

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of BALTIMORE INDUSTRIAL)
MEDICAL CENTER, INC.)
) Docket No. MSBCA 1815
Under Department of)
Transportation Contract No.)
MDOT-93-MA-001)

September 21, 1994

Board review of proposal evaluation: The Board does not substitute its judgment for that of the agency evaluators in reviewing a proposal, but merely concerns itself with whether a reasonable basis exists for the conclusions and results reached or determined in that evaluation.

Procurement official discretion in proposal evaluation: Procuring officials enjoy a reasonable degree of discretion in evaluating proposals. Such discretion may not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations.

Proposal evaluation includes subjective impression: An evaluator's analysis of the quality of a product or service through review of the offeror's written proposal or as measured by actual observation during a site visit or oral interview may be expected to reflect or involve a degree of subjective impression, as well as comparison of that offeror's proposal with that of other offerors.

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OPINION BY BOARD MEMBER STEEL

This is an appeal from a Department of Transportation (MDOT) procurement officer's denial of Appellant Baltimore Industrial Medical Center's ("BIMC") protest of a proposed award to Mercy

Medical Center ("Mercy") of a contract to provide medical advisor services procured by competitive sealed proposals.

Findings of Fact

1. As a result of the development of an independent personnel system for the Department of Transportation (Transportation Service Human Resources System, TSHRS), the Department (MDOT) determined that an independent medical advisor system should be established to provide worker's compensation treatment, substance abuse testing, medical surveillance, return-to-work physical examinations, specialist services, as well as the development of medical standards for all MDOT work classifications.

2. In the fall of 1992, through a seven member panel, MDOT prepared a request for proposal (RFP) for a medical advisory contract to serve the approximately 10,000 employees of headquarters and all six transportation modal administrations (Maryland Department of Transportation, MDOT; Maryland Port Administration, MPA; Maryland Transportation Authority, MdTA; Mass Transit Administration, MTA; Motor Vehicle Administration, MVA; State Highway Administration, SHA; and Maryland Aviation Administration, MAA).

3. As described in the RFP, the contractor would be required to provide evaluation and monitoring of Worker's Compensation cases, pre-employment and job-related physical examinations, testing of current and prospective employees for substance abuse, and service as medical officer and medical advisor to the Department.

4. The Department used the competitive sealed proposal method authorized by State Fin. & Proc. Code An. Sec. 13-104, and COMAR 21.05.03, and planned to conduct site visits to offeror facilities and entertain oral presentations from offerors.

5. At page 60 of the RFP, the evaluation criteria were described:

Technical Proposals, Cost Proposals, and the oral presentation will be carefully evaluated for conformance with the requirements of this RFP. Selection of a Medical Advisor will be based upon both Technical and Cost Proposals, with the Technical Proposal weighed greater than the Cost Proposal.

The following factors will be considered in decreasing order of importance:

A. Technical Proposal Factors

1. Response to Scope of Services: Evaluation will include quality and soundness of technical methodology, completeness and depth of proposal information, teaming relationships, facility locations, and general comprehension of project requirements. Ability to provide services 7 days

per week, 24 hours per day applies to locations throughout the State.

2. Project Organization: Evaluation will include qualifications and relevant experience of key personnel, role of local offices, and project organization.
3. Experience on Similar Projects: Evaluation will include the offeror's similar experience and references, improving the services requested, and development of treatment plans, preparation of worksite assessments, and medical standard specifications for providing drug testing services, fitness for duty evaluations and return to work evaluations.
4. Oral Presentation: Evaluation will include ability to explain or clarify the proposal, answer questions and demonstrate understanding of the project's requirements.

B. Cost Proposal Factors

4. Total cost
5. Average hourly billing rate

6. Prior to the issuance of the RFP, it was determined that the technical proposals would be weighted 60% and the cost proposals 40%. A point system was also devised for comparison purposes, and each of the seven evaluators was asked to rate the technical proposals on a scale of 600, such that the maximum number of points which could be received by an offeror on the technical merits of its proposal was 4200. Whichever offeror received the highest number of points on its technical proposal was credited with 60 points, and the offeror with the lowest bid price received 40 points. These details were not conveyed to the offerors in the RFP.¹

7. In April 1993, with completion of the RFP, a technical evaluation committee was formed, comprised mainly of the modal representatives who had participated in the preparation of the RFP.

