

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF APS HEALTHCARE,
INC.)

Under DHMH RFP DHMH/DOC)
02-7059)

Docket No. MSBCA 2244

December 10, 2001

Negotiated Procurement - Evaluation - Not Reasonably Susceptible of Being Selected for Award
- Identification of those proposals that are acceptable, or capable of being made acceptable, is a matter within the sound discretion of the Procurement Officer.

APPEARANCE FOR APPELLANT:

Peter Driscoll, Esq.
Columbia, MD

APPEARANCE FOR RESPONDENT:

David E. Beller
Barbara Hull Francis
Assistant Attorneys General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY
(Maryland Health Partners, Inc.)

None

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its bid protest of the Respondent's determination that its offer was not reasonably susceptible of being selected for award.

Findings of Fact

1. The Maryland Department of Health and Mental Hygiene (DHMH) is responsible for administering the Medicaid Program (sometime herein Program) established at Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396s. Md. Code Ann., Health Gen'l (HG) Title 15. The Program provides health services to eligible individuals.
2. In 1995, DHMH applied for and was granted an 1115 Waiver by the Center for Medicare and Medicaid Services (CMS), formerly known as the Health Care Financing Administration. The waiver and enabling legislation provided that there would be a "Specialty" Mental Health System also known as a Public Mental Health System (PMHS). HG §15-103(21).
3. Specific responsibility within DHMH for the PMHS is assigned to the Mental Health Administration (MHA). MHA's responsibilities under the PMHS are to establish performance standards for providers in the system (credentialing and privileging) and medi-

- cal necessity criteria for services, to train providers in accessing the system, to preauthorize services, to link with other systems, to collect and compile data, to reimburse providers, and to submit claims to the Medicaid Program for submission for federal financial participation (FFP) to CMS.
4. Under the regulations governing the PMHS, MHA may contract with an administrative services organization (ASO) to provide administrative services. Code of Maryland Regulations (COMAR) 10.09.70.02A. In September 1996, MHA issued a Request for Proposal (RFP) for an ASO. Upon DHMH's recommendation, the Board of Public Works (BPW) approved award of a contract to Maryland Health Partners, Inc. (MHP), the Interested Party herein. This Contract commenced on January 2, 1997, terminating on June 30, 1998. MHA exercised its option to renew the Contract for three (3) additional years. BPW extended this Contract for three (3) months, until October 1, 2001 and again until January 1, 2002.
 5. On April 3, 2001, MHA issued a RFP for a new ASO predicated on a fee for service system. The RFP was divided into Sections related to Specific Requirements, Government's Responsibilities, Organization of Proposal, Evaluation and Selection Procedures, General Information and Instructions, Contract, Appendices and Attachments. Section I, Specific Requirements, contained an Introduction, Background, Purpose, and Services to be Performed subsections. Services to be Performed included an introduction, the offeror's agreements, scope of work, access services, utilization management services, management information services, claim services and evaluation services.
 6. During the implementation of the ASO Contract awarded to MHP, DHMH/MHA experienced problems drawing down FFP funds. This was a result of some initial difficulty between MHP and the Medicaid Program's ability to accept the claims for reimbursement, i.e. there were problems with the Program's edits, particular to Maryland. The inability to interface with the Program seamlessly could threaten MHA's collection of FFP, essential to its operation of the PMHS. At the time of issuance of the instant RFP in April 2001, however, the problems involving collection of FFP had been addressed and remedied.
 7. When MHA issued the RFP for a new ASO contract, for the most part, the required deliverables remained the same; however, MHA delineated, *inter alia*, that the contractor must be able to accept a minimum of 5 million claims annually,¹ have a claims processing system consistent with all requirements of a SAS 70 audit and make claims and payment systems consistent with requirements of CMS and the Medicaid Program. The ASO data was required to match the data in the Program's Management Information System (MMISII), and it had to ensure that appropriate eligibility spans are in place in order to process claims. Such requirements were discussed in the pre-bid conference held April 17, 2001.
 8. On May 7, 2001, MHA received three (3) proposals: Appellant,² MHP and Value-Options. Fiona Ewan of MHA's procurement staff forwarded the proposals to the

¹ The RFP as originally issued projected a minimum of 2.5 million claims annually. This was an error corrected by addendum issued April 25, 2001 prior to the May 7, 2001 date for receipt of proposals.

