then the State must consciously determine whether the increased cost is worth that expenditure based upon the superiority of selecting the preferred technical proposal.

Here, the cost-benefit analysis conducted by the University was precisely quantified not by a stated dollar amount, but instead, by numerical assessment of both technical and financial elements of proposal evaluation. Specifically, the procurement officer assigned to the evaluation process the total sum of 1,000 points possible for each proposal. Because the RFP required that

technical be weighted heavier than financial, 600 points of the possible 1,000 points were attributed to the technical component of proposal evaluation while 400 points were assigned to the financial component. In determining the cost component of proposal assessment, the full 400 point total was awarded to the lowest cost proposal, and the financial point total afforded to other proposals was based upon the proportionate percentage difference between the total cost of the lowest priced offer and the higher priced offers, determined as a fraction of the 400 points available. (RFP Sec. IV E, Joint Ex. 1, pg. 30.) In this fashion, both technical and financial comparisons were made by precise numerical calculation.

On the technical proposal, Daycon obtained a near-perfect score of 586 out of the total 600 points allotted. This was determined by an evaluation committee consisting of six employee representatives of the University, including an associate director, two individuals from operations and maintenance, one procurement contracting specialist, and one from each of two of the specialized campuses. Each of the evaluation committee members precisely rated Daycon on seven separate technical factors. Of the total 600 points possible, the most important factor, "Vendor Management Inventory Services" was assigned 185 points, further broken down into three sub-factors weighted at 70, 70, and 45 points, out of the 185 for that primary factor. Another 160 points was divided into two equally weighted sub-factors accounting for evaluation of the proposer's background. Another primary factor, "Key Personnel," was afforded 100 points, with that score total divided into five sub-factors weighted between 12 and 25 points each. A possible 75 points was assigned to the evaluation factor of "References" while 65 points was assigned to "Delivery." Finally, 11 points was allotted to "Green Products" and 4 points to "Maryland Economic Benefits." The point total for each factor and sub-factor was calculated by

averaging the point totals assigned by each of the six evaluators. (State's Ex. 3; App. Ex. 9; Joint Ex. 6.)

By contrast, using the same formula for evaluating its technical proposal, interested party Fitch scored only 483, more than 100 points less than Daycon. On the first sub-factor of the first primary factor, Fitch scored only one-half of Daycon's perfect score of 70. Clearly, the University's evaluation committee deemed Daycon superior by a wide margin. But that cannot be the end of the analysis, nor was it. That is only a calculation of the "benefit" side of a cost-benefit analysis. For this procurement, the next step of proposal evaluation was to determine the point total assigned to "cost" by awarding the full 400 points available for the financial component of proposal evaluation to Fitch as the lowest priced offer. In stark contrast, the cost proposed by Daycon was more than a million dollars higher than the price proposed by Fitch, a price difference of over 50%. As a result, Fitch's technical score of 483 was increased by 400 to 883. Daycon's higher technical score of 586, on the other hand, was increased by only an additional 260 points. So in the final analysis, considering both technical and financial components of the proposals, with technical rated substantially higher than financial, namely, by a ratio of 600 to 400, or 3 to 2, Daycon ultimately received 846 points compared to Fitch's score of 883. Thus, Fitch won the overall competition.

Appellant relies upon the Board's 2012 ruling in the Appeal of L-1 Secure Credentialing, Inc. (L-1), MSBCA No. 2793, to support its contention that no cost-benefit analysis was conducted in this procurement. That reflects a misunderstanding of L-1. As recited into the record by counsel for the State, in L-1 the Board stated, "The obligation to conduct a cost-benefit analysis is not an onerous one. It merely mandates that an agency accurately computes or projects and thereafter takes into consideration the cost of each proposal, giving deliberate and intelligent attention to whether a difference in higher cost to

difference in higher cost to the State is justified by the added value of purchasing the more expensive option." Certainly, in the case at bar, this was done. In L-1, the Motor Vehicle Administration (MVA) simply took the rankings of the technical proposals and used them to determine the final recommendation for award. There was little indication from the evidence that the State considered the prices of the proposals. Here, the exact opposite occurred. The University clearly preferred to award the contract to Daycon. But after the price criterion was factored into the selection process, in order to save a million dollars, the State concluded that it would be more advantageous to recommend contract award to the proposal ranked considerably lower on technical features but far better on cost. This is a perfect example of the consequence of conducting a proper cost-benefit analysis.

Many features of the evaluation of proposals conducted here are not in contest. The means of calculating point totals in the financial component of the evaluation is not an issue raised in this appeal. The point totals assigned to technical vs. financial evaluations are also not dispute, nor the point totals allotted to the various factors and sub-factors. Importantly, the correctness and accuracy of the point totals actually given to Daycon and Fitch for both the technical and financial components of proposal evaluation are also uncontested. While the method of conducting the cost-benefit analysis in this procurement is unlike the methods used in some other procurements, a form of cost-benefit analysis clearly occurred. If a cost-benefit analysis had not taken place, and the selection decision had been made solely on the basis of technical evaluation without cost considerations, plainly the University would have selected Daycon over Fitch. But instead, the State determined that the preferred superiority of Daycon could not be justified by its much higher price. It made this determination because of its specifically quantified cost-benefit analysis.

