

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of)
Occupational Health Centers of)
the Southwest, P.A. d/b/a)
Concentra Medical Centers) Docket Nos. MSBCA 2996, 3014,
) and 3016
Under)
Department of Budget and)
Management RFP No. 050B6400002)

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OPINION BY CHAIRMAN COLLINS

The procurement officer acted within the discretion provided by law in determining which offeror to recommend for award. In making this determination the procurement officer's actions were not arbitrary, capricious or contrary to law, and these appeals must, therefore, be denied.

Findings of Fact

1. On January 5, 2016 the Maryland Department of Budget and Management ("DBM" or "State") issued Request for Proposals ("RFP") No. 050B6400002 soliciting proposals for State Medical Director and Occupational Medical Services for Maryland State Agencies (the "Contract").
2. Three proposals were submitted in response to the RFP: 1) Occupational Health Centers of the Southwest, P.A. d/b/a Concentra Medical Centers ("Concentra"), which was the incumbent contractor; 2) PTN WorkPro Holdings, LLC d/b/a WorkPro Occupational Health ("WorkPro"); and 3) Occupational Medical Services ("OMS").
3. All offerors were determined to be capable and qualified to perform the required services.
4. DBM determined that WorkPro's proposal was the most advantageous to the State, being approximately 39% less costly than what was proposed by Concentra.
5. Concentra filed its first protest on June 30, 2016.
6. On August 19, 2016, the Procurement Officer issued his final decision, denying the protest.
7. On August 29, 2016, Concentra noted its appeal to this Board, which was docketed as MSBCA No. 2996.
8. Concentra submitted three supplemental protests to DBM on September 2, 2016, September 30, 2016, and November 2, 2016.
9. DBM issued final decisions denying Concentra's three supplemental protests on November 4, 2016 (first and second supplemental protests), and November 9, 2016 (third supplemental protest).
10. On November 14, 2016, Concentra noted its appeal of the final decisions denying its first, second, and third supplemental protests to this Board, which was docketed as MSBCA No. 3014.

11. Concentra submitted a fourth supplemental protest to DBM on November 10, 2016.
12. DBM issued a final decision on November 14, 2016 denying Concentra's fourth supplemental protest.
13. Concentra noted its appeal of the denial of its fourth supplemental protest with this Board on November 15, 2016, which was docketed as MSBCA No. 3016.
14. A hearing was held beginning on December 8, 2016.

Decision

In the instant appeals, Appellant Concentra seeks to disturb the procurement officer's decision to award the contract to WorkPro, and in doing so accepts that the burden in this case rests solely on Appellant with a bar that is set quite high. In order to meet this bar, Appellant must prove that the procurement officer acted in a way that was arbitrary, capricious, contrary to law or was in some way an abuse of his discretion. Here Appellant fails to meet its burden of proof, and its appeals must be denied.

Appellant relies on a number of arguments to make its case, but as Respondent correctly points out, it is not this Board's job to deeply analyze every decision of the procurement officer. Rather, it is the job of this Board to determine if the procurement officer acted in a way that was beyond the considerable discretion afforded to him by Maryland procurement law.

In Eisner Communications, Inc., MSBCA 2438, 2442 and 2445 (2005), the Board wrote:

It is not the function of this [Board] to evaluate proposals in order to determine their relative technical merits. The contracting agency is responsible for determining which technical proposal best meets its needs, since it must bear the major burden for any difficulties incurred by reason of a defective evaluation.

Accordingly, we have consistently held the procuring officials enjoy 'a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award,' and that such determinations are entitled to great weight[.]

Similarly here, the Board must afford the procurement officer the discretion he is entitled to in making his evaluation. The procurement officer is charged with making a determination that best meets the needs of the contracting agency, ensuring that he has evaluated the offerors' proposals fairly and thoroughly. Additionally, the procurement officer and the contracting agency have a great deal at stake in making a proper evaluation as it is they who must deal with any difficulties that arise from a faulty evaluation. AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987); Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994); Klein's of Aberdeen, MSBCA 1773, 4 MSBCA ¶354 (1994). Therefore, it is certainly reasonable that the procurement officer would carefully evaluate proposals and select the offeror that provided proposals that show it to be capable of providing the best value to the State.

