

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of)
PREAAmerica, LLC)
)
) **Docket Nos. MSBCA 3036 & 3040**
Under Maryland Department of)
Juvenile Services Solicitation No.)
17-AX-001)

Appearance for Appellant: **Wendell Finner, Esq.**
Wendell Finner, PC
Baltimore, Maryland

Appearance for Respondent: **Antonio V. Rivera, Esq.**
Dept. of Juvenile Services
Assistant Attorney General
Baltimore, Maryland

OPINION AND ORDER BY CHAIRMAN BEAM

The Board holds that the Procurement Officer (“PO”) acted arbitrarily, capriciously and unreasonably when she determined that Appellant’s bid was non-responsive due to a pricing mistake on the bid pricing form. The PO failed to consider the State’s best interest when she determined that the mistake could not be waived or corrected because it was an impermissible change in price rather than a minor irregularity. The PO’s refusal to exercise her discretion to waive the mistake or allow Appellant to correct it was unreasonable.

FINDINGS OF FACT

1. On March 20, 2017, Respondent, the Maryland Department of Juvenile Services, issued an Invitation for Bids under Solicitation No. 17-AX- 001 (the “IFB”). The purpose of the IFB was to

obtain Prison Rape Elimination Act (“PREA”) audit services at 13 facilities operated by Respondent. The facilities were to be audited over the three-year contract period.

2. The IFB in Section 1.15 Award Basis provides:

The Contract shall be awarded to the responsible Bidder submitting a responsive Bid with ***the most favorable Total Bid Price*** (as referenced in COMAR 21.05.02.13) for providing the goods and services as specified in this IFB. The most favorable Total Bid Price will be the lowest price total on Attachment F – Bid Form. (Emphasis added).

3. Attachment F of the IFB contained “Bid Pricing Instructions” and a “Bid Form.”

4. The “Bid Pricing Instructions” section provides:

BID PRICING INSTRUCTIONS

In order to assist Bidders in the preparation of their Bid and to comply with the requirements of this solicitation, Bid Pricing Instructions and a Bid Form have been prepared. Bidders shall submit their Bid on the Bid Form in accordance with the instructions on the Bid Form and as specified herein. Do not alter the Bid Form or the Bid Form may be rejected. The Bid Form is to be signed and dated, where requested, by an individual who is authorized to bind the Bidder to the prices entered on the Bid Form.

The Bid Form is used to calculate the Bidder's TOTAL BID PRICE. Follow these instructions carefully when completing your Bid Form:

- A) All Unit and Extended Prices must be clearly entered in dollars and cents, e.g., \$24.15. Make your decimal points clear and distinct.
- B) All Unit Prices must be the actual price per unit the State will pay for the specific item or service identified in this IFB and may not be contingent on any other factor or condition in any manner.
- C) All calculations shall be rounded to the nearest cent, i.e., .344 shall be .34 and .345 shall be .35.
- D) Any goods or services required through this IFB and proposed by the vendor at **No Cost to the State** must be clearly entered in the Unit Price, if appropriate, and Extended Price with **\$0.00**. (Emphasis in original).
- E) Every blank in every Bid Form shall be filled in. Any blanks may result in the Bid being regarded as non-responsive and thus rejected.
- F) Except as instructed on the Bid Form, nothing shall be entered on or attached to the Bid Form that alters or proposes conditions or contingencies on the prices.

Alterations and/or conditions usually render the Bid non-responsive, which means it will be rejected.

