

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Master Security Company, LLC

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Under

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MAA Solicitation No.

Docket No. MSBCA 3062

MAA-MC-18-005

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OPINION AND ORDER BY MEMBER STEWART

The Board denies this appeal on the grounds that the procuring agency asserted a sufficient and reasonable cause for including the minimum experience requirement in the solicitation, and that the Appellant failed to prove by a preponderance of the evidence that the requirement was unreasonable, arbitrary or unlawful.

FINDINGS OF FACT

On July 28, 2017, Maryland Department of Transportation (“MDOT”) Maryland Aviation Administration (MAA) issued a solicitation for Contract No. MAA-MC-18-005 (“the Solicitation”). The Solicitation’s purpose is to solicit bids for security guard services at Baltimore/Washington International Thurgood Marshall Airport (“BWI”). The scope of work under the contract awarded pursuant to the Solicitation is to provide the necessary trained uniformed personnel, supervision, training, vehicles, equipment, insurance and expertise to cover the security guard assignments as required by the MAA at BWI.

The Solicitation is being conducted as a Multi-Step Invitation for Bids (“IFB”). The Solicitation uses a two-step process for award: the first step is an evaluation of the Minimum Requirements of bidders as set forth in the Solicitation, and the second step is a determination of which bidder (from among the pool of “Acceptable” bidders) submitted the lowest responsive bid based on the total contract cost. To determine whether a bidder meets the Minimum Requirements of the Solicitation, each bidder is required to submit a bid consisting of two separate envelopes:

Envelope A contains its responses to an Experience Questionnaire – Minimum Requirements located in Section Q of Volume II of the Technical Provisions, along with necessary supporting documentation for each answer, and Envelope B contains the Bid Bond, Bid/Proposal Affidavit, MDOT MBE Form A- Certified MBE Utilization and Fair Solicitation Affidavit, MDOT MBE Form B-MBE Participation Schedule, Maryland Living Wage Affidavit, and Bid Proposal/Bid Tabulation Form.

The original deadline for submission of bids was September 12, 2017. On that date MAA was to open (not in public) and evaluate the Envelope A submissions of all bidders. After evaluation to determine which bidders met the Minimum Requirements set forth in the Solicitation, MAA would then publicly open the Envelope B submissions of those bidders and announce the apparent low bidder on September 15, 2017. Addendum No. 8 to the Solicitation dated November 28, 2017, revised the deadline for bid submissions to February 6, 2018, and the date MAA would publicly open and read the bids it evaluated as meeting the Minimum Requirements thereof was changed to February 13, 2018.

The Solicitation in Section TP-1.03 Contractor Qualifications provides:

C. Experience

1. The Contractor must have five (5) years' experience working at one (1) or more airports in the past Eight (8) years (between August 1, 2009 and July 31, 2017), as a company working in airport security operations and management as the contracted security guard services provider for a Category X Airport (see "D." below for definition and listing of airports). The experience must be in compliance with **49 CFR 1542**, Transportation Security Administration, Department of Transportation, and Airport Security. The Contractor may find a link to **49 CFR 1542** on the TSA website.
2. The Contractor must provide documentation and references that they have managed a security guard workforce of a minimum of 150 employees at a single Category X airport.
3. The Administration shall not accept the experience of individual employees or combinations of employees as company experience. The contractor shall

submit documentation demonstrating the five (5) years' experience, including company, address, contact person, telephone number, term of contract, description and amount.

4. The Contractor shall submit with its bid (Envelope A), documentation of its qualifications on **Section Q – Experience Questionnaire - Minimum requirements.**¹
(emphasis in original).

Section TP-1.03D defines a “Category X airport” as one in the U.S. where passenger security screening is performed pursuant to 49 CFR §§ 1544.101(a)(1) or 1546.101(a) and the number of annual enplanements is five (5) million or more and international enplanements is one (1) million or more. Section D also provides that there are 28 Category X airports in the U.S. and includes BWI as one of them.

The appellant, Master Security Company, LLC (“Master Security”) submitted a pre-bid question to MAA regarding the experience requirement set forth in Section TP-1.03C.2. The question and MAA’s answer are found in Addendum No. 3 to the Solicitation:

Question #77. Under TP-1.03 C 2 it states that the Contractor must provide documentation and references that they have managed a security guard workforce of a minimum of 150 employees at a SINGLE Category X airport. Would the Administration consider a Bidder with concurrent contracts at TWO Category X airports operated under the same Aviation Authority with a combined workforce in excess of 150 employees as qualifying experience for this solicitation?

Response: No. TP-1.03 C.2. The Contractor must provide documentation and references that they have managed a security guard workforce of a minimum of 150 employees at a single Category X airport.