8. On July 20, 1993, four cost and technical proposals were received from BIMC, Mercy Medical Center ("Mercy"), CMC Occupational Health (CMC) and Jessup Columbia Laurel, Inc. (JCL).

9. Cost proposals remained sealed, offerors were notified of scheduled oral presentations, and were told that unannounced site visits would occur before the oral presentations.

10. The Department prepared several questions which were asked of every offeror at the oral presentations, as well as a

¹MDOT was not required to provide this information in the RFP; the requirements of COMAR 21.05.03.02A(2) and 21.05.03.03A were satisfied by the evaluation factors set out in the RFP at page 60.

number of questions specifically addressed to the proposals of individual offerors. The evaluators' questions focused on accessibility of the sites, cleanliness, security and chain of custody for drug testing procedures, and development of medical standards for MDOT.

11. Following the Oral Presentations, MDOT rejected the JCL proposal as nonresponsive, and requested two cost and technical best and final offers from the remaining offerors.

12. The evaluators scored the final technical offers, and the price proposals were scored. As BIMC had the best cost proposal (\$2,176,533), it received the maximum score of 40 points. Mercy ranked second on cost (\$2,613,000) with a score of 33.3; CMC was third (\$2,883,330) with a score of 30.2. The highest ranked technical score went to Mercy Medical Center (3938 out of a possible 4200) so Mercy was given a final score of 60 points; CMC was second with 49.1 (3219 of 4200) and BIMC was third with 40.4 (2648 of 4200). Thus, combining the cost and technical scores, the final ranking of the three offerors was Mercy with 93.3, BIMC with 80.4, and CMC with 79.3.

13. By letter of March 1, 1994 BIMC was notified that it had not been selected for award. BIMC requested a debriefing. At the debriefing on March 16, 1994, MDOT discussed with BIMC the strengths and weaknesses of its proposal, but constrained by COMAR 21.05.03.06B², the procurement officer did not discuss the reasons

²COMAR 21.05.03.06B states:

B. Debriefing.

(1) Debriefing shall:

(a) Be limited to discussion of the unsuccessful offeror's proposal and may not include specific discussion of a competing offeror's proposal;

(b) Be factual and consistent with the evaluation of the unsuccessful offeror's proposal; and

(c) Provide information on areas in which the unsuccessful offeror's technical proposal was deemed weak or deficient.

(2) Debriefing may not include discussion or dissemination of the thoughts, notes, or rankings of individual members of an evaluation committee, but may include a summary of the procurement

why Mercy's proposal was superior. A written summary of some of the "talking points" from the debriefing was provided to BIMC.

14. BIMC timely protested the award to Mercy on March 21, 1994. The Procurement Officer denied the protest by letter dated April 20, 1994, and BIMC timely appealed the denial to this Board on April 29, 1994.

Decision

As observed by the Board in Mid-Atlantic Vision Service, Inc., MSBCA 1368, 2 MSBCA ¶173 (1988) at p. 24, citing Health Management Systems, Comp. Gen. Dec. B-200775, 81-1 CPD ¶255 (1981):

The determination of the needs of the . . . [State] and the method of accommodating such needs is primarily the responsibility of the procuring agency which therefore is responsible for the overall determination of the relative desirability of proposals.

Accordingly, this 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 Motor Coach Co., MSBCA 1216, 1 MSBCA ¶94 (1985), Transit Casualty Company, MSBCA 1260, 2 MSBCA ¶119 (1985).

