

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEALS OF BENTON &
ASSOCIATES

Under DHR RFP FIA/FS 01-0100S

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Docket Nos. MSBCA 2196 & 2201

November 1, 2000

Competitive Negotiation - Evaluator Bias - The Board of Contract Appeals will not find that actual bias or conflict of interest exists respecting a member of an evaluation committee merely because an offeror (or employee thereof) occupies an oversight position on a board or commission relative to such evaluation committee member.

APPEARANCE FOR APPELLANT:

Gerald M. Richman, Esq.
Ellicott City, MD

APPEARANCE FOR RESPONDENT:

Turhan E. Robinson
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

This bid protest appeal arises out of the Department of Human Resources (DHR) Family Investment Administration's (FIA) denial of the protest filed by Appellant concerning the DHR Request for Proposal (RFP) for services related to the FIA Food Stamp Payment Accuracy Rate. Appellant's protest was submitted to the DHR's Procurement Officer prior to the due date for receipt of initial proposals on grounds that any proposal it submitted could not be objectively evaluated by certain State personnel. Appellant further stated that it would not be submitting a proposal in response to the RFP and did not, in fact, submit a response. The Procurement Officer denied the protest on the grounds that Appellant was not an interested party under the procurement and therefore did not have standing to protest and Appellant appealed to this Board (MSBCA). MSBCA, citing Helmut Guenschel, Inc., MSBCA 1434, 3 MSBCA ¶211(1989), advised the parties that a person did not have to submit a proposal to preserve an issue of protest raised prior to the due date for the proposals. The MSBCA placed the appeal in suspense status pending a Procurement Officer's decision on the merits of the protest. The Procurement Officer again denied the protest by letter dated August 28, 2000 and Appellant appealed to MSBCA again.

Findings of Fact

1. On May 16, 2000, FIA issued RFP FIA/FS-01-0100S to acquire contractual services of a qualified organization to determine how the FIA, through the local departments of social services, can obtain and retain a food stamp payment accuracy rate equal to or better than the federal tolerance level.

2. The RFP was sent to approximately 130 vendors and a pre-proposal conference was held on June 6, 2000.
3. The pre-proposal conference was attended by approximately 20 vendors and staff from the DHR Central Office and local departments of social services.
4. On June 13, 2000, Appellant [through Mr. Bill B. Benton, Vice President of Appellant] submitted a letter to the Procurement Officer where it asserted that:

At the pre-proposal conference last Tuesday, you indicated that the panel evaluating proposals would likely be composed of 3-4 staff from the State Office and a similar number of local department staff. It seems possible from your comments that either A or B (who attended the pre-proposal conference) or another member of the Howard County Department of Social Services may be asked to serve on the panel evaluating proposals.

I [Mr. Bill B. Benton] have been a member of the Howard County Board of Social Services for several years. From time to time, the Board has been critical of our local department's performance. Most recently, the Board has expressed significant concerns about the local department's persistent excessive Food Stamp quality control error rate. This matter was exacerbated by the local department's refusal to provide Food Stamp quality control data requested by the Board to enable the Board to discharge its fiduciary responsibilities under Article 88A, Section 14A of Maryland State Statutes.

It is important that any appearance of bias or conflict of interest in this procurement be avoided. I will be going off the Board on June 30, before proposals are evaluated. Under the circumstances, however, it would be virtually impossible for any representative of the Howard County Department of Social Services to fairly evaluate any proposal our firm may wish to submit.

5. On June 22, 2000, the Procurement Officer informed Appellant that the request to exclude A and B (or any other employee of the Howard County Department of Social Services) from the evaluation committee could not be honored because DHR "must reserve the right to select the participants on the evaluation panel."
6. Appellant submitted a protest on June 23, 2000 noting that while it did not dispute the fact that DHR has a right to select whomever it wishes to serve on an evaluation panel any proposal Appellant might submit could not be objectively evaluated by A, B, or any other representative of the Howard County Department of Social Services. The protest stated "...[u]nder the circumstances, we will not be submitting a proposal in response to the above referenced RFP."