In performing his evaluation, the procurement officer must weigh factors and be certain that the offeror recommended for award is capable of providing the services required, has met the requirements of the RFP and is financially capable as well. Further he must be certain in his subjective opinion that his decision is in the best interest of the State.

Appellant alleges that WorkPro failed to satisfy the minimum requirements of the RFP, specifically the requirements found at RFP §2.1.1 and §2.1.2. These sections state specifically:

2.1.1 The Offeror shall have, within the past five years, at least six months experience in providing similar services to one organization, firm or agency of at least

5,000 employees, members, clients, etc. As proof of meeting this requirement, the Offeror shall provide with its Proposal, at a minimum, one reference to demonstrate the experience of providing similar services to one organization, firm or agency of at least 5,000 employees, members, clients, etc.

2.1.2 During the same six month period referenced in 2.1.1, the Offeror shall have a cumulative total of employees, members, clients, etc. serviced that exceeds 10,000. As proof of meeting this requirement, the Offeror shall provide with its Proposal references that demonstrate a client base that exceeds 10,000 employees, members, clients, etc. within the same time frame as referenced in 2.1.1 above.

Appellant asserts that WorkPro failed to provide evidence of its meeting these minimum RFP requirements. It further asserts that the procurement officer erroneously relied on what was submitted by WorkPro, namely Tab D of its proposal, which cited WorkPro's contract with the State of Delaware which has over 17,000 employees. Appellant also complains that WorkPro hasn't been performing "similar" services as contemplated by §2.1.1, and it points to Tab H of WorkPro's proposal to illustrate the work that has been performed by WorkPro.

Regarding the argument relative to similar services, "similar" is not "exact." Rather, in the RFP the concept of similar cites examples of the type of work to be performed, but the RFP does not specify that an Offeror must have performed these exact types of work in the past.

The procurement officer determined that WorkPro has performed similar work and further determined that it was capable of performing under the contract. Here the procurement officer used his discretion in making this determination, and he did not act in a way that was arbitrary, capricious or contrary to law.

Turning to minimum requirements in RFP §2.1.1 and §2.1.2 Appellant also points to the procurement officer's testimony that

the RFP requirement was not for having actually serviced at least 10,000 individuals but rather that the Offeror have the capability of providing services to at least 10,000 individuals. While the requirement may seem somewhat confusing to Appellant because of its interpretation of the terminology in the requirement, it is not confusing to this Board.

The RFP in §2.1.1 and §2.1.2 seeks to determine whether an Offeror is qualified to provide services as needed to a large client base. In §2.1.1 the RFP seeks to determine if an Offeror can show that it has a single organization for which it provides services for at least 5,000 individuals. The RFP in §2.1.2 then seeks to determine if an Offeror that has met the requirement in §2.1.1 is also able to serve a client base of at least 10,000 individuals.

The RFP clearly states in §2.1.2 that the proof of meeting this requirement is demonstrating that it has a client base that exceeds 10,000, which WorkPro did in its submission of references. Further, it is clear that the requirement in §2.1.1 is for an Offeror to have a single organization which has more than 5,000 people who may receive services from the Offeror. The requirement in §2.1.2 is for an Offeror to be a service provider for a cumulative 10,000 or more individuals across any number of organizations. The requirement in §2.1.2 is for an Offeror to "service" a client base of at least 10,000, which it does in part simply by standing ready to provide the actual services it has been contracted to perform. When an Offeror stands ready to perform, it is a "service" provider as contemplated by the RFP.

In the instant appeal, Appellant does not dispute that WorkPro has provided proof that it has a single organization for which it provides services to over 17,000 individuals employed by the State of Delaware, satisfying the requirement in §2.1.1. While he did not rely exclusively on the reference provided by WorkPro for satisfying the requirement of §2.1.1 as also

satisfying the requirement of §2.1.2, the procurement officer certainly could have relied on that submission alone to satisfy the requirements of both §2.1.1 and §2.1.2. Nonetheless, the procurement officer relied on WorkPro's submission of its client base across all of its client organizations, which is 40,000 cumulative individuals for whom it provides services, far exceeding the 10,000 requirement in §2.1.2.