- G) It is imperative that the prices included on the Bid Form have been entered correctly and accurately by the Bidder and that the respective total prices agree with the entries on the Bid Form. Any incorrect entries or inaccurate calculations by the Bidder will be treated as provided in COMAR 21.05.03.03E and 21 .05.02.12, and may cause the Bid to be rejected.
- H) All Bid prices entered below are to be fully loaded prices that include all costs/expenses associated with the provision of services as required by the IFB. The Bid price shall include, but is not limited to, all: labor, profit/overhead, general operating, administrative, and all other expenses and costs necessary to perform the work set forth in the solicitation. No other amounts will be paid to the Contractor.
- I) Unless indicated elsewhere in the IFB, sample amounts used for calculations on the Bid Form are typically estimates for bidding purposes only. The Department does not guarantee a minimum or maximum number of units or usage in the performance of this Contract.
- J) Failure to adhere to any of these instructions may result in the Bid being determined non-responsive and rejected by the Department.

5. The "Bid Form" section provides:

BID FORM

The Bid shall contain all price information in the format specified on these pages. Complete the Bid Form only as provided in the Bid Pricing Instructions. Do not amend, alter or leave blank any items on the Bid Form. If option years are included, Bidders must submit Bids for each option year. Failure to adhere to any of these instructions may result in the bid being determined non-responsive and rejected by the Department.

The Contractor is required to conduct PREA Audits for 13 DJS facilities during the three (3) year term of the contract. The fully loaded cost shall include the Contractor's transportation, lodging, overhead costs and profit.

Note: Please refer to Excel Spreadsheet Attachment.

6. Attachment F of the IBF contained an Excel spreadsheet with columns listing each of the three (3) contract years for which the bidder was to provide audit services, and each column listing the contract year was further divided into columns listing each of Respondent's facilities that the

successful bidder was to audit in each of the contract years, and a Fully Loaded Price column consisting of blank spaces, wherein the bidder was to list the price that the bidder was proposing to perform a PREA audit of each facility. The proposed price for the facilities in each contract year were to be totaled at the bottom of the table, and an additional space was provided for the 3-year total of all PREA audits that the bidder was to perform.

7. Appellant submitted a Bid Form that included pricing for 12 facilities. The price for ten (10) of the facilities was \$2,495.00, and the price for two (2) of the facilities was \$2,695.00. The Bid Sheet reflected that Appellant's Total Bid Price was \$30,340.00, which was the sum of the prices submitted to audit 12 facilities. The Bid Sheet did not include a price for the audit of the Cheltenham Youth Facility.

8. On May 18, 2017, the bids were opened and tabulated as follows:

<u>Bidder</u>	<u>Amount</u>
PREAAmerica, LLC	\$30,340.00
Company A	\$44,800.00
Company B	\$82,480.00

9. On May 15, 2017, Respondent's PO, Raelene Glasgow, notified all bidders that "[b]ased on the bid submitted, PREAAmerica, LLC is the apparent low bidder and if determined to be a responsible bidder will be awarded the contract."

10. During the routing of the contract for approval, Respondent discovered that pricing on Appellant's Bid Form for the Cheltenham Youth Facility was left blank. In an email dated May 25, 2017, to Appellant's Chief Financial Officer, Tom Kovach, the PO asked: "I am reviewing your Bid Sheet, is there a reason why there was no Bid amount for the Cheltenham Facility?"

11. On May 26, 2017, Mr. Kovach responded via email stating that “I have reviewed the Excel sheet for the bid. We did intend to bid on all facilities. Our records show a bid for Cheltenham Facility as \$2495. There must have been a saving error that omitted that facility. What steps can we take to correct that error?”

12. The PO responded via email to Mr. Kovach later the same day: “I will have to speak with my supervisors since the Bid is already closed; it would be unfair to the others to have one vendor submit a second Bid Form.”

13. Despite the apparent mistake, the PO did not formally request that Appellant confirm its bid, and Appellant did not request to change its Total Bid Price.

14. On May 30, 2017, the PO sent an email to Mr, Kovach stating:

After speaking with our Assistant Attorney General and Director, unfortunately changes in pricing are not permitted after Bids have been opened. I am attaching a letter to this email and will be sending a hard copy in the mail. Unfortunately, we have to move to the next lowest Bidder.

