

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ARAMARK CORPORATION	)	
d/b/a ARAMARK HEALTHCARE	)	
SUPPORT SERVICES	)	
Under DHMH RFP for Housekeeping	)	Docket No. MSBCA 1893
Services at Rosewood Center	)	
DHMH-DCT-95-1718	)	

September 25, 1995

Negotiated Contracts - Evaluation Panel

The procurement officer and agency head are required by COMAR 21.05.03.03A to make the final evaluation of proposals. Accordingly, they have the discretion to either accept the recommendation of the evaluation committee, or to substitute their judgement for that of the committee's. Thus the procurement officer and agency head may reject the recommendation of the evaluation committee for award of the contract and award the contract to another offeror provided their judgement to do so is not shown to be arbitrary or constitute an abuse of discretion.

APPEARANCE FOR APPELLANT: Philip M. Andrews, Esq.  
Kramon & Graham, P.A.  
Baltimore, MD

APPEARANCE FOR RESPONDENT: Sharon Krevor-Weisbaum  
Assistant Attorney General  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that its alternate proposal was not considered, and that the agency was arbitrary in its rejection of the recommendation of the evaluation committee that it be awarded the contract and that award was based solely on low price.

Findings of Fact

1. On December 27, 1994 Department of Health & Mental Hygiene (Department) services solicitation number DHMH-DCT-95-1718 appeared in the Maryland Register Contract Weekly announcing the procurement of housekeeping services to specific buildings on the campus of Rosewood Center, a State residential facility for individuals with special needs. The announcement

stated that the procurement would follow COMAR 21.05.03, procurement by competitive sealed proposals. Appellant was the incumbent vendor at this time.

2. On January 10, 1995 a pre-proposal conference was held. No questions were raised at the pre-proposal conference relative to: 1) the permissible content of an alternate proposal that the RFP provided could be submitted; or 2) the basis for the award of the contract (relative weight of technical and financial proposals).

3. After the February 14, 1995 deadline for submission, an evaluation committee comprised of seven senior Rosewood staff reviewed all five technical proposals submitted in response to the RFP. In addition, the Department's procurement officer and alternate procurement officer, while not members of the evaluation committee, attended all meetings of the evaluation committee and all discussion sessions with offerors.

4. As a result of discussions each offeror was invited to submit revisions to their technical proposals.

5. Four of the five offerors submitted timely revisions as requested by the evaluation committee. After consideration of the revised proposals from these four offerors, each was determined to be reasonably susceptible of being selected for award. The fifth offeror failed to submit a revised technical proposal, and thus was deemed by the committee not "reasonably susceptible" of being selected for award.

6. In addition to its primary technical proposal, Appellant submitted an alternate proposal. Although an alternate proposal was permitted by the RFP, Appellant was the only offeror to include one. This alternate proposal was reviewed by the evaluation committee but never formally considered. The Appellant's primary proposal offered 520 hours of weekly non-direct working supervisory labor as required by the RFP while the alternate offered 200 hours less. Because the procurement officer was orally advised that the alternate proposal offered fewer hours of weekly non-direct working supervisory labor, rather than the 520 hours required by the RFP, the procurement officer determined that the alternate proposal did not meet the requirements of the RFP and, therefore, should not be considered. At the direction of the procurement officer, no further discussion took place regarding the alternate proposal.

7. Unbeknownst to the procurement officer, Appellant's alternate proposal also reduced the number of weekly direct labor hours by 53 hours (1824 to 1771). This reduction was also not considered by the evaluation committee.

8. The committee ranked the remaining four proposals on the basis of highest to lowest in technical quality. Thereafter, the financial proposals for these four offerors were opened. All four offerors were then invited to submit a Best and Final Offer on their financial offer. After considering the technical and price proposals of the four offerors the evaluation committee recommended that Appellant be awarded the contract. Appellant had the highest ranking on its technical proposal and offered the second lowest price. The committee's determination was taken under advisement but rejected by the procurement officer and agency head who recommended award to Associated Building Maintenance which had the second highest technical ranking and the lowest price.<sup>1</sup>

9. Upon learning of its non-selection, Appellant filed a protest on April 25, 1995. The protest alleges in part material to this appeal that:

1. The RFP made no reference to a "low bid requirement" for award.
2. The recommendation of the evaluation committee to award to Appellant was inappropriately overruled.
3. The alternate proposal submitted received no consideration from the evaluation committee.

10. By letter dated May 22, 1995 the procurement officer denied Appellant's protest and by letter dated May 27, 1995, Appellant filed an appeal with this Board.

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<sup>1</sup> The price and technical ranking of the offers as actually considered by the evaluation committee was as follows:

Vendor Proposal Summary			
Vendor	Price Rank	Final Bid Price	Technical Rank
Associated	1	\$3,662,949.16	2
Appellant	2	\$3,842,851.60	1
EMS	3	\$3,911,961.04	3
Patriarch	4	\$4,351,252.00	4

11. On June 1, 1995, the Board of Public Works awarded the contract to Associated Building Maintenance (Associated).

### Decision

The Appellant alleges that the RFP made no reference to a “low bid requirement” as the basis for award and argues that the award determination was improperly based solely on the lowest price offer submitted. However, the record reflects and as specifically set forth in the RFP at p. 42, award was to be based on both an offeror’s technical and financial proposal with the financial proposal having a “much greater weight in the overall award determination than the technical proposal.”

