BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	)
Gantech, Inc.	)
	)
	) **Docket Nos. MSBCA 3021 & 3023**
Under Maryland Department of	)
Transportation RFP No.	)
J01R7400007	)

Appearance for Appellant:	**Scott A. Livingston, Esq.** **Rifkin Weiner Livingston LLC** **Bethesda, Maryland** **Kevin Rodkey, Esq.** **Gantech, Inc.** **Columbia, Maryland**
Appearance for Respondent:	**Craig H. DeRan, Esq.** **Assistant Attorney General** **Baltimore, Maryland**
Appearance for Interested Party:	**Philip M. Andrews, Esq.** **Kramon & Graham, P.A.** **Baltimore, Maryland**

OPINION BY MEMBER STEWART

On May 19, 2017, Maryland Department Transportation ("MDOT") filed a Motion for Summary Decision pursuant to COMAR 21.10.05.06D concerning appeals from denials of bid protests by Gantech, Inc. ("Gantech") of the award of master contracts in response to MDOT Request For Proposal ("RFP") No. J01R7400007. MDOT contends that there is no genuine dispute of material fact that (1) the financial proposals were properly evaluated and ranked using criteria set forth in the RFP, (2) Gantech's First Bid Protest was not timely filed, (3)

MDOT's failure to conduct oral presentations did not affect Gantech's overall ranking, and (4) that Gantech lacks standing to file this appeal.

The subject appeals were filed with the Maryland State Board of Contract Appeals ("Board") by appellant Gantech on January 20, 2017, MSBCA Docket No. 3021, and on February 23, 2017, MSBCA Docket No. 3023. The two appeals were consolidated by Order of the Board on March 17, 2017. Gantech's Response to MDOT's Motion for Summary Decision was filed on June 16, 2017; MDOT filed a Supplemental Motion for Summary Decision on July 7, 2017, and an Interested Party, Infojini, Inc. ("Infojini") filed a Motion to Adopt MDOT's Motions on July 11, 2017. A hearing was held on July 18, 2017.

Gantech filed three bid protests concerning MDOT's award of master contracts pursuant to offers received in response to MDOT's RFP. For reasons stated below, the Board need only address the denial of Gantech's First Bid Protest filed on January 12, 2017.

UNDISPUTED FACTS

The parties to these consolidated appeals do not dispute that:

1. MDOT issued RFP No. J01R7400007 on September 23, 2016.
2. The purpose of the RFP was to allow MDOT to award three-year master contracts with an optional two-year renewal period for on-call, temporary contingent labor services in two functional areas: Functional Area 1 (FA1) for information technology and other professional technical labor categories, and Functional Area 2 (FA2) for administrative labor categories.
3. MDOT intended to award no more than two awards for each functional area, and an offeror could propose for either or both functional areas.
4. Offerors were to submit separate technical and financial proposals to MDOT.

5. The RPF in Section 1.15 Award Basis states:

   The Contract shall be awarded to the responsible Offeror(s) submitting the Proposal(s) that has(/have) been determined to be the most advantageous to the State, considering price and evaluation factors set forth in this RFP (see COMAR 21.05.03.03F), for providing the services as specified in this RFP. See RFP Section 5 for further award information.

6. The RFP in Section 5.3 Financial Proposal Evaluation Criteria states:

   All Qualified Offerors (see Section 5.5.2.4) will be based on labor category rates within the stated guidelines set forth in the RFP and as submitted on **Attachment F** – Financial Proposal Form. Financial Proposals will be evaluated separately. Offerors shall provide prices for Contract years one (1) through (5) for all labor categories. These are the maximum prices the State will pay under any RSO or SOA for all proposed labor categories throughout the Contract term.

7. The RFP in Section 5.5.3 Award Determination states: Upon completion of the Technical and Financial Proposal Evaluations, the Procurement Officer will recommend award of a Master Contract(s) to up to four (4) technically qualified and responsible Offeror(s).

8. Gantech admitted at the hearing on this Motion that the language of Sections 1.15 and 5.3 of the RFP was unambiguous.

9. MDOT evaluated seven qualified offerors for FA1 and ranked each based on its technical and financial proposals, and then ranked the offerors overall. The technical rankings were as follows (offerors who were not awarded a master contract nor who are protesting the awards are identified as Companies A, B, C and D, respectively):

Gantech	1
Infojini	2
Company A	3
Abacus Corporation	4
Company B	5
Company C	6
Company D	7

The financial rankings were as follows:

Abacus	$31,255,410,69 (1)
Company D	$33,305,364.45 (2)
Company C	$44,723,388.00 (3)
Company B	$46,975,952.12 (4)
Infojini	$47,032,358.70 (5)
Company A	$64,430,608,66 (6)
Gantech	$78,569,629.42 (7)

The overall rankings were as follows:

Abacus Corporation	1
Infojini	2
Company B	3
Company A	4
Gantech	5
Company C	6
Company D	7

10. Based on the overall evaluations, MDOT recommended master contracts in FA1 be awarded to Abacus Corporation and Infojini.