After receiving the response from MAA to its question on September 11, 2017, Master Security filed a Bid Protest with the procurement officer (“PO”) at MAA, which was received by the PO on September 14, 2017. In its Bid Protest, Master Security argued that the Solicitation’s requirement

¹ The prior procurement for Security Guard Services at BWI, Contract MAA-MC-11-004, provided in Volume II, Section Q, Item #3 that “[t]he Contractor must demonstrate the ability to operate and manage a two-hundred (200) security guard/officer workforce at a single airport facility.”

that a bidder document that it managed a security guard workforce of at least 150 employees at a single Category X airport (what Master Security terms “the Single Airport Requirement”) is unreasonable and arbitrary and not necessary to meet MAA’s minimum needs under the proposed contract. Specifically, Master Security asserted that the purpose of the experience requirement is to demonstrate that a bidder has successfully managed at least 150 employees performing airport security duties and thus will be able to do so at BWI. Master Security further asserted that during the period required by the Solicitation for experience (between August 1, 2009, and July 31, 2017) it concurrently managed on average a combined number of at least 150 security employees at Reagan National (42) and Washington Dulles International (125) airports under a contract with the Metropolitan Washington Airport Authority, and that this demonstrates its capability to provide at least 150 security employees at BWI.

Finally, Master Security alleged that the Single Airport requirement violates Maryland law and procurement regulations requiring solicitation specifications to be drawn to encourage maximum practicable competition without modifying the legitimate requirement of the State, and that State agencies may include restrictive requirements only to the extent necessary to satisfy the agency’s legitimate needs. Master Security concluded that the Single Airport Requirement is not necessary to meet the MAA’s minimal need with respect to experience, and is, therefore, without a rational basis. Master Security asked the PO to modify Section TP-103C of the Solicitation to allow for documentation and references for management of at least 150 security employees at a single Category X airport or concurrently at two or more Category X airports.

On November 14, 2017, the MAA’s PO issued a Final Decision denying Master Security’s Bid Protest. The PO noted that under the current MAA contract for security services that staffing levels had “ebbed and flowed” during the preceding five calendar years (from 365 personnel in 2013

and 156 in 2017), and that those staffing levels did not include the increased scope of work included in the Solicitation, namely, the requirement to monitor, respond to and acknowledge terminal door alarms as specified in Section TP-2.01A2d. The PO also noted that the Solicitation's absolute minimum baseline hourly staffing requirements of 312,018 hours per year equates to 150 full-time employees at 40 hours a week, or 2,080 hours per year, and that the MAA requires a contractor with a proven ability to add staffing on short notice for additional security guard operations as well as oversight of airport construction in the BWI Airport Air Operations Areas (AOA) per Section TP-1.14 Extra Work Allowances. The PO further noted that the staffing requirement for the Solicitation was lowered from the current MAA contract requirement of 200 security employees at a single facility to 150 security employees at a single Category X airport to increase competition. The PO concluded that "[g]iven the nature of the work to be performed, providing a security force of at least 150 employees at a Category X airport, MDOT MAA needs to make sure that the contractor selected has a proven track record successfully performing the needed services or else property and lives may be in jeopardy."

On November 22, 2017, Master Security filed an appeal of the PO's Final Decision with this Board. The MAA filed the Agency Report on December 14, 2017. The Appellant filed its Comments to the Agency Report on January 2, 2018. MAA filed a Rebuttal to Appellant's Comments on January 8, 2018. Neither party to this appeal requested a hearing.

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

Appellant contends that the Solicitation's minimum experience requirement set forth in Section TP-1.03C.2, that "[t]he Contractor must provide documentation and references that they have managed a security guard workforce of a minimum of 150 employees at a single Category X airport," is unlawful because it violates Md. Code Ann., State Finance & Procurement (SF&P) §13-205(a)(1), which mandates that a unit "shall draft specifications to encourage maximum practicable competition without modifying the requirements of the State..." Appellant further contends that MAA's requirement that a contractor document and provide references demonstrating that it *had met* the requirement rather than demonstrate that it *could meet* the requirement was arbitrary and unreasonable.

SF&P §13-205(a)(1) and COMAR 21.04.01.04² provide that specifications in a solicitation should be drafted to encourage maximum practicable competition without modifying the requirements of the State. *Balfour Beatty Constr. v. Dept. of Gen'l Servs.*, 220 Md. App. 334 at 362 (2014); State Finance & Procurement Article §13-205(a)(1); and COMAR 21.04.01.04. In drafting specifications, a state agency is in a unique position to determine those specifications that most accurately reflect the minimum needs of the State. *Id.* at 362 – 363 (citing *Lottery Enterprises, Inc.*, MSBCA No. 1680, 4 MSBCA ¶314 at 7 (1992); *Admiral Services, Inc.*, MSBCA No. 1341, 2 MSBCA ¶159, at 2 (1987)). State agencies are, therefore, afforded great discretion in determining their own needs. *Id.* at 363. When reviewing a procuring agency's specifications, the Board will

² 21.04.01.04 Responsibility for Review and Approval.