² All references to Appellant's proposal herein are to its technical proposal. Appellant's price proposal has never been opened.

Evaluation Committee (the Committee).³

9. The Committee consisted of MHA representatives, Oscar L. Morgan, Director; Brian M. Hepburn, M.D., Clinical Director; John T. Allen, Director, Consumer Affairs; Thomas Merrick, Chief, State and Federal Programs, Child and Adolescent Programs and Core Service Agency (CSA) Directors, Phillip Dukes, Ph.D., Washington County; Robert L. Pitcher, Frederick County; and Nancy Zinn, the Mid Shore Counties, consisting of Caroline, Dorchester, Kent, Queen Anne's and Talbot Counties. The CSAs are the local planners for service needs in the PMHS. They are established under HG §10-1201 et seq.
10. On May 16, 2001, the Committee members met to discuss the proposals.
11. DHMH's Procurement Officer, Russell L. Jenkins, and Ms. Ewan of MHA's procurement staff attended all meetings. Ms. Ewan kept summary chronological notes. The Committee had serious questions regarding Appellant's ability to perform, particularly in the areas of claims processing systems, experience with fee payment reimbursement systems, a system as large and complex as PMHS and authorizing services as varied as those in the PMHS.
12. On May 17, 2001, Mr. Allen, of the Committee, who had information management experience met with Timothy Santoni, MHA Deputy Director, Administration and Finance, to discuss the Committee's concerns about Appellant's experience as it related to claims payment and a management information system (MIS). Mr. Allen also forwarded the relevant portions of the RFP and Appellant's proposal to David Bickel, the then Branch Manager of DHMH's Information Resources Management Administration (IRMA) for review. Subsequently, Ms. Ewan and Mr. Allen met with Mr. Bickel. Mr. Bickel was of the opinion that the information management system set forth in Appellant's proposal could not handle the data processing volume as configured in Maryland's PMHS quickly enough to be efficient. Mr. Bickel testified at the hearing of the appeal, articulating his concern about Appellant's proposed information management system and the specific reasons therefor as previously conveyed to the Committee during the evaluation process at the agency level.
13. On May 18, 2001, the Committee met to discuss the proposals again. Because of the Committee's concerns with Appellant, it was decided to pose questions to all offerors rather than hear an oral presentation at the scheduled meetings on May 21st and May 22nd.
14. The Committee and advocate representatives⁴ met with the offerors, accepted their written presentations,⁵ explained why they were altering the format for all offerors and proceeded to ask their clarifying questions. The Committee's evaluation of MHP and Value Options was that their proposals were reasonably susceptible of being selected for award.
15. Appellant did not improve its position when it answered questions posed regarding its experience with performing the services required in the PMHS. The Committee's evalua-

³ COMAR 21.05.03.03A(6) provides that: "Initial evaluations may be conducted and recommendation for award made by an evaluation committee. Final evaluations, including evaluation of the recommendation of the evaluation committee, if any, shall be performed by the procurement officer and the agency head or designee."

⁴ Advocates (consumers and family members) are an integral part of the PMHS who have helped design the PMHS. MHA requested that advocate representatives participate by asking questions at the oral presentations. The offerors agreed. The advocate representatives then shared their view of how the offerors answered the questions. The advocates did not participate in the final evaluation or in opening of the proposals. Also present in addition to Mr. Jenkins and Ms. Ewan was MHA counsel.

⁵ These written presentations were not made part of the record.

tion of Appellant's proposal was that it was not reasonably susceptible of being selected for award based on lack of demonstrated experience in managing a system of the magnitude of the PMHS, its lack of demonstrated experience in interfacing with Medicaid programs, and its inadequate design for the State's MIS.

16. However, prior to making a final determination, the Committee requested Mr. Allen to contact the offerors' references and again review the system design Appellant proposed. On May 25, 2001, Mr. Allen checked some but not all references and re-searched the Internet as to the viability of Appellant's proposal.
17. On May 29, 2001, the Committee met and reviewed the information obtained by Mr. Allen regarding Appellant's references and the viability of its system design. Based on this latest information, Mr. Allen, who testified concerning his concerns at the hearing, still concluded that Appellant's proposal was technically deficient from a system design standpoint for the work to be performed under the PMHS and the State's MIS.
18. The Committee unanimously voted that Appellant's proposal was not reasonably susceptible of being selected for award and submitted this recommendation to the Procurement Officer.
19. The Committee then opened the financial proposals of MHP and Value Options and asked for a Best and Final Offer (BAFO). On June 12, 2001, the Committee met to discuss the BAFOs. The Committee voted to recommend that MHP be awarded the contract.
20. By letter dated June 15, 2001, the Procurement Officer notified Appellant that it was not reasonably susceptible of being selected for award pursuant to COMAR 21.05.03.03B and the reasons supporting this decision as follows:
Appellant's corporate experience is primarily with capitated payment (versus fee for service) and post payment review models;