The total of your Bid Form matches what is listed without Cheltenham being a part of the addition. We are very sorry but must adhere to the governing State.procurement [sic] regulations.

15. The May 30, 2017 letter attached to the email informed Appellant that Respondent was withdrawing its selection of Appellant due to mistakes found in its bid, relying on COMAR 21.05.02.12 as the basis for its decision, and noted that changes in prices are not permitted.

16. Mr. Kovach responded the same day with two emails. The first email asked whether Respondent could accept the bid “as is” with no additional charge. The second email included an attached letter dated May 30, 2017, stating that Appellant intended its bid to be for all facilities at the total price listed on its bid as received. It further stated that since the IFB did not prohibit submitting a bid for one facility at no charge, Appellant was not seeking a change in its Total Bid Price.

17. On June 1, 2017, Mr. Kovach sent, via email and certified mail, a Notice of Protest to the PO.

18. On June 2, 2017, the PO acknowledged receipt of Appellant's Notice of Protest and advised Appellant that she would bring the items to the Assistant Attorney General for discussion.

19. Despite this representation, there is no evidence that the PO brought the Notice of Protest to the Office of the Attorney General for discussion.

20. Nonetheless, on June 7, 2017, the PO responded via email and stated that her "decision to move on to the next lowest vendor stands," and that her decision was based on COMAR and the pricing instructions set forth in Attachment F to the IFB.

21. Mr. Kovach replied in an email back to the PO on the same day asking for information regarding how the PO's decision could be appealed. The PO responded via email shortly thereafter that she was "aware that there is a Board of appeals but I am not familiar with the process." She referred Appellant to, and provided a link for, this Board's website.

22. On June 12, 2017, Appellant filed a Notice of Appeal of the PO's denial of its protest, which was docketed as MSBCA No. 3036.

23. On July 3, 2017, the PO sent Appellant a letter identified as the "BID PROTEST DECISION." The PO stated that Appellant's Bid was non-responsive due to its failure to provide pricing for one of the facilities on the Bid Form. The letter concluded that "[t]his decision is the final action of this agency."

24. On July 14, 2017, Appellant filed another "Notice of Contract Appeal," which was docketed as MSBCA No. 3040. In its Notice, Appellant requested that the two appeals be

consolidated, and Respondent consented to this request via motion filed on August 1, 2017. Accordingly, the Board ordered the appeals consolidated on August 2, 2017.¹

DECISION

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)). Resolution of this appeal requires the Board to determine whether the PO’s conclusion that COMAR 21.05.02.12 prohibited her from either waiving Appellant’s omission as a minor irregularity or allowing Appellant to correct its bid was reasonable.

The facts in this case are undisputed. Appellant’s Total Bid Price on the Bid Form was \$30,340.00, which was the sum of the prices to audit 12 of Respondent’s 13 facilities. Despite clear instructions in the IFB, Appellant neglected to fill in the blank for a price to audit Respondent’s Cheltenham Youth Facility. After notifying Appellant that it was the apparent lowest bidder, the PO discovered the missing price on the Bid Form. When the PO inquired about the omission, Appellant replied that it had intended to bid the amount of \$2,495.00 for this facility, but failed to include a price in the blank due to a “saving error” with the Excel spreadsheet. Although Appellant asked how it could fix the mistake, it did not request that it be allowed to increase its Total Bid Price, and Respondent did not request that Appellant confirm its bid. After

¹ Respondent initially contended that Appellant’s first Notice of Appeal filed on June 12, 2017, was premature because the PO had not issued a final decision letter as required by COMAR 21.10.02.09. The PO later issued her Final Decision on July 3, 2017. The parties ultimately agreed and stipulated on the record at the hearing of this appeal that this issue was now moot and that the Board has jurisdiction to hear the merits of Appellant’s appeal(s).

consulting with the Office of the Attorney General and her Director, the PO responded that fixing the error would be an impermissible change in price prohibited by COMAR 21.05.02.12. Appellant replied that it would perform the audit of this facility at no charge and that it would perform the entire scope of work under the contract for the Total Bid Price reflected on its Bid Form. Respondent nevertheless rejected Appellant's bid.