11. By letter dated December 25, 2016, from the MDOT procurement officer ("PO"), Gantech was informed that it was not selected for award. The letter included a table setting forth Gantech's technical and financial rankings and information on how Gantech could obtain a formal debriefing.

12. On December 30, 2016, Gantech filed its First Bid Protest alleging two bases: (1) that MDOT used maximum hourly rates as a factor in evaluating the financial proposals in violation of COMAR 21.05.03.03A(5), which provides that: "[f]actors not specified in the request for proposals may not be considered," and (2) MDOT did not hold oral presentations or discussions to evaluate technical proposals as required by RFP Section 5.5.2.2.

13. On January 12, 2017, MDOT's PO issued her final decision denying Gantech's First Bid Protest and, on January 20, 2017, Gantech filed this appeal, which was docketed as MSBCA No. 3021.

14. On January 19, 2017, Gantech filed its Second Bid Protest alleging that MDOT had not conducted a debriefing. Gantech withdrew its Second Bid Protest after a debriefing was held on February 1, 2017.

15. On February 2, 2017, Gantech filed its Third Bid Protest alleging that MDOT's use of the financial proposals to "rank" the proposals was improper as an undeclared criterion in the evaluation process. On February 17, 2017, the PO issued her final decision denying the Third Bid Protest. On February 23, 2017, Gantech appealed her denial of the Third Bid Protest, which was docketed as MSBCA No. 3023. Gantech stated in its Response to MDOT's Motion for Summary Decision that it did not oppose MDOT's Motion as to its Third Bid Protest. Gantech confirmed that it did not oppose the granting of MDOT's Motion on the record at the hearing. Accordingly, the Board granted MDOT's Motion as to the denial of Gantech's Third Bid Protest.

16. In its Response to MDOT's Motion, Gantech submitted an Affidavit of Christa Stolarik dated June 16, 2017, who swore under oath that, among other things, she was the Gantech employee "accountable" for the Gantech proposal; she was unaware of any impropriety at the time Gantech submitted its proposal; she did not think MDOT would consider price or rank the financial proposals; she had previously participated in Gantech's response to the Maryland Department of Information Technology ("DoIT") Consulting and Technical Services+ ("CATS+") Request for Proposals Project No.

060B2490023 ("CATS+ RFP"); and, based on her experience with CATS+ proposals, she thought the MDOT RFP would follow the structure and intent of the CATS+ RFP.[1]

SUMMARY DECISION STANDARD

In deciding whether to grant MDOT's Motion for Summary Decision of the appeal of Gantech's First Bid Protest, the Board must follow COMAR 21.10.05.06D(2):

> The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor or the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore,* 312 Md. 662, 678 (1988).

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[1] The DoIT CATS+ RFP follows a streamlined procurement process set forth in the State Finance & Procurement Article of the Annotated Code of Maryland §§13-401 & 402. It is a two-step process for the procurement of Information Technology ("IT") services, whereby, in the first step, an RFP is issued and master contracts are awarded by DoIT to all technically qualified offerors. In the second step, an agency may issue a task order ("TO") RFP, and those who were awarded a master contract with DoIT may compete for award of the TO based on price.

Gantech attached the CATS+ RFP to its Response to MDOT's Motion. The procuring unit of the State for that RFP was DoIT, and the RFP was for IT and technical services. By contrast, the RFP at the center of these appeals was issued by MDOT for on-call, temporary contingent labor services in two functional areas: Functional Area 1 (FA1) for information technology and other professional technical labor categories, and Functional Area 2 (FA2) for administrative labor categories. The CATS+ RFP does not contain a section similar to Section 1.15 Award Basis contained in MDOT's RFP. Moreover, the CATS+ RFP in Section 4.5.3 Award Determination mandates that Master Contracts be awarded to all technically qualified offerors, whereas the MDOT RFP Section 5.5.3 Award Determination mandates that Master Contracts be awarded to up to four (4) technically qualified and responsible offerors.

STANDARD OF REVIEW FOR BID PROTESTS

To prevail on an appeal of the denial of a bid protest, an appellant must show that the agency's action was biased or that the action was "arbitrary, capricious, unreasonable, or in violation of law." *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Comty Servs., Inc.*, MSBCA 2302 at 8, 5 MSBCA ¶ 523 at 5 (2002)).