The names are not set forth due to confidentiality concerns expressed by the attorneys at the hearing of the appeal.

7. Seven vendors submitted proposals on June 26, 2000. A proposal was not received from Appellant. On July 6, 2000, Appellant requested resolution of its protest and the Procurement Officer denied Appellant's protest on July 12, 2000. The basis of denial was that Appellant was not an interested party and thus lacked standing to protest because it stated it would not submit a proposal and did not submit a proposal.
8. Appellant timely appealed to MSBCA on July 27, 2000.
9. On August 21, 2000, Respondent filed its Agency Report.
10. By letter dated August 22, 2000, MSBCA placed the appeal in suspense pending the issuance of a Procurement Officer's decision on the merits. MSBCA noted that from a review of the Agency Report it was apparent that the Procurement Officer and Agency Head had not denied the protest based on the merits of the evaluation committee member issue, but rather on the basis that it would not be considered because Appellant stated it would not and did not submit a proposal and thus was not considered by the agency to be an interested party.¹ MSBCA advised DHR to consider Appellant's protest on the merits notwithstanding that Appellant had not submitted a proposal.
11. By letter dated August 28, 2000, the Procurement Officer again denied Appellant's protest on grounds that the selection of evaluators is a discretionary act and that DHR would not eliminate potential evaluators based on Appellant's assertions that representatives of the Howard County Department of Social Services could not objectively evaluate a proposal submitted by Appellant because of bias and conflict of interest.
12. By Fax and letter dated September 5, 2000, Appellant appealed this second Procurement Officer's decision arguing that DHR had a responsibility to exclude persons from a review (evaluation) panel with known bias and that DHR had not addressed this responsibility. The Appellant also alleged in this appeal that the Howard County Department of Social Services had deliberately withheld public information from the Howard County Board of Social Services and only provided such information after it had been separately provided by DHR.
13. By letter dated September 5, 2000, MSBCA docketed the second appeal, consolidated it with the first appeal, removed the first appeal from suspense and advised the parties that DHR did not have to file another Agency Report. This letter gave Appellant ten (10) working days to file comment on the Agency Report and/or request a hearing on the consolidated appeals. This September 5, 2000 letter was addressed to the individual then identified by Appellant as its counsel and to counsel for Respondent. The Board copied two interested parties on this letter that had been previously identified as an interested party by counsel for Respondent pursuant to copies of letters to such parties sent to the Board.
14. Unbeknownst to the Board, counsel then representing Appellant never received this September 5, 2000 letter.
15. The Board issued a final decision denying the above referenced appeals on September 27, 2000 at which time there had been no comment on the Agency Report and no request for a hearing filed by any person.
16. Following issuance of the opinion Appellant and new counsel advised that Appellant's previous counsel had never received a copy of the September 5, 2000 letter from the Board. Appellant and new counsel requested a hearing and the opportunity to file comment.

¹ The Agency Report, however, also addressed the issue of the alleged bias or conflict of interest of certain DHR personnel. It is stated in the Agency Report that "[T]he Procurement Officer has determined that the protest was not actionable because no actual bias or conflict of interest exists."

