

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of Tri-State)
Consultants)
)
) Docket No. MSBCA 2590
)
)
Under DHCH IFB-08-22-02)

APPEARANCE FOR APPELLANT: None

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

OPINION BY CHAIRMAN BURNS

Appellant timely appeals the denial of its protest challenging the prospective contract awards of Invitation for Bids No. 08-22-02, ("Training Seminars: Industrialized/Modular Building and Mobile Homes Program Maryland Accessibility Code Field Inspections") by the Maryland Department of Housing and Community Development (DHCD). For the reasons that follow, this appeal is denied.

FINDINGS OF FACT

1. Respondent DHCD is a state agency which seeks to "revitalize communities, and expand homeownership and affordable housing opportunities."
2. On July 30, 2007, DHCD issued Invitation for Bids (IFB) No. 08-22-02 "seeking the services of a

Contractor to provide training seminars based on the Maryland Industrialized/Modular Buildings and Mobile Homes Program, the Maryland Accessibility Code, and Field Inspections".

3. The bid sheet included with the IFB permitted bidders to bid on one or more areas of the contract.
4. Prospective bidders were also notified that DHCD retained the option of awarding multiple contracts under the IFB.
5. The IFB was posted on DHCD's website and mailed directly to eight (8) firms known to have experience providing training seminars related to Maryland building codes.
6. The Bids were due by 10:30 am on August 22, 2007.
7. DHCD received four proposals in response to the IFB, one of which was received after the proposal deadline and was therefore returned to its sender.
8. The three (3) proposals remaining under consideration were from the Institute of Building Technology and Safety (IBTS), United Spinal Association (United), and appellant Tri-State Consultants (Tri-State).
9. The IFB set forth minimum presenter qualifications required in order for consideration under the IFB, which included:

"For each topic, the proposed presenter(s) shall hold a degree in architecture or engineering and shall be registered with the state government, or must be recognized as a Master Code Official, or must have ten (10) years of equivalent experience related to the International Residential Code.

The proposed presenter(s) shall have a minimum of two (2) years of training experience."

10. Bidders were also required to submit a technical proposal that included documentation demonstrating how they met the minimum qualifications, a sample training curriculum, and references.
11. An evaluation committee evaluated all technical proposals and found all proposals to be responsive and reasonably susceptible for contract award.
12. The Procurement Officer notified the three (3) bidders that a public bid opening would be held on August 28, 2007.
13. Three (3) topic areas were bid, namely, 1) Industrialized/Modular Building and Homes Program, 2) Maryland Accessibility Code, and 3) Field Operations.
14. In accordance with the IFB, the Procurement Officer recommended award to the lowest bidder in each topic area.
15. IBTS was the low bidder and prospective contract awardee for the Industrialized/Modular Building and Homes Program training with a bid of \$9,780.00. The only other bid for this topic area was Tri-State's bid of \$26,398.00.
16. United was the low bidder and prospective contract awardee for the Maryland Accessibility Code training with a bid of \$7,120.00. The only other bid for this topic area was Tri-State's bid of \$26,396.00.

17. IBTS was the low bidder and prospective contract awardee for the Field Operations training with a bid of \$9,780.00. The only other bid for this topic area was Tri-State's bid of \$26,432.00.
18. On September 5, 2007, Tri-State filed a protest with the Procurement Officer challenging the prospective awards to IBTS and United. In that protest, Tri-State alleged that IBTS and United did not meet a requirement of the IFB, specifically, that neither IBTS nor United were "Authorized Providers" for the International Association of Continuing Education and Training (IACET) and, therefore, could not issue Continuing Education Credits (CEU) recognized by IACET.
19. Tri-State cited Section 3.3c of the IFB in support of its protest:

"The contractor shall provide each participant of the seminar with a certificate indicating completion of the seminar. A Continuing Education Credit (CEU) recognized by the International Association for Continuing Education and Training as well as other organizations such as the American Institute of Architects (AIA) should be awarded for each session of the seminar, and should be based on the lesson plan for the seminar attended."
20. Tri-State viewed this language as requiring CEU's issued to be recognized by the IACET and since ITBS and United were not IACET "Authorized Providers", they could not issue CEUs recognized by IACET.

21. The Procurement Officer denied Tri-State's protest on September 14, 2007 stating that "the award of CEUs is discretionary under the scope of work and being a qualified IACET Authorized Provider is not a requirement of the IFB."
22. Tri-State filed an appeal of the Procurement Officer's decision with the Maryland State Board of Contract Appeals (Board) on September 27, 2007. In the appeal, Tri-State requests that the Board rule in its favor and have DHCD disqualify IBTS and United, declare Tri-State the successful low and qualified bidder and immediately award the contract to Tri-State.
23. DHCD submitted an Agency Report to the Board on October 24, 2007.
24. Tri-State filed no comments on the Agency Report.
25. A hearing has not been requested in this matter.