Appellant's experience in Georgia, and the program model presented in the proposal and at the oral [written question] presentation, focused on a Medicaid clinic option rather than a prospective medical necessity review of a broader range of inpatient and outpatient mental health services;

Appellant had no experience adjudicating claims for the collection of Federal Funding Participation (FFP), an activity which is critical to the Maryland system; and

Appellant's claims processing system is inadequate for the needs required in the RFP.

21. On June 25, 2001, Appellant protested the Procurement Officer's decision. By letter dated July 18, 2001 and received by Appellant on July 24, 2001, DHMH notified Appellant that its final decision was that Appellant's offer was not reasonably susceptible of being selected for award.
22. The final decision expanded upon the four points set forth in the Procurement Officer's letter of June 15, 2001 which notified Appellant that its proposal was not reasonably susceptible of being selected for award. The final decision reflected, as did the letter of June 15, 2001, that Appellant had not demonstrated its ability to provide the services required by the RFP using a fee for service payment model. The record reflects that Appellant, in fact, has experience in providing services under fee for services programs. However, it

was unable to articulate the scope of this experience during the evaluation process at the agency level.⁶

23. On August 1, 2001, Appellant noted its appeal to this Board.

Decision

Appellant bears the burden to demonstrate why final agency action was unreasonable, an arbitrary abuse of discretion or a violation of law or regulations. Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA ¶94 (1985) at page 10; B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58 (1983), at page 11; Beilers Crop Service, MSBCA 1066, 1 MSBCA ¶25 (1982) at page 5; Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10 (1982) at page 14. The Respondent correctly observes that these would be the only reasons for disturbing the decision of the Procurement Officer.⁷ To determine whether the decision is arbitrary, capricious, unreasonable, an abuse of discretion or violative of law or regulation, the Board may only look at what was available for the Procurement Officer to review at the time of the decision, not what might be presented later on appeal.

Appellant maintains that DHMH's decision was unreasonable or arbitrary or an abuse of discretion, in so far as:

there was no requirement in the RFP that the offeror demonstrate experience with a fee for service model and that if there was, Appellant met this requirement;

Appellant had experience in prospective medical necessity review of a broader range of inpatient and outpatient mental health services than just outpatient clinic services;

there was no requirement in the RFP that the offeror demonstrate experience with adjudication of claims for FFP and if there was Appellant met this requirement; and

Appellant's claims system and MIS was adequate.

The Respondent's position is that the Procurement Officer properly exercised his business and technical judgment in adopting the recommendation of the Committee and that his decision was reasonable in light of the requirements set forth in the RFP.

With respect to the respective positions of the parties we find that Appellant has not met its burden of proof. Indeed, there is ample evidence in the record that DHMH's final agency de-

⁶ At the commencement of the hearing of the appeal counsel for the State made it clear that Appellant is a responsible provider of services and that the issues in the appeal relate only to the instant RFP and the Appellant's response thereto.

⁷ As used herein the references to the Procurement Officer's decision are references to the final agency decision or action of DHMH as endorsed by the Deputy Secretary for Operations, the designee of the Agency Head.

cision is reasonable.

First we observe that there was a requirement that the offeror demonstrate experience. Part I of the RFP contained "Specific Requirements of Proposed Contract." The very first requirement set forth in Part I of the RFP, Specific Requirements of Proposed Contract, is that:

Offerors must have experience in providing administrative services for the delivery of mental health services, as describe (sic) here in, for at least 400,000 covered lives with a minimum of 70,000 active cases, since June 30, 1997.

The offerors must understand the design of MHA's system, MA requirements generally and the requirements of the 1115 Waiver in particular.

In describing how the offerors shall present their technical proposals, the RFP stated that:

The offeror is to convey its understanding of the objectives of the RFP and difficulties that might be encountered in achieving these objectives.

The offeror shall describe its organization structure and its experience in providing administrative services for the delivery of mental health services, as described in the RFP, for at least 400,000 covered lives with a minimum of 70,000 active cases, since June 30, 1997.