17. The Board, by letter dated October 5, 2000, withdrew the decision in the appeals issued on September 27, 2000 and scheduled a hearing of the appeals for October 26, 2000.
18. On October 25, 2000, Appellant filed comment and affidavits from Mr. Bill B. Benton and the Chairman of the Howard County Board of Social Services. The affidavits elaborated on the specific grounds of criticism (set forth in Findings of Fact 4 and 12 above) by the Howard County Board of Social Services and Mr. Bill B. Benton (who was a member of the Howard County Board) directed at local Howard County Department personnel and particularly A and B. These affidavits also expressed the affiant's opinion that neither A, B or any other representative of the Howard County Department of Social Services could be fair and impartial in a review of any proposal submitted by Appellant. Additionally, the affidavits asserted that (1) A had advised State and local appointed and elected officials that Mr. Benton's activities constituted "micro management" of A and the operations of the Howard County Department of Social Services and (2) A's allegations of "micro management" were clear evidence of bias.
19. The material filed by counsel for Appellant on October 25, 2000 also stated that Appellant had a "secondary complaint" that the Board of Contract Appeals copied two offerors on the Board's September 5, 2000 letter discussed above. This complaint was based on the request by Appellant in the June 23, 2000 protest that the protest and all related correspondence and information remain confidential. The Board explained at the hearing that the bid protest appeals before the Board are public and open proceedings which interested parties have a right to know about and to participate in and that its actions concerning the September 5, 2000 letters were taken in conformity with COMAR regulations.²
20. At the hearing of the appeal on October 26, 2000 no member of the Howard County Department of Social Services was called to testify by either party. Mr. Benton gave testimony consistent with his affidavit.
21. At the hearing of the appeal on October 26, 2000 it was revealed that no member of the Howard County Department of Social Services actually served or was serving on the panel evaluating proposals for the subject procurement.
22. Appellant had not been advised that no member of the Howard County Department of Social Services had actually served or was serving on the evaluation panel until the hearing.

Decision

In Maryland public negotiated procurements, initial evaluations may be conducted and recommendations for award made by an evaluation committee. Final evaluations, including evaluations of the recommendations of the evaluation committee, if any, shall be performed by the procurement officer and the agency head or designee. COMAR 21.05.03.03(6). The selection of an evaluation committee member is a matter falling primarily within the discretion of the procuring agency and will not be questioned absent evidence of actual bias or other improprieties. See Calso Communications, Inc., MSBCA 1377, 2 MSBCA ¶185(1988) and cases cited at pp. 10-12. See also Gloria G. Harris, B-188201, April 12, 1977, 77-1 CPD ¶255; New York University, B-195792, August 18, 1980, 80-2 CPD ¶126.

² Through inadvertence the Board failed to send a copy of its September 5, 2000 letter to two other interested parties who had also been identified by counsel for Respondent through copies of letters to such interested parties sent to the Board prior to September 5, 2000. Counsel for Respondent notified the interested parties of the hearing scheduled for and conducted on October 26, 2000. No interested party appeared at the hearing.

Appellant has alleged that actual bias and conflict of interest would arise if any member of the Howard County Department of Social Services were permitted to sit on the evaluation committee. Whether such bias or conflict of interest may have actually existed we now conclude is a moot point because no Howard County Department of Social Services personnel actually sat or is sitting on the evaluation committee. We affirm that it is not necessary to file a bid or proposal to preserve an issue of protest raised prior to bid opening or the due date for proposals under COMAR 21.10.02.03A. However, herein we hold that where such ground consists of an assertion of evaluator bias and/or evaluator conflict of interest and such allegedly biased or conflicted evaluator does not in fact sit on the evaluation committee the Board will not require the agency to begin the procurement process anew. This ruling applies whether or not the protestor appellant has submitted a proposal or been notified prior to the due date for proposals that such alleged biased or conflicted person is not or will not be an evaluator.³

Appellant does not dispute that appointment of evaluators involves a discretionary action. Appellant argues, however, that unless it is assured in advance of the date for receipt of proposals that a person who may be biased for or against Appellant will not sit on the evaluation committee Appellant may not submit a proposal with confidence of a fair and even evaluation. We recognize this concern. However, against this concern we must weigh State policy regarding confidentiality of the identity of evaluators designed to permit an evaluator to evaluate without fear that his subjective judgment will be subject to public scrutiny. This Board respects the policy that the identity of evaluators should be kept confidential. However, where examination of an actual evaluator under oath is sought and such examination is required to uphold fundamental fairness in the appeal process, the Board will permit such examination, although it might restrict the persons who could be present during such testimony to the attorneys, the Board (and its contract reporter) and client representatives. No such request for examination was made herein; nor, as noted, were any allegedly biased or conflicted evaluators actually on the evaluation committee. We thus deny the appeal. However, we believe further comment is warranted.