As further elaborated in the MSBCA's decision in AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 12:

The determination of the relative merits of proposals thus is the responsibility of the procuring agency and it must bear the burden of any difficulties incurred by reason of a defective evaluation. Since procuring officials enjoy a reasonable range of discretion in evaluating proposals and in determining which offeror or proposal is to be accepted for award, their determinations are entitled to great weight. In this regard, our function is not to evaluate proposals in order to determine which should have been selected for award as the most advantageous proposal, but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of Maryland procurement law. Accordingly, we will not disturb an agency's determinations regarding

officer's rationale for the selection decision and recommended contract award.

an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations.

See also Beilers Crop Services, MSBCA 1066, 1 MSBCA ¶25 (1982); Macke Building Services, MSBCA 1283, 2 MSBCA ¶132 (1986), and Calso Communications, Inc., MSBCA 1377, 2 MSBCA ¶185 (1988).

Counsel for Appellant conceded that, "procuring officials enjoy a reasonable degree of discretion in evaluating proposals. And such discretion may not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations." and therefore argued that Appellant was not the successful bidder because the evaluation committee's decisions were arbitrary and capricious.

Appellant specifically listed as grounds for its appeal arbitrary and capricious decisions concerning those eight items listed as "disadvantages" on the "talking points" paper provided by the procurement officer at the debriefing. The issues concerned site locations, cleanliness, treatment time, utilization of physician's assistants, drug testing procedures, specialization of individual sites, location of drug testing sites, and Medical Review Officer/Medical Advisor. These issues were briefed, and fully addressed at the hearing.

1. Site locations. According to the State, the locations of facilities BIMC proposed to utilize in performing the contract were not optimal. Unlike those of Mercy, Appellant's sites in Baltimore, where the majority of MDOT employees are located, are not accessible 24 hours a day by public transportation, and are not served by ambulance. Appellant argued that bus service to the Baltimore locations is adequate, and in any event, it would provide free transportation back to the worksite. MDOT was not unreasonable or arbitrary in determining that Mercy's sites were more advantageous to the State.

2. Cleanliness. On two visits to BIMC sites, evaluators were troubled by a lack of cleanliness. At one site, a towel was used to deflect cold air from a vent located over an examining table.

The vent side of the towel had collected soot. At another Baltimore BIMC site, the floor was noted to be sticky and slippery, causing an evaluator to slip. The evaluators found no such circumstances at Mercy sites. They were thus not arbitrary or capricious in rating BIMC lower than Mercy in cleanliness of facilities.

3. Treatment Responsiveness. Evaluators observing the waiting rooms at Appellant's sites on one or two occasions noted that persons seated in the waiting room were still there when the evaluators had completed their tour, an extended period of time. This was somewhat remarkable to them since they had not observed the phenomena at other offerors' sites. The procurement officer and the evaluators who testified stated that this factor was not given much weight, since the evaluators had not asked whether they were patients, were awaiting rides, or companions to others being treated.

The committee's consideration of this information somewhat lacking in probative value does not rise to the level of acting arbitrarily or capriciously. An evaluator's analysis of the quality of a product or service through review of the offeror's written proposal or as measured by actual observation during a site visit or oral interview may be expected to reflect or involve a degree of subjective impression. See Transit Casualty Company, supra at p. 55. In any event, even if arbitrary, this information was not given sufficient weight to have altered the outcome of this procurement.

4. Physician Assistants. Unlike the other offerors, Appellant's proposal listed more physician assistants than physicians on its staff. The RFP required that comprehensive physical examinations, assessments, medical examinations and reporting on qualification for employment be performed by physicians. Appellant acknowledged this difference, but indicated that only personnel treated after normal working hours might not be able to see a doctor. If an employee was injured after hours and treated by a physician assistant, he would be instructed to return

the next day to see a physician. Appellant maintains that this is an effective solution since the return visit to see the physician provides the opportunity for the physician to perform "case management", i.e., direct supervision and control of the case to ensure the prompt return of the employee to his employment.