In setting forth the evaluation criteria, the RFP ranked:

Extent to which the offeror's description of its experience and organizational structure clearly describes and indicates its ability to provide the services required by this RFP.

as one of two criteria of top equal importance. Appellant's assertion that experience in delivering the services described in the RFP is not required, is simply not supportable.

The Procurement Officer's determination that Appellant's proposal did not demonstrate that it had the experience needed to be the ASO for the anticipated requirements of Maryland's fee for service reimbursement system was reasonable and supported by the record.

Referencing Appellant's proposal, the Procurement Officer found that only one program listed by Appellant required Appellant to operate a fee for service system and that Appellant was not processing claims in this program. This finding was in error. Appellant demonstrated at the hearing that programs it listed in its proposal were fee for service systems and the record reflects this to be the case. Appellant also presented evidence at the hearing concerning its experience with fee for service systems. However, as this Board stated in Bruce D. Royster, MSBCA 1968 and 1969, 5 MSBCA ¶406 (1996), a proposal may only be evaluated on the basis of the information that is provided by the offeror in its proposal. The quality of the information provided may lead to rejection. The Procurement Officer found that the Appellant failed during the agency evaluation process to demonstrate that its experience was sufficient. We shall not disturb such

finding notwithstanding error in the assumption that the programs listed by Appellant were not fee for service systems.

We also find that The Procurement Officer's determination that Appellant lacked the experience in authorizing a broad range of services was reasonable and supported by the record.

MHA's PMHS is unique. It represents a blending of all populations for whom state subsidization is needed to pay for mental health services. The PMHS not only provides services to Program recipients but also to "grey zone" individuals, those individuals who because of the severity of their illness and their lack of financial resources need state subsidization for the services and the service array in the PMHS. Services available under PMHS for both these populations as set forth in COMAR 10.09.07 exceed those required either by CMS or Maryland law and is more varied than a commercial package and offers more than is required by the Program. COMAR 10.09.70.10.C sets forth the service array for mental health services to include hospital services, including State hospitalization, physician services, individual mental health professional services, pharmacy services, psychiatric home health services, freestanding clinic services, medical laboratories services, early and periodic screening, diagnosis and treatment services, including therapeutic nursery services, mental health case management, psychiatric day treatment services, mobile treatment, psychiatric rehabilitation services, residential treatment centers, group homes, therapeutic group homes, psychiatric halfway house services, residential rehabilitation services, case management supported employment services, respite care, mobile crisis services, residential crisis services, and peer support and family to family education.

The purpose of such a continuum of services is to offer the consumer the service that is most appropriate to his/her need, preventing any deterioration of the mental illness which could result in long term hospitalization. A lack of experience in authorizing this varied array of services could result in adverse consequences for the consumer and MHA's budget. Also important to the functioning of the PMHS is experience in managing the care of individuals who are hospitalized in an acute care psychiatric hospital, a state hospital or a residential treatment center. As stated in the RFP.

The ASO assists MHA and the Core Service Agencies (CSA's-agents of local governing) in maximizing eligible consumers' access to appropriate, medically necessary publicly-funded mental health services and in ensuring that these services assist individuals in achieving cost-effective treatment goals.

In asserting that it had a wide range of experience, Appellant first cited as experience services that involved treatment for substance abuse, which is not covered by the PMHS. It did not give any experience in authorizing inpatient stay. The PMHS' budget is dependent on careful management of the level of care a consumer receives. As noted in DHMH's final decision Appellant only identifies one program to demonstrate experience with inpatient services, and also does not give examples of implementation of a comprehensive 1115 Waiver. In its appeal to MSBCA Appellant does not contradict the State and indicate where in its proposal it demonstrated that it had the experience implementing a utilization management program for the array of services set forth in COMAR 10.09.70. The Procurement Officer's decision was supported by substantial evidence that Appellant's presentations did not set forth experience in managing

services such as are delivered in the PMHS to the varied populations.

The Procurement Officers's determination that Appellant had inadequate experience adjudicating claims for the collection of FFP with the program was reasonable.