DECISION

MDOT's Motion for Summary Decision contends that there is no genuine dispute of material fact regarding (1) the factors to be considered in evaluating the financial proposals submitted in response to the RFP, (2) whether the protest was timely filed, (3) whether the failure to conduct oral presentations for the technical proposals adversely affected Gantech's overall ranking, and (4) whether Gantech had standing to file this appeal.

The Board first addresses the two procedural bases of MDOT's Motion. If the Board concludes that Gantech's First Bid Protest was untimely filed or that Gantech lacked standing to file a protest, then it need not address the remaining issues.

MDOT asserts that Gantech's protest was not timely filed because it did not allege an impropriety in the evaluation criteria prior to the closing date for receipt of proposals. MDOT relies on COMAR 21.10.02.03A, which provides that "[a] protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals." Gantech does not contend that the language of the RFP is ambiguous; rather, Gantech contends that ranking the financial evaluations was improper because a factor (*i.e.*, ranking) was used to evaluate the financial proposals that was not specified in the RFP. Viewing the facts in the light most favorable to Gantech, Gantech could not have discovered

that the financial proposals were ranked until after it was notified that it had not been selected for award. As such, COMAR 21.10.02.03A does not apply.

The undisputed facts show that Gantech discovered the two bases of its First Bid Protest via MDOT's December 26, 2016, non-selection letter, and that Gantech filed its First Bid Protest on December 30, 2016. As such, it is clear that Gantech filed its protest within the time specified by COMAR 21.10.02.03B, which provides that "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." The Board concludes that there is no genuine dispute of material fact that Gantech's proposal was timely filed.

As to whether Gantech had standing to file this appeal, the Board must apply the standard for determining standing for the protest of contracts awarded via RFPs: an appellant must not only allege that the State did something improper; it must also be able to demonstrate that, had the impropriety not occurred, that that particular offeror would have been awarded the contract. *Active Network, LLC.*, MSBCA 2920 at 6 (2015). Viewing the facts in the light most favorable to Gantech, that is, that only the technical proposals would be ranked, Gantech would have been an awardee because its technical proposal was ranked highest. Therefore, the Board concludes that Gantech has standing to file this appeal.

The Board now turns to MDOT's contention that there is no genuine dispute of material fact regarding the factors that were to be used to evaluate the financial proposals and the propriety of using price to rank the financial proposals. This Board has held that it will use the rules of construction of contracts in interpreting the language of a RFP when the RFP and the proposal become part of and the basis for a procurement contract. *TransCore, LP*, MSBCA No. 2485 at 12 (2005). The MDOT RFP meets this requirement. *TransCore, LP*, contains a concise summary of those rules of construction:

> Maryland follows the objective law of contract interpretation, and under this test a court construing an agreement must determine from the language of the agreement what a reasonable person in the position of the parties would have meant. *General Motors Acceptance Corp. v. Daniels,* 303 Md. 254, 261 (1985). In construing a contract, Maryland courts have repeatedly emphasized that the words of a contract should be given their ordinary and usual meaning, in light of the context in which they are employed. *Wells v. Chevy Chase Bank*, 363 Md. 232, 251 (2002). Moreover, in Maryland it is a recognized rule of construction that a contract must be construed in its entirety, and effect given to all of its language. *Sagner v. Glenangus Farms, Inc.*, 234 Md. 156, 167 (1964). Language in a contract may not be read alone without reference to other language on the same subject. *Marsh v. Loffler Housing Corp.*, 102 Md. App. 116, 127 (1994); *Cam Construction Company*, MSBCA 1088, 1 MSBCA ¶62 (1983). *Id.* at 11.

It is undisputed that the language of the RFP is clear and unambiguous. After reviewing the language of the RFP, and after giving effect to all relevant sections regarding evaluation of proposals, the Board concludes that the language of Section 1.15 of the RFP regarding evaluation of the proposals clearly allowed the PO to use price as a factor in evaluating the proposals. While COMAR 21.05.03.03A(5) requires that a proposal be evaluated against factors set forth in the RFP itself, no particular words, phrases or statements are required to be used to describe the evaluation factors. Section 5.3 of MDOT's RFP clearly states that MDOT would evaluate financial proposals separately based on labor category rates. Section 1.15 clearly states that the PO shall award master contracts to those offering proposals "most advantageous to the state considering price...."