In its Protest, Appellant contended that, pursuant to COMAR 21.05.02.12A, "saving the state [\$14,000,] nearly [half] the value of the bid is in the state's interest" and that "the mistake was to the state's advantage...we did not ask for a change in price and the mistake was not of consequence when the bid was awarded after several days of review and clarification." Appellant concluded that "it was clearly in the state's interest for the department to stay with the lowest qualified bidder."

However, in Respondent's final decision letter denying the Protest, the PO concluded that Appellant's mistake "was not a technicality or minor irregularity that could be cured or waived as it went to a matter of substance, i.e., price." The PO further concluded that Appellant's "failure to enter pricing for that facility was a material defect in their Bid" and that "to allow [Appellant] to correct the Bid Form or to accept [Appellant's] bid as-is and to audit [the facility] at no additional charge—only after they were told their Bid had to be rejected—would have been prejudicial or, simply, unfair to other Bidders." The PO did not address whether waiving the mistake or correction of the mistake would be in the State's best interest or otherwise advantageous to the State.

We begin our analysis by examining the applicable regulations governing mistakes in bids. COMAR 21.05.02.12A provides:

.12 Mistakes in Bids.

A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so.

Under COMAR 21.05.02.12A, "technicalities or minor irregularities in bids" is defined in COMAR 21.06.02.04. If the mistake in a bid meets the definition of a technicality or minor irregularity, then COMAR 21.05.02.12A applies.

COMAR 21.06.02.04 provides:

.04 Minor Irregularities in Bids or Proposals

- A. A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.
- B. The defect or variation in the bid or proposal is immaterial or inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.
- C. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

Under COMAR 21.06.02.04, a "minor irregularity" is a mistake that is "merely a matter of form and not of substance," or it is a mistake that "pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation." If the correction or waiver of such a mistake is prejudicial to other bidders or offerors, then it is not a "minor irregularity."

In this case, we must determine whether Appellant's mistake, that is, its failure to include a price of \$0.00 in the blank line of the Bid Form, constitutes a minor irregularity as defined in COMAR 21.06.02.04. Under COMAR 21.06.02.04A, we must first determine whether the mistake is a matter of form or substance, or whether it is an immaterial or inconsequential defect or variation from the solicitation for bids. COMAR 21.06.02.04B defines what is "immaterial" or "inconsequential": "when its significance as to price...is trivial or negligible when contrasted with the total cost or scope of the procurement."

Here, the failure to include a price of \$0.00 on a blank line cannot reasonably be construed as a matter of substance because the inclusion of \$0.00 as the price for the Cheltenham Youth Facility would have no effect on the Total Bid Price. We simply cannot agree with the PO that this mistake was a matter of substance merely because it relates to price. It must have some adverse effect on price, in this case, the Total Bid Price, which is the basis upon which this contract was to be awarded, in order to be a matter of substance. In this case, it does not. Therefore, it is a matter of form, not substance.

Likewise, inserting a price of \$0.00 in the blank line cannot reasonably be said to be a material or consequential defect, or a material or consequential variation from the solicitation. Although the blank line clearly did not comply with the Bid Instructions in the IFB, this deviation from the solicitation was a minor mistake and of no consequence insofar as Appellant assured Respondent that it was not seeking to change its Total Bid Price. Its effect on the total cost of the procurement is indeed trivial, and certainly negligible.