Assuming arguendo that allegedly biased or conflicted individuals from Howard County had been on the evaluation committee we would also deny the appeal based on this record.

Appellant argues that criticism and proposed remedial action offered by Mr. Bill B. Benton and the Howard County Board of Social Services, while Mr. Benton (Vice President of Appellant) was a member, would result in any Howard County local Department personnel having a bias or conflict of interest regarding Appellant's proposal. However, we decline to hold that mere membership on an evaluation committee by a State employee whose job performance may be criticized (or praised) by an offeror (or employee thereof) who occupies an oversight position on a Board or Commission relative to such employee would constitute a prohibited conflict of interest for such State employee. Therefore, the existence of actual bias (for or against) such offeror must be shown to exist. Appellant bears the burden to show that such bias exists. See W.M. Schlosser Company, Inc., MSBCA 2126, 5 MSBCA ¶465(1999) and cases cited at p. 5; Presearch, Inc., Comp. Gen. Dec. B-227097, 87-2 CPD ¶28. See also Maryland New Directions, Inc., MSBCA 1367, 2 MSBCA ¶179(1988) at p. 17; Transit Casualty Company, MSBCA 1260,

³ An exception to this ruling would be made if there was deliberate misrepresentation concerning the identity of an evaluator. No such allegation of misrepresentation has been made herein.

Herein, Appellant asserts that local department employees from Howard County would be biased against Appellant because of criticism and proposed remedial actions. However, the Board declines to hold that actual bias will be found to exist whenever a State employee may be the subject of criticism and proposed remedial action by a person or persons occupying an oversight position. Actual bias of such employee toward the person or persons occupying the oversight position must be shown. The burden herein is especially heavy, because Appellant did not submit a proposal and thus there are no comparative scores from which bias might be shown to exist.

Herein, Appellant has not presented any specific facts that Howard county employees would actually be biased. These employees did not testify. The factual matter set forth in the affidavits and Mr. Benton's testimony do not establish actual bias; only inference and supposition arising out of criticism and proposed remedial actions directed at certain personnel of the Howard County Department of Social Services by Mr. Benton and the Howard County Board while Mr. Benton was a member of the Howard County Board. Bias will not be attributed by MSBCA to an evaluation committee member or potential member based on mere inference or supposition. Indeed, in a similar context where it was alleged that an agency deliberately selected evaluators for their bias against an incumbent offeror, this Board opined:

The selection of an evaluation panel member is a matter falling primarily within the discretion of the procuring agency and will not be questioned absent evidence of actual bias. Fox & Co., B-197272, November 6, 1980, 80-2 CPD ¶340. "A protestor alleging bad faith on the part of government officials bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with a specific and malicious intent to injure the protestor." The Aeronetics Division of AAR Brooks & Perkins, B-222516, B-222791, August 5, 1986, 86-2 CPD ¶151. Furthermore, even if the protestor demonstrates actual bias in the selection of the evaluators, the panel's decision will be upheld unless such bias is clearly shown to have permeated the decision. Fox & Co., supra.

Appellant has failed to meet its burden of proof of the existence of actual bias in the selection of the evaluators. Appellant has shown that [the Procurement Officer] selected evaluators who had expressed to him dissatisfaction with Appellant's performance. This does no more than raise an inference that only evaluators known to be dissatisfied with Appellant were selected or that the evaluators were selected on the basis of their dissatisfaction.

Calso Communications, Inc., MSBCA 1377, 2 MSBCA ¶185(1988) at p. 10.

Bias must be demonstrated to exist by substantive hard facts or evidence. Such facts or evidence have not been presented by Appellant herein, notwithstanding the information contained in the affidavits provided by Mr. Benton and the Chair of the Howard County Board.

Accordingly, the appeal is denied. Wherefore, it is Ordered this 1st day of November 2000 that the appeal is denied.

Dated: November 1, 2000

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 2196 & 2201, appeals of Benton & Associates under DHR RFP FIA/FS 01-0100S.

Dated: 11/01/00

Mary F. Priscilla
Recorder