As to the ranking of financial proposals, a PO is allowed to assign numerical rankings per COMAR 21.05.03.03A(4), which states that in evaluations of proposals: "Numerical rating systems may be used but are not required." In this instance, the Board considers the ranking of financial proposals by the MDOT PO to be assigning a rating under the COMAR provision.

Gantech attempts to create a dispute of a fact where there is none by arguing that even though the language of the MDOT RFP is clear, the way proposals are evaluated under CATS+

RFPs establishes a "trade usage"[2] for evaluating the MDOT proposal. Gantech relies on *Hensel Phelps Constr. Co.*, MSBCA No. 1016, 1 MICPEL ¶ 44 at 11 (1983), in which the Board held that evidence of trade usage[3] is admissible to explain or define a contract term. In *Hensel*, the MTA attempted but failed to establish that the term "subcontractor" had a clear trade usage that limited it to entities doing onsite work for purposes of workers' compensation "wrap-up" coverage. In this instance, however, Gantech is not attempting to explain or define a term or a word of the RFP, but is arguing that the way DoIT procurement officers evaluate CATS+ TORFPs under a Master Contract establishes a "trade usage" that trumps the clear and unambiguous language of the MDOT RFP itself regarding how proposals shall be evaluated and how master contracts shall be awarded.

At the hearing, Gantech admitted that it assumed the financial proposals would not be ranked based on its experience bidding on DoIT's CATS+ RFPs. In essence, Gantech assumed that the MDOT proposals would be evaluated the same way DoIT evaluates CATS+ RFP

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[2] The Uniform Commercial Code (UCC) as enacted as the Commercial Law Article of the Annotated Code of Maryland in §1-303(c) defines "Usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law."

However, §2-102 of the Commercial Law Article limits the U.C.C.'s application to "transactions in goods." Section 2-106 further limits the application of the U.C.C. to the contracts and agreements relating to the present or future sale of goods. The RFP at issue here is for the provision of technical and administrative services. Therefore, §2-202 allowing parol or extrinsic evidence to explain or supplement contract terms by usage of trade as defined by §1-303(c) is not applicable to this RFP. Even if the MDOT RFP was for the procurement of goods or "supplies" as used in COMAR 21.01.03.02A, the Board would not be **required** to adopt the U.C.C.'s rules for the interpretation of contracts. The MDOT RFP at issue here is governed by COMAR Title 21 as it implements Titles 11 – 15 of the State Finance & Procurement Article of the Annotated Code of Maryland. *See*, COMAR 21.01.03 and State Finance & Procurement Article §§11-201 – 07.

[3] *Hensel* uses the term "trade usage," but the other Maryland cases in accord use "local meaning" or "trade meaning." *See*, *Della Ratta, Inc. v. American Better Community Developers, Inc.*, 38 Md. App, 119 (1977) (interpreting what the term "building permits" meant in a construction contract). "Local meaning" means that which means what is peculiar to a locality, a trade, a profession, and the like. *See*, *Abuc Trading & Sales Corp. v. Jennings*, 151 Md. 392 (1926)(interpreting whether the term "scrap copper" meant pure unalloyed copper, or whether the term included all metal in which copper appeared as a basic element).

proposals. Gantech uses its "trade usage" argument to suggest that this assumption is reasonable. Gantech concedes, however, that the CATS+ RFPs and the RFP at issue here are similar, but have essentially different evaluation provisions. MDOT's Section 1.15 specifically states that price will be considered as a basis for award; the CATS+ RFP provision does not. Section 5.5.3 of the MDOT RFP mandates award of Master Contracts to no more than four (4) technically qualified offerors; the CATS+ RFP in Section 4.5.3 mandated the award of master contracts to all technically qualified offerors.[4]

Considering the clear and admittedly unambiguous language of the RFP, the Board concludes that Gantech's assumption is unreasonable. The Board sympathizes with Gantech's assumption that CATS+ sets the standard for the way information technology services are to be procured by Maryland agencies, but notes that MDOT is not required to use the DoIT streamlined process for the procurement of IT services.[5] Further, if MDOT wanted to procure only IT services, it could have availed itself of the streamlined procurement procedure and issued Task Order RFPs using CATS+. MDOT clearly wanted to procure both technical and administration services via its RPF and to create a short list of vendors in each functional area to supply those services. The language of the two RFPs may be similar, but they are not the same. Assuming that certain requirements and criteria are implied in an RFP is no substitution for reading the RFP's requirements and criteria as set forth in the language of the RFP itself.