DHMH sets forth sufficient explanation in its final decision to support its conclusion that Appellant's proposed claims system was inadequate to meet the requirements in the RFP. The ASO's responsibility is to be, in effect, a mini-medicaid reimbursement agent, and then to interface seamlessly with the Program. Nowhere in its proposal did Appellant specifically indicate how it plans to file paid claims with the Program. It listed programs, it gave the name of the system it plans to use and advised that "The system is fully configured to adjudicate claims for the collection of Federal Funding Participation." Such advice was to be accepted on its face. The lack of detail, however, left MHA to research the pro-posed system. MHA sought guidance from an internal management information systems source, Mr. Bickel, who with credibility provided information conveyed to the Committee and Procurement Officer that the Appellant's proposed system lacked capacity. MHA also re-searched the system's web site. The information obtained indicated that this system had not been fully implemented and operational in any state. The Procurement Officer was faced with a proposed system that he believed was too slow to handle the anticipated workload efficiently, thus jeopardizing collection of FFP and compromising the effectiveness of the PMHS.

Appellant asserts that because it is the present managed care contractor for Maryland State employees it, *de facto*, has the experience to operate the PMHS claims system. However, the record reflects that the Maryland State employee behavioral health benefit is a capitated system, in which benefits and providers are limited. PMHS system is a fee for service, where membership is fluid and any qualified provider can participate and the range of services exceeds that offered in the employees' benefit package. Unlike managed care for State Employees, the PMHS is a predominantly a medicaid reimbursable system. The PMHS is dependent on its ability to draw down FFP in order to continue to serve gray individuals during the year without deficit funding. The loss of federal dollars would reduce the number of services the PMHS can provide to gray area individuals and could jeopardize MHA's budget. Having an ASO with significant experience in interfacing with a medicaid agency is crucial to the continued viability of the PMHS. A comparison with the managed care contract for Maryland State employees (which Appellant currently holds) does not demonstrate such experience. The Procurement Officer's findings as set forth in the final decision and as discussed above with respect to collection of FFP are supported by the record.

The Procurement Officer's determination that Appellant lacked adequate claims and MIS systems to perform under the contract was reasonable and supported by the record.

Appellant did not submit a guarantee from the company from which it was purchasing this system and did not bring a company representative with them to explain this proposed new claims and MIS system to the State. It did not give an example of where the proposed software is operating on a similar hardware platform, processing the number of FFP adjudicated claims. Appellant's proposal merely asserts that it meets the requirements of the RFP without explaining how or why. DHMH's final decision notes on page 12 that:

the response [to the finding that Appellant's proposal was not reasonably susceptible of award] also suggests that you are either unclear or unaware of the additional requirements in processing claims for adjudication for collection of federal funds participation. In addition to all of the functions that you described in your proposal for processing a claim for payment, the additional requirements of FFP adjudication require each claim to undergo in excess of one hundred edits to evaluate FFP eligibility.

The need to have a claims system and MIS system that can handle the PMHS is essential. The record reflects that Appellant failed to adequately address this requirement in its proposal.

Appellant has failed to meet its burden. The Board has repeatedly held that it would not overturn a Procurement Officer's decision unless it is shown to be unreasonable, arbitrary or in violation of the procurement statute or regulations. Appellant has not proven any violation of the procurement statute or regulations. It has simply alleged that the Procurement Officer was wrong in light of Appellant's qualifications. However, the qualifications must be judged on the basis of what was presented in Appellant's written proposal and subsequent written presentation and response to questions from the Committee.

We have often observed that the Board does not second guess an evaluation of a proposal, but merely concerns itself with whether a reasonable basis exists for the conclusions and results reached or determined. Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994) at p. 5, citing Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA ¶94 (1985); Transit Casualty Co., MSBCA 1260, 2 MSBCA ¶119 (1985). See also, Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116 (1985), at p. 12 "Identification of those proposals that are acceptable, or capable of being made acceptable, is a matter within the reasonable discretion of the procurement officer"; and Baltimore Motor Coach Co., *supra*, at p. 10 "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 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."

The testimony reflects that it was the consensus of the Evaluation Committee and opinion of the Procurement Officer that any one of the four concerns discussed above would have resulted in a determination that Appellant's proposal was not reasonably susceptible of being selected for award under COMAR 21.05.03.03B (1)(b). Accordingly the appeal is denied.

Wherefore, it is Ordered this 10th day of December, 2001 that the appeal is denied.

Dated: December 10, 2001

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
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 2244, appeal of APS Healthcare, Inc. under DHMH RFP DHMH/DOC 02-7059.

Dated: December 10, 2001

Mary F. Priscilla
Recorder