The evaluation team, however, felt that the emphasis on physician assistants was a serious disadvantage of Appellant's proposal, in comparison with the proposals of Mercy and CMC. One evaluator testified that the employees at her modal would prefer to be treated by a physician. All evaluators were unwilling to send employees back to see a physician after an initial visit with a physician assistant not only because of the inconvenience experienced by the employee, but because of the necessity of arranging for substitute personnel to cover bus/subway routes, and other ongoing activity.

It is not unreasonable for an evaluator to rate examination or treatment by a physician rather than a physician assistant more highly, notwithstanding that the provider has been servicing clients by physician assistants without complaint, and that physicians assistants are licensed and qualified to perform the functions assigned them by physicians. These concerns are reasonable and legitimate, and will not be second guessed by this Board.

5. Drug Testing Procedures. Of major importance to MDOT is the provision of substance abuse testing, both for applicants for employment and safety-sensitive employees on an on-going basis. The RFP was detailed as to its requirements, both as to availability (24-hour, seven day per week coverage) and testing procedure (pursuant to federal, NIDA standards) with results to be provided within 72 hours. The chain of custody must be protected so as to withstand court challenges to the results.

The evaluation committee was disappointed in and confused about Appellant's proposal for drug testing. It appeared to the Committee that specimens would be collected at a BIMC location or a NIDA laboratory, analyzed by a NIDA lab, and referred to a

Pennsylvania subcontractor, Concorde, Inc. for interpretation and preparation of all necessary reports "under the direction of BIMC staff members." Evaluator confusion as to who would serve as the "Medical Review Officer"³ for purposes of the drug testing continued through review of the proposal, through the oral presentation, and into the hearing before this Board.

In addition, observations of deviations from security measures during mock walk-throughs of drug test procedures at two of the BIMC site visits caused concern as to Appellant's ability to follow the strict requirements for substance abuse testing under the RFP.

By contrast, each of the other offerors were succinct in describing their approach to substance abuse testing, and Mercy was particularly clear and straightforward as to training, collection techniques and reporting, and its plan to utilize a centralized system. Further, no evaluators observed deviations from security measures at Mercy sites.

Under these circumstances the evaluation committee did not act unreasonably in determining that Mercy's proposal would best serve the drug testing needs of MDOT and ranking Mercy's and BIMC's proposals accordingly.

6. Specialization of Sites. Evaluators visited every treatment site identified by all vendors. They determined that each of the sites identified by Mercy were occupational medicine facilities, while more than one third of the sites identified by Appellant were family or internal medicine oriented. The technical evaluation committee members reasonably concluded that Mercy's proposal to deliver industrial medical services from industrial medical sites was more advantageous to the State, and ranked the proposals accordingly.

7. Medical Standards. Of major concern to MDOT is the state of its medical standards, i.e., requirements employees must meet to

³It was unclear whether the Medical Advisor, Dr. Mamaril, would also be serving as Medical Review Officer or whether employees of Concorde, Inc. would serve as Medical Review Officer.

qualify for performance of a particular job. During the oral presentations, the evaluators (who had also participated in the preparation of the RFP) sought information as to how the Medical Advisor would assist in redrafting and in many cases creating medical standards for its job classifications. Mercy clearly described what serious overhaul was needed, and allocated more than \$300,000 of its price proposal towards development of new standards. By contrast, as stated by the procurement officer in his letter denying Appellant's protest, Appellant's proposal

did not specifically set-out a clear plan to develop the medical standards for the Department. Rather you chose the option method offering to I) Train MDOT to redevelop and write the updated standards, II) write the updated standards itself, or III) a combination thereof. This "cover all bases" approach was not as effective as clearly delineating a work plan. Frankly, it left the technical evaluation committee members with real doubt about BIMC's willingness to participate in the groundwork for the Medical Advisor Project.

This view was not ameliorated by the oral presentations made by Appellant. The committee felt that, while obviously motivated by a desire not to offend, Appellant's Dr. Mamaril was not as prepared, nor as clear and forthright about needed changes in the medical standards as other offerors, and the follow-up submission did not impress the committee as much as the plans presented by Mercy. These determinations were matters within the evaluation committee's discretion and have not been shown to be unreasonable.