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[4] The PO awarding Master Contracts under CATS+ RFPs does not encounter the difficult task of winnowing down technically qualified offerors when awarding Master Contracts like the MDOT RFP PO. It is difficult to fathom how the MDOT PO could winnow down to two offerors in FA1 to award master contracts to those who are technically qualified and responsible, as is required by the RFP's Section 5.5.3 Award Determination, without assigning some numeric rating or ranking to both the technical and financial proposals of the offerors.

[5] Section 13-402 (c) (1) of the State Finance & Procurement Article of the Annotated Code of Maryland provides: "A unit of the Executive Branch that requires information technology services **may** issue a solicitation for a task order to a qualified offeror in the appropriate category of information technology services consistent with procedures and policies adopted by the Secretary in subsection (b) of this section" (emphasis added).

When evaluating proposals, the MDOT PO must follow COMAR and the language of the RFP and not trade usage or prior course of dealing on another procurement. Unexpressed criteria may not be considered in evaluating a proposal, nor may specific requirements or criteria in an RFP be ignored by the evaluating agency. *Walbert Partnership*, MSBCA No. 1633, 3 MICPEL ¶ 300 (1992). If the MDOT PO had ignored the unambiguous evaluation criteria set forth in its RFP in favor of evaluation criteria contained in the CATS+ RFP, then the MDOT PO would not only have ignored the plain language of her own RFP, but also would have violated COMAR 21.05.03.03A(5), which states that "[f]actors not specified in the request for proposals may not be considered."

The Board rejects Gantech's argument that MDOT "misevaluated" the proposals by considering price when making an award determination. MDOT properly evaluated the financial proposals under the RFP, as price was stated as a factor in the RFP, and the PO was allowed to use numerical ratings or rankings of financial proposals as permitted by COMAR. Based on the foregoing, the Board concludes that there is no genuine dispute of material fact that the financial proposals were properly evaluated using criteria clearly set forth in the RFP and that the PO's decision to rank the proposals based on price was not arbitrary, capricious, unreasonable, or contrary to law.

MDOT next contends that its failure to conduct oral presentations of the technical proposals is moot because Gantech's technical proposal was ranked the highest. MDOT further contends that this failure did not adversely affect Gantech's overall ranking. It is undisputed that MDOT did not follow the RFP selection procedures as set forth in Section 5.5.2.2 because oral presentations and discussions were not held during the evaluation of the technical proposals. It is also undisputed that evaluation criteria of the RFP required technical and

financial proposals to be evaluated separately. Gantech does not disagree with MDOT's evaluation of its technical proposal being the highest ranked.

Gantech has proffered no facts whatsoever that would be admissible in evidence to show how MDOT's failure to conduct an oral presentation regarding the technical proposal affected Gantech's overall competitive position, nor did it proffer how having oral presentations or discussions on the technical proposal would have assisted Gantech in submitting an offer based on cheaper maximum rates that would be the most advantageous to the State. In other words, MDOT's failure to conduct the oral presentation regarding the **technical** proposals could not have affected Gántech's **financial** proposal, which was submitted and evaluated separately. The Board has consistently ruled that it will only determine whether the determinations of procurement officials regarding the evaluation of the technical merits of proposals are arbitrary, capricious, unreasonable or contrary to law or regulation, since procurement officials' determinations concerning the relative technical merits of proposals are discretionary and entitled to great weight. *See, Delmarva Cmty Servs, Inc.*, at 8-9, 5 MSBCA ¶523 at 5.

The Board concludes that there is no genuine dispute of material fact that the failure to conduct oral presentations of the technical proposals could not have affected Gantech's financial proposal or overall ranking and non-selection of award. Stated differently, even if MDOT had conducted oral presentations and discussions of the technical proposals, it would not have affected Gantech's financial proposal because the technical and financial proposals were evaluated separately.

Having resolved all inferences in favor of Gantech, the Board finds that there is no genuine dispute of material fact and that MDOT is entitled to prevail as a matter of law regarding the denial Gantech's First Bid Protest based on (1) the propriety of the financial

proposal evaluations and (2) the lack of any adverse impact from MDOT's failure to conduct oral presentations on the technical proposals.

Accordingly, this Board hereby grants MDOT's Motion for Summary Decision as to the appeal filed by Gantech of the denial of its First Bid Protest.

SO ORDERED this 8th day of August, 2017.

/s/
Michael J. Stewart Jr., Esq., Member

I Concur:

/s/
Bethamy N. Beam, Esq., Chairman

/s/
Ann Marie Doory, Esq., 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 Nos. 3021 and 3023, Appeals of Gantech, Inc., under Maryland Department of Transportation RFP No. J01R7400007.

Dated: 8/8/17

Ruth W. Foy
Deputy Clerk