DECISION

Appellant Tri-State requests that the Board find that DHCD must disqualify both IBTS and United from award of this contract because the IFB requires CEUs issued by trainers to be recognized by the IACET and since neither IBTS nor United are IACET "Authorized Providers", they cannot issue such IACET recognized CEUs and cannot, therefore, fulfill this "requirement" of the contract.

The Board cannot agree with Appellant. For the reasons that follow, the Board finds in favor of the Respondent and will deny Appellant's Appeal.

The Code of Maryland Regulations (COMAR) provides in 21.05.02.13A. that:

- A. General. The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the most favorable bid price or most favorable evaluated bid price. A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids.

COMAR defines responsive in 21.01.02.01B.(78) by stating that responsive "means a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids."

Tri-State believes that the word "should" as used in Section 3.3c of the IFB mandates that a CEU recognized by the IACET must be issued by the trainer and that the perceived inability of both United and IBTS to issue such a CEU results in each of those two entities being incapable of award of the contract leaving only Tri-State remaining eligible for award.

The Board does not agree with Tri-State's view. The Board notes that the first sentence of 3.3c states that the "contractor shall provide each participant with a certificate indicating completion of the seminar"; whereas the later sentence in 3.3c dealing with CEUs merely states that CEUs "should" be issued. Clearly, the use of "shall" was directory, indicating a requirement which must be met by the contractor. Just as clearly, the use of "should"

indicated an optional provision not required under the IFB and remaining within the discretion of DHCD. The use of these two different words clearly illustrates that DHCD intended that the issuance of CEUs be optional, not mandatory, under this section of the IFB. Prior to bid opening, appellant raised no question concerning DHCD's use of the word "should" as designating an optional provision of its contract.

CEUs are not a mandatory requirement under this IFB, and the nature of any CEUs issued are within the discretion of the agency. If DHCD had desired that only IACET authorized providers bid on the IFB, it could have easily made that a minimum requirement of the IFB. DHCD did not do so, a decision within its discretion. Appellant brought no information to DHCD or to the Board concerning the basis of preference for IACET CEU's as compared to CEU's which are not authorized by IACET, and the Board will not speculate concerning the desirability of IACET CEU's. If any question existed in this regard it was incumbent upon appellant to raise such a question prior to bid opening.

The Procurement Officer recommended contract award to the lowest responsive bidder in each of the three (3) topic areas. In each topic area, the bid of the eventual awardee - IBTS in the topic areas of Industrialized/Modular Building and Homes Program training and Field Operations training, and United in the topic area of Maryland Accessibility Code training - was substantially less than the bid received from Tri-State.

Given the substantial difference in bid prices, the Procurement Officer's recommended awards for each of the

various topic areas of the contract certainly meets the review test of being fiscally advantageous to the agency and are in the State of Maryland's best interest.

This Board has expressed well-founded reluctance to substitute its judgment for that of an agency, in part because it is the procuring agency and it will have to "live with the results" of its decision. *E.g.*, Stronghold Security, LLC, MSBCA 2499, _____ MSBCA ¶ _____ (December 12, 2005); Klein's of Aberdeen, MSBCA 1773, 4 MSBCA ¶354 (1994) at p. 7.

COMAR and case law give Procurement Officers wide discretion in matters such as the one at issue in this appeal and there is no evidence that the Procurement Officer herein acted in any manner that was illegal or in any way inconsistent with the requirements of COMAR.

There is no evidence that the decision to award the contract to IBTS and United was arbitrary or capricious. The IFB required prospective bidders meet certain minimum qualifications, that technical proposals received be reviewed for acceptability, and that the contracts would be awarded "to the responsible bidder with an acceptable technical offer and the lowest bid price."

DHCD determined that three (3) bidders met the minimum qualifications of the IFB (which did not include a mandatory requirement that a bidder have the ability to award only CEUs from a provider authorized by the IACET). The technical proposals of all three (3) bidders were reviewed by an evaluation committee which determined that each of the bidders demonstrated, in their technical proposals, an acceptable approach and understanding of the

scope of work involved and that all three were reasonably susceptible for award of the contract. The Procurement Officer then recommended contract award in each of the topic areas based on the lowest bid received in response to the IFB.

The process involved in this procurement followed the IFB and the award of the contract was clearly not arbitrary or capricious. Moreover, the issue of the CEUs did not taint the process or the award in any way.

Appellant Tri-State Consulting's appeal is, therefore, without merit.

Appellant's appeal is, therefore, denied.

Wherefore, it is Ordered this ^{23rd} day of January, 2008 that the appeal of Tri-State Consultants in the above-captioned matter is denied.

Dated:

23 January 2008



Michael W. Burns
Chairman

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 2590, appeal of Tri-State Consultants under DHCD IFB-08-22-02.

Dated: *January 23, 2008*


Michael L. Carnahan
Deputy Clerk