8. Oral Presentations. Finally, Appellant protests as arbitrary and capricious the views taken by the evaluators of its oral presentation. The oral presentations served as an "interview" with the individual(s) who would serve as the MDOT Medical Advisor, responsible for the performance of this large contract, and as Medical Officer, to receive and interpret laboratory urinalysis reports for MDOT. The ability of the Medical Advisor/Medical Review Officer(s) to communicate with MDOT managerial personnel is critical to the success of this project, because they are the persons who the entire Department will look to for advice on a very

wide range of medical issues. A measure of the significance of this portion of the process is that the oral examination was one of only four evaluation factors set forth specifically in the RFP at page 60.

As the Procurement Officer stated in his letter denying the protest,

we were not impressed with the level of understanding shown by [Dr. Mamaril] during oral presentation. It was rather clear to us that he had not properly prepared for the oral presentation, or did not understand it, or both. It was also apparent that he did not interview or participate in the site selection process. By contrast, the competitor's [Medical Advisors] visited each site, interviewed staff, and were integrally involved in developing the network system. They also briefed personnel at site locations on their role in the network so that an informative dialog ensued when the evaluation team visited the site location. This greatly helped the evaluation team in making a recommendation. It also resulted in higher technical scores for the competitors.

The influence of the subjective evaluation of an oral presentation has been considered by the MSBCA in AGS Genasys Corporation, supra. As the Board there stated at p. 13, "it is reasonable to . . . expect that scores might improve, or for that matter, be downgraded, based on the oral interview phase of the process." The Department's subjective evaluation of Appellant's oral interview was not unreasonable in light of the totality of the circumstances, including the relative impression left by the presenters from the other offerors.

Conclusion

Had Mercy not submitted a proposal, Appellant would have been awarded the contract. Appellant is a well-respected provider of occupational medical services in the State of Maryland, and one whose services have been utilized by various modals of the Department of Transportation. It is a responsible offeror, whose bid was responsive to the RFP, and who offered its services at a competitive price.

However, under the Procurement regulations and the RFP, the State was seeking a proposal "most favorable" to its needs, and we find that the State was not unreasonable in determining that the proposal provided by Mercy Medical Center was "most favorable."⁴ The evaluation team was unanimous in finding that when compared to all offerors the Mercy proposal was better organized, its personnel communicated more clearly, the treatment locations as a whole were cleaner and more attractive, employees would more likely be served by physicians than physician's assistants, and personnel were more accurate about drug testing procedures.

Many of MDOT's reasons may have been based upon subjective issues and impressions, such as ambiance at a treatment site and ability of personnel to clearly communicate with Mercy evaluators, but Maryland's Procurement Law provides that the determination of which proposal best fits the agency's needs is the responsibility of the agency. Such determination should not be overturned unless contrary to all objective facts. After reviewing all the evidence, the Board finds that Appellant failed to show that the State was arbitrary or capricious in its determinations, and therefore does not find that the selection of Mercy Medical Center, albeit by its very nature in some measure subjective, is in any way arbitrary or capricious. The Appeal is therefore denied.

⁴Of course, the Board may only focus on propriety of the evaluation of the proposals as conducted by the State pre-protest. However, it should be noted that three of the seven evaluators testified at the hearing, and were present during the testimony of Appellant's witnesses. While acknowledging that some confusion about Appellant's proposal was clarified during Appellant's testimony before this Board, all three evaluators stated unequivocally that the additional information gleaned would not have altered their evaluation sufficiently to influence the ranking of offerors, and that they still believed that Mercy's was the proposal more advantageous to the State.

It is therefore, Ordered this 23rd day of September, 1994 that the appeal is denied.

Dated: Sept. 23, 1994

Candida Steel

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III

Robert B. Harrison III
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 1815, appeal of Baltimore Industrial Medical Center, Inc., under MDOT Contract No. MDOT-93-MA-001.

Dated: 9/23/94

Mary A. Priscilla
Mary A. Priscilla, Recorder