The procurement officer or his designee shall be responsible for reviewing the specifications for content, clarity, and completeness and to insure that the specification is nonrestrictive. Final approval of the specifications shall rest with the procurement officer and subsequently with the Department. Specifications may be revised by the procurement officer for purposes of clarification as long as elements of the specifications remain the same. Revisions which change the technical elements of the specification may be made in consultation with the using agency.

defer to the technical judgment of the procuring agency unless it is clearly erroneous. *Id.* (citing *Siems Rental & Sales Co., Inc.*, MSBCA 1609, 3 MSBCA ¶288 at 4–5 (1991); *Adden Furniture, Inc.*, MSBCA 1219, 1 MSBCA ¶93 at 4 (1982)).

In order to defend its specifications, the State must simply assert reasonable cause for a restrictive bid or proposal requirement. *Balfour Beatty Constr.*, MSBCA 2803 at 5 (2012)(citing *Xerox Corp.*, MSBCA No. 1111, 1 MSBCA ¶48 (1983)). The more restrictive a specification may be, the greater the justification that the State may be fairly required to assert. *Id.* at 5-6. Once the State satisfies this showing, the protestor has a “considerable burden” to prove by a preponderance of the evidence that the restriction is unreasonable. *Id.* at 5 (citing *Xerox Corp., supra; The Trane Co.*, MSBCA No. 1264, 2 MSBCA ¶118 (1985)).

The Board finds that the MAA has a reasonable, legitimate, and substantial public-safety interest in ensuring it will have adequate security staffing at BWI.³ The record before the Board indicates that the PO had reasonable cause to draft the minimum experience requirement in a manner that encouraged competition while insuring that MAA’s minimum requirements for security staffing are met by the contract resulting from the Solicitation. The Final Decision of the PO recounts how the MAA crafted the requirement that bidder provide documentation and references that they have managed a security guard workforce of a minimum of 150 employees at a single Category X airport. The MAA reviewed historical security staffing levels on the current MAA security contract at BWI and found that although the levels varied from year to year, they never fell below 156 employees. The PO further noted that increases in the scope of work under the Solicitation, plus the need to add

³ The Board notes that on September 11, 2011, a series of four coordinated terrorist attacks by the Islamic terrorist group al-Qaeda on the United States using commercial airliners hijacked after taking off from civilian airports killed 2,996 people, injured over 6,000 others, and caused at least \$10 billion in infrastructure and property damage. https://en.wikipedia.org/wiki/September_11_attacks (last visited Jan. 12, 2018).

security staff on a short notice and the need to oversee construction in the BWI AOA, mandated that the MAA have at a minimum 150 full-time employees for 40 hours a week each year. The record indicated that the PO reduced the number of employees from 200 under the last contract to 150 in this Solicitation to encourage competition, but required that the contractor **document that they had managed** 150 employees at a single Category X airport rather than simply **demonstrate the ability to manage** 200 employees at a single airport to ensure adequate security staffing at BWI given the scope of work.

The Board finds that the MAA met its burden of producing reasonable facts upon which we can conclude that the inclusion of the minimum experience requirement at issue was not unreasonably restrictive and does advance the legitimate interests of the State. With that initial burden met, it is the considerable burden of Master Security to prove by a preponderance of the evidence that the restriction is unreasonable. The Board has determined that Master Security has failed to do so. Just because Master Security cannot meet the minimum experience requirement of the Solicitation does not mean that the requirement is unreasonable. Master Security presents no evidence in the record that the requirement in question is unreasonably restrictive. Master Security is asking the MAA to relax its minimum experience requirement.⁴ The State, however, is not required to change its minimum needs or requirements as it perceives them to be merely because bidders prefer another approach. *Admiral Services, Inc.*, MSBCA No. 1341, 2 MSBCA ¶159 (1987).

⁴ Appellant asked the MAA if it would relax the 200-employee requirement at a single airport during the prior procurement of security guard staffing at BWI as evidenced in the questions and answers to that solicitation set forth in Addendum No. 3 thereto:

99. Volume II, Section Q, Item #3, states “The Contractor must demonstrate the ability to operate and manage a two-hundred (200) security guard/officer workforce at a single airport facility.” This qualifier greater limits competition. We currently provide security at a Category X airport but the security requirements do not require 200 security officers. Will the Maryland Department of Transportation consider revising this qualifier?

ORDER

For the foregoing reasons, the above-captioned appeal is hereby DENIED.

SO ORDERED this 18th day of January, 2018.

/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 No. 3062, Appeal of Master Security Company, LLC, under Maryland Aviation Administration Solicitation No. MAA-MC-18-005.

Dated: 1/18/18

/s/
Ruth W. Foy
Deputy Clerk