This Board finds that the procurement officer properly evaluated the Offerors on these two RFP requirements, and he properly determined that WorkPro satisfied the requirements of §2.1.1 and §2.1.2 of the RFP.

This Board has stated repeatedly that it will not substitute its judgment for that of the procurement officer absent evidence that the procurement officer acted in a way that was arbitrary, capricious, contrary to law or otherwise an abuse of discretion. See Facchina-Trumbull-Skanska JV, MSBCA 2630 (2009).

Appellant raises as another ground of protest its concern that WorkPro did not submit a draft Problem Escalation Procedure ("PEP") with its proposal. It suggests that this is a reason for which the entire proposal should be rejected and WorkPro should have been removed from consideration for award. Appellant points out that Section 4.4.2.6(b) of the RFP required Offerors to submit a draft PEP.

DBM sent to WorkPro a cure letter on April 14, 2016 stating that WorkPro had failed to submit a PEP with its proposal. In its April 21, 2016 response to DBM, WorkPro indicated that it would submit a final PEP after award.

While the PEP was an RFP requirement, as WorkPro points out in its post-hearing brief, the PEP was not a major factor as Appellant suggests. In fact, unlike major factors, such as MBE participation goals, there is no penalty specified for failure to submit a draft PEP.

The State also correctly notes that as this Board has observed, and as COMAR 21.05.02.12 provides, "technicalities or minor irregularities in bids . . . may be waived if the procurement officer determines that it shall be in the State's best interest." See also Seaway Coatings, Inc., MSBCA 2205 (2000) at 4 (where integrity of procurement process "is not compromised, it is within the Procurement Officer's discretion to determine that an irregularity may be waived"); COMAR 21.06.02.04.

The State correctly points out that the procurement officer also testified that Concentra's Technical Proposal had some problems as well, which he also determined to be minor irregularities even though he considered Concentra's deficiency to be "a far more egregious violation" than that of WorkPro. (Transcript at pp. 449-450). There is no substantial evidence that the procurement officer acted arbitrarily, capriciously or abused his discretion in determining that both WorkPro and Concentra had "minor" irregularities in their respective Technical Proposals.

Therefore, the Board finds that the PEP was not a disqualifying factor. The Board further finds that the procurement officer was within his discretion in determining that the PEP was not a major factor and in determining that he would not disqualify WorkPro for failure to submit a draft PEP.

In addition to Appellant's concerns over WorkPro's ability to perform based on failing to submit required items and failing to meet minimum requirements, it argues that WorkPro is not financially capable. It points to issues raised by the auditor in his evaluation of the company.

However, Appellant overlooks the fact that the auditor never declared that WorkPro was financially incapable. Rather, he raised concerns that he had. While he did not specifically say that WorkPro was capable, he also never said that they were not

capable, and the procurement officer was left to make this determination on his own while also considering the information he did receive from the auditor. As this Board has previously found:

When evaluating the relative desirability and adequacy of proposals, a Procurement Officer is required to exercise business and technical judgment. Under such circumstances, a Procurement Officer enjoys a reasonable degree of discretion and, for this reason, his or her conclusions may not be disturbed by a reviewing board or court unless shown to be arbitrary or arrived at in violation of Maryland's procurement law.

Baltimore Motor Coach Company, MSBCA 1216, 1 MSCBA ¶94 (1985), B. Paul Blaine Associates, MSBCA 1123, 1 MSBCA ¶58 (1983).

Ultimately, the procurement officer is the one who has to make a subjective determination as to whether he believes an Offeror is financially capable of performing the contract. As mentioned earlier in this opinion, he and DBM have a great deal at stake in this determination since the procurement officer and the agency will have to deal with any difficulties arising from an error in this determination.

Here again the procurement officer did not act in a way that was arbitrary, capricious, contrary to law or an abuse of his discretion.