However, before we can conclude that the mistake is a minor irregularity as defined by COMAR 21.06.02.04, we must also consider whether the correction or waiver of the mistake

would result in prejudice to the other bidders. Although the PO concluded that it would be prejudicial to other bidders to waive the mistake or allow Appellant to correct its mistake, this conclusion is unsupported by the facts. Since the correction does not constitute a change in the Total Bid Price, the Board fails to see how the correction gives Appellant a competitive advantage over other bidders. We cannot identify any prejudice that other bidders would suffer by allowing Appellant to correct its mistake and perform the audit of one facility for free. Moreover, when pressed on this issue at the hearing, Respondent was unable to articulate any factual or reasonable basis to support this position. Even if Appellant had requested that it be allowed to correct its mistake by inserting its originally intended price of \$2,495.00 in the blank line (which it did not), Appellant would still have been the lowest bidder.²

Therefore, we conclude, based on COMAR 21.06.02.04, that Appellant's failure to include a price of \$0.00 in the blank line for the audit of one facility is a minor irregularity—it is a matter of form, not substance; the correction of this mistake would have absolutely no effect on the Total Bid Price and cost of the procurement; and the waiver or correction of the mistake would pose no harm or prejudice to other bidders.

Having determined that the mistake meets the definition of a minor irregularity, we return to COMAR 21.05.02.12A. Under this provision, the PO may either give a bidder an opportunity

² Apparently, the PO relied on Appellant's *intent* to include a price of \$2,495.00 to audit the Cheltenham Youth Facility as the basis for denying Appellant's request to fix its mistake. Appellant's intent is irrelevant. This Board held in *Orfanos Contractors, Inc.*, MSBCA No. 1391, 2 MSBCA ¶188 at 8 (1988), that "acceptability of a bid is determined from the face of the bid document and not from the subjective intent of the bidder." *Id.* (citing *Calvert General Contractors Corp.*, MSBCA 1214, 2 MSBCA ¶140 (1986); *The Driggs Corporation*, MSBCA 1243, 1 MSBCA ¶106 (1985)).

to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency “if it is to the State’s advantage to do so.” Similarly, under COMAR 21.06.02.04(C), the PO may waive the mistake, or the PO may give the bidder an opportunity to correct the mistake, “whichever is to the advantage of the State.” A PO has the discretion to choose between two options when dealing with a mistake that is a minor irregularity in a bid: the PO may allow the bidder to correct the mistake, or the PO may waive it—but only after determining (i) whether it is in the State’s best interest to either waive or correct the mistake, and (ii) which option is the most advantageous to the State.³

The threshold question and first step in this part of the analysis is to determine whether it is in the State’s best interest to allow Appellant to audit this facility for free. We believe the answer to this question is self-evident and does not warrant much discussion. Clearly, it would be in the State’s best interest to allow Appellant to audit this facility at a price of \$0.00, rather than reject Appellant’s bid and cause the State to incur an additional \$14,460.00 by selecting the next lowest bidder, whose Total Bid Price was nearly 48% higher than Appellant’s Total Bid Price. The PO failed to consider the State’s best interest in her analysis, which we believe was a fatal flaw.

Rather than consider the effect upon the State’s interest of either waiving the mistake or allowing Appellant to correct its mistake, the analysis of which is required by both of the applicable COMAR provisions discussed *infra*, the PO only considered its purported prejudicial effect upon other bidders. In this case, when balancing the purported harm to other bidders against the advantage to the State, the scales weigh heavily in favor of the State. The PO’s failure to consider

³ In this case, it makes no difference which option is selected. Waiving the defect or allowing Appellant to insert a price of \$0.00 in the blank line has the same effect. The facility would be audited at no charge, and the Total Bid Price (which is the basis for award per Section 1.15 of the ITB) would remain the same.

I Concur:

 /s/
Ann Marie Doory, Esq. *u*

 /s/
Michael J. Stewart, Esq. *U*

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. 3036 and 3040, Appeals of PREAAmerica, LLC, under Maryland Department of Juvenile Services Request for Proposals No. 17-AX-001-RFP.

Dated:

11/7/17

/s/

Ruth W. Foy
Deputy Clerk