After discussions were completed, the technical ranking placed Appellant first and Associated second. After reviewing the Best and Final Offers, Appellant’s financial offer was ranked second and Associated’s first with a dollar value of \$179,902 separating the two offers. If the technical and financial proposals were to be given equal weight, Appellant and Associated would, in effect, be equally ranked for the most favorable offer. However, as stated in Section IV, paragraph 0 of the RFP, the financial proposal “shall have a much greater weight in the overall award determination than the technical proposal.”

The procurement officer and agency head made the award based upon consideration of each offeror’s technical and financial proposal, with much more weight being given to the financial offer as required by the evaluation criteria. The record does not support Appellant’s appeal on grounds that award was made solely on the basis of low bid or price offer.

The Appellant next alleges that the procurement officer inappropriately overruled the recommendation of the evaluation committee. The evaluation committee recommended that Appellant be awarded the contract. However, as set forth in COMAR 21.05.03.03,<sup>2</sup> the

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COMAR 21.05.03.03A provides:

**.03 Evaluation of Proposals, Negotiations and Award.**

A. Evaluation. The evaluation shall be based on the evaluation factors set forth in the request for proposals and developed from both the work statement and price. Technical proposals and price proposals shall be evaluated independently of each other. Numerical rating systems may be used but are not required. Factors not specified in the request for proposals may not be considered. 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.

procurement officer and agency head are required to make the final evaluation. Accordingly, they have the discretion to either accept the recommendation of the evaluation committee, or to substitute their judgement for that of the committee. COMAR 21.05.03.03A; See generally the concurring opinion in United Technologies Corp. and Bell Helicopter Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989). Even though the committee recommended that Appellant be awarded the contract, it is the determination of the procurement officer and agency head which constitutes the final decision. The Appellant has not established on the record herein that the procurement officer and agency head abused their discretion or were arbitrary in recommending award to Associated based on Associated having an acceptable technical proposal and a price that was almost \$180,000 less than Appellant's price.

Appellant finally argues that the alternate proposal submitted should have been considered by the evaluation committee. The Board finds that provision of the 520 hours of non-direct working supervisory labor was a material requirement of the RFP. Thus the RFP would have had to be amended with the amendment sent to all four offerors then in competition in order for an alternate proposal reducing the required 520 hours of non-direct working supervisory labor to be considered.<sup>3</sup> See COMAR 21.05.03.02E, COMAR 21.05.02.08, and COMAR 21.05.03.03C(3)(a).

In making this determination the Board acknowledges that it is a matter not entirely free from doubt. The RFP provides in relevant part as follows regarding submission of an alternate proposal:

Each offeror may submit a maximum of two (2) proposals. The second proposal should follow the same format as the first and should only contain that information which differs from the primary (first) proposal. Each proposal should be separately bound and identified as described in Section IV, L.

Appellant argues focusing on the dictionary meaning of the word "format" that this language does not preclude consideration of an alternate proposal that includes fewer than 520 hours of non-direct working supervisory labor. We disagree, but acknowledge the Appellant's concern. The language

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<sup>3</sup> The 520 hour requirement is referenced several times in the RFP. See p.40 "(the 520 hours specified on page 30)" and the financial proposal form at pp. 51, 53, 55 and 57 where the 520 hours are specified. The evaluation committee considered whether to amend the RFP to allow for less than 520 hours of supervisory labor. The committee did not believe such a modification was appropriate.

is not a model of clarity. However, there was no pre-proposal opening inquiry concerning its meaning and complaint about use of such language may not now be considered. See COMAR 21.10.02.03. We have found from a reading of the entire RFP that offerors should have interpreted the 520 hour requirement as mandatory. Thus an alternate proposal would have to make any proposed adjustments in areas other than the number of hours of non-direct working supervisory labor.<sup>4</sup> However, Appellant also proposed in its alternate proposal a reduction of 53 hours in direct labor hours from the 1824 hours set forth in its original (“primary” or “first”) proposal down to 1771 hours. Both the procurement officer and Respondent attorney expressed the opinion, at the hearing, that had they known of the 53 hour direct labor reduction in the alternate proposal that they would have recommended that this portion of the alternate proposal should have been considered by the evaluation committee.<sup>5</sup> The Board finds, however, that the Appellant’s alternate proposal was intended to be a unified package and that the proposed reduction in supervisory hours represents a material deviation from what was required and thus taints the entire alternate proposal and would make it improper for the State to consider the 53 hour reduction in direct labor hours also contained in the alternate proposal. Therefore, the Board finds no error in the determination not to consider (discuss) Appellant’s alternate proposal.

Accordingly, the appeal is denied.

Wherefore, it is Ordered this 25th Day of September, 1995 that the appeal is denied.

Dated: September 25, 1995

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Robert B. Harrison III  
Chairman

I concur:

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Candida S. Steel  
Board Member

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<sup>4</sup> The RFP at p. 30 mandates only the total number of supervisory hours, not the number of supervisory positions. It states that “...the vendor may alter the number of supervisors provided due to the use of part-time supervisors or by working other than a 40 hour week; however, the total number of hours specified must still be provided.”

<sup>5</sup> The record reflects that this 53 hour reduction in direct labor hours would have reduced the cost differential between Appellant and Associated to approximately \$100,000 over the three year contract period.

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Randolph B. Rosencrantz  
Board 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1893, appeal of Aramark Corporation under DHMH RFP for Housekeeping Services at Rosewood Center DHMH-DCT-95-1718.

Dated: September 25, 1995

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Mary F. Priscilla  
Recorder