Appellant calls to the Board's attention a certain e-mail dated October 21, 2014, in which one of the evaluation committee members appears to have contacted another evaluator complaining about the outcome of the evaluation, stating, "each of us on the committee agreed that Daycon should be awarded the contract. Daycon has served UMB for the past 15 years, has met this Universities [sic] expectations and has built good relationships. And it was disappointing to learn that due to a 'number system' Daycon had in fact lost the contract to a company that in 'our' opinion fell short of meeting the expectations of our University on the information they provided and during the Oral Presentations." (App. Ex. 11.) This communication is of little concern to the Board. It simply indicates that at least one evaluator, and perhaps others as well, differed with the ultimate selection determination, quite possibly because the evaluation committee which reviewed the technical proposals ranked Daycon as substantially superior to Fitch. It was only after the price difference was factored into the evaluation that it was determined that selecting Fitch over Daycon represented best value to the State.

It is easy to imagine why employees of the University, particularly persons responsible for program operation and maintenance, would prefer that contract award determination be made without regard to price. Surely they might prefer that the best goods and services be procured, regardless of cost. If quality diminishes due to cost-savings, it will be the operations and maintenance personnel who will need to pick up the slack caused by imperfect contract performance. But cost has to be considered in government contracts, even when some or all government employees would prefer it otherwise. That is why a cost-benefit analysis is required and why one was conducted here.

An additional commentary on the importance of financial compared to technical components of a procurement evaluation may also be useful at this juncture. The case at bar harkens back to

another decision of the Board, namely, the Appeal of Penn Parking, MSBCA 2540, 2552 (2006). Like Daycon, in that case appellant put forward the clearly superior proposal and felt aggrieved that it was not selected. That was because, also like Daycon, Penn Parking sought to charge a lot more than its lower cost competitor. The price disparity was not quite as great as the case at bar because Penn Parking's price proposal was less than a million dollars more than another proposal while the difference between Daycon and Fitch is over a million dollars. In addition, the total contract cost offered by Penn Parking was in the \$4-6 million range rather than the \$2-3 million range, as is the case for the instant procurement.

In both appeals, as should be the case for every procurement, price matters. It matters particularly when the goods and services contracted for are comparatively elementary and do not directly jeopardize public safety and welfare in a time sensitive fashion that demands that extra costs may need to be incurred to avoid a severe catastrophe. Here, the University of Maryland, Baltimore wants to be certain that it has enough toilet paper, paper towels, and janitorial supplies, most of which is provided by BISM. That's important, and Daycon should be commended for its technological innovations, advice, and excellent contract performance to date. But in the final analysis, it is not a rocket ship to the moon that the government is attempting to procure here. How much more should it possibly cost to have Daycon provide the University's towels and toilet paper as compared to Fitch? A million dollars? The University said no, and the Board cannot and does not second guess that quite reasonable determination. The Board might even conclude that the determination to afford 60% of proposal evaluation total to the technical proposal was excessively generous to Daycon.

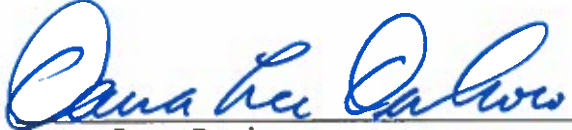
Just like Daycon, in the Appeal of Penn Parking, Id., appellant did a superlative job developing its proposal and presenting it to the State. Penn Parking, the highly experienced

incumbent, even negotiated project labor agreements prior to contract award. But in the end, the State recognized that it was not procuring astrophysicists to engineer a highly sophisticated device upon which human lives were reliant. They just wanted some parking spaces. And they were not willing to pay an extra million dollars to have that opportunity provided in a more reliable manner than a less expensive alternative. In the case at bar, the technical proposal was weighted considerably more than financial considerations, which itself might be questioned but which was not an issue in this appeal. Even so, once price was considered, it became apparent that best value compelled the State to select the lower cost proposal to procure the paper products and janitorial supplies it requires.

A final note by way of *dicta* is also included here for the Board to comment upon one of the elements of this proposal that is troubling. As a condition of their participation, members of the evaluation committee for the University were required to sign a form promising to execute the final award recommendation after the evaluation was completed. (Joint Ex. 5, pg. 2.) Then, after informing evaluators that they were required to sign, the award recommendation letter stated above the place for signatures, "If you approve this recommendation, please sign below where indicated." (Resp. Ex. 2.) This was entirely improper, and created the false impression held by the procurement officer that the entire evaluation committee agreed with the recommendation for award to Fitch, which was not the case. (Tr. 304-305.) At the same time, this issue was not the subject of a bid protest, nor would it make any difference in the outcome of this appeal. It is simply noted by the Board in the hope that such instructions are eliminated or modified in the future. Members of an evaluation committee should be free to engage in open discourse and ultimately to agree with or dissent from a majority finding or determination.

Because the evidence adduced at trial fails to support the conclusion that no legally sufficient cost-benefit analysis was conducted in the course of this procurement, the Board grants the University's Motion for Judgment and this appeal is therefore DENIED.

Dated: 8/7/15



Dana Lee Dembrow
Board Member

I Concur:



Michael J. Collins
Chairman



Ann Marie Doory
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 29219, Appeal of Daycon Products Company, Inc., under University of Maryland Baltimore RFP No. 87712VP.

Dated:

8/7/15



Ruth Foy
Deputy Clerk