In this procurement, the technical evaluations were to be completed prior to opening price proposals. Appellant contends that the procurement officer violated this requirement and that the price proposals were opened prior to the evaluations of technical proposals being completed.

As evidence of this, Appellant points to the backdating of the procurement officer's memorialization of the technical rankings. The procurement officer admitted that he completed the memorialization after the price proposals were opened but that he dated the memorialization using the date the technical

evaluations were completed. It is clear to the Board that the procurement officer was not acting in a way that was intended to deceive anyone relative to when he completed the memorialization and that he was merely attempting to make it clear that the technical evaluations were completed on a certain date.

Confusing the issue is the fact that immediately after concluding the evaluation of technical proposals, the price proposals were opened. Appellant believes that the price proposals were opened prior to the completion of technical evaluations. However, Appellant has not shown any evidence of this other than the backdating of the memorialization.

Indeed, the procurement officer testified that the technical evaluations had been completed before the price proposals were opened. (Transcript at pp. 307-308). Absent any real evidence to the contrary, the Board must find that the procurement officer is correct with regard to when the price proposals were opened and conclude that the price proposals were opened after the technical evaluations were completed.

Appellant also seeks to fault the procurement officer for failure to do a proper price analysis. However, no price analysis was required as part of this RFP.

Further, Appellant seems to link its status as the incumbent with some sort of superiority in the process, particularly when looking at price. Simply because Appellant was able to charge more in its previous contracts does not negate the fact that another Offeror is capable of doing the work for less.

It is the procurement officer's job to find the best value for the State, and in his opinion WorkPro was the Offeror that represented the best value to the State. He determined that an in-depth price analysis was not necessary, and here again acted within the discretion given to him under Maryland Law.

Appellant asserts that WorkPro and OMS colluded in an attempt to defraud the State. Appellant points to employees of

the two organizations speaking to each other, the fact that the companies list each other as subcontractors in their respective proposals and their BAFO pricing being similar.

As the procurement officer testified, it is not unprecedented for companies to use each other as proposed subcontractors in their bids (Transcript at p. 251), and it is also not unusual for pricing to be quite close (Transcript at p. 255). Had the procurement officer found evidence of collusion, he would be required to report this to the Office of the Attorney General.

State procurement law prohibits collusion in the procurement process and provides that "a procurement officer who has reason to believe that collusion has occurred in connection with the procurement process shall send to the Office of the Attorney General written notice that states the belief and its basis." SFP § 11-205(c)(1); see also COMAR 21.05.01.03. However, the procurement officer did not find evidence of collusion and, therefore, was not required to report anything to the Office of the Attorney General.

Despite Appellant's efforts to prove that there was collusion between these two Offerors, it provided no actual evidence that there was collusion. The Board finds this allegation baseless, and again finds that the procurement officer did not act in a way that was arbitrary, capricious, contrary to law or otherwise an abuse of discretion.

As the Board noted in Facchina-Trumbull-Skanska JV, MSBCA 2630 (2009):

Appellants ... have the burden of proving that a procurement officer's award of a contract is contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion. An Appellant's disagreement with the evaluation of its, or another's, proposal or a recommendation for award, although understandable, is not sufficient to meet this burden.

See also Delmarva Community Services, Inc., MSBCA 2302, 5 MSBCA ¶523 (2002).

Throughout the appeal process, the Appellant was unable to produce any evidence that the procurement officer acted in any way that was arbitrary, capricious, contrary to law or otherwise an abuse of discretion, and this Board must find that the procurement officer acted within the discretion afforded him under Maryland law.

For all of these reasons, these appeals must be denied.

Wherefore it is Ordered this _____ day of February, 2017 that the above-captioned appeals are DENIED.

Dated:

Michael J. Collins
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 2996, 3014, and 3016, Appeals of Occupational Health Centers of the Southwest, P.A. d/b/a as Concentra Medical Centers Under Department of Budget and Management RFP No. 050B6400002.

Dated:

Michael L. Carnahan
Clerk