

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CMC HEALTH CARE CENTER )  
 ) Docket No. MSBCA 1489  
Under MdTA Contract )  
No. 18932022 )

March 1, 1990

Bid Protest - Timeliness - The Board's determination that the protest was timely was based on its finding the offeror could not have determined the grounds for the protest until it reviewed a competitor's proposal, and that the offeror made reasonably diligent efforts to obtain access to the competitor's proposal pursuant to COMAR 21.10.02.03B.

Competitive Negotiation - Responsiveness - The procurement officer reasonably determined that a proposal was acceptable even though an agreement to perform in accordance with the proposal was oral. Under COMAR 21.05.03.03C(3)(a) an oral clarification constituted a matter of contract administration. This Board will not substitute its judgment for that of an agency unless we find its judgment legally erroneous, arbitrary, or capricious.

APPEARANCES FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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Assistant Attorney General  
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APPEARANCE FOR INTERESTED PARTY:  
(Baltimore Industrial Medical  
Center)

None

OPINION BY MR. PRESS

Appellant appeals that Maryland Transportation Authority (MdTA) procurement officer's determination that: (1) its bid protest was untimely filed and (2) that the interested party's

proposal met the requirements of the solicitation.

Findings of Fact

TIMELINESS

1. On August 8, 1989, the Maryland Transportation Authority (MdTA) solicited proposals for an agency physician to provide pre-employment and medical evaluations. On September 12, 1989, five proposals were received, and a selection committee evaluated the proposals based on the following criteria: general proposal, experience of the firm, medical staff resources, and price. The price quotes of each offeror were delivered in a sealed envelope, separate from the proposals. The envelopes were opened only after the scores for the other criteria were recorded.

The proposals and scores of the evaluation were as follows:

Baltimore Industrial Medical Center (BIMC), the interested party, received the highest evaluated score of 360.5, broken down as follows:

General Proposal	99
Experience	36.5
Resources	33
Professional Credentials	32
Price	160

CMC Healthcare Center (Appellant) received the second highest evaluated score of 335, broken down as follows:

General Proposal	103.5
Experience	34
Resources	30

Professional Credentials 31.5

Price 136

2. After reviewing the committee's evaluations, the Procurement Officer, Ms. Frances Riley, recommended acceptance of the proposal from BMIC. Notices were sent to unsuccessful vendors on October 17, 1989 by certified mail-return receipt requested. Appellant acknowledged receipt of this notice on October 20, 1989.

3. On October 26, 1989, the president of CMC, Ms. Carolyn McGuire, telephoned Steven W. Vanderbosch, Counsel to MdTA, to inquire if she could review the proposal submitted by the successful proposer. Mr. Vanderbosch informed Ms. McGuire she should submit her request in writing to the procurement officer and arrange an appointment to review the proposal. On the same day, Ms. McGuire wrote a letter to Mr. Vanderbosch stating she wanted to preserve her right of appeal until she had an opportunity to review the successful proposal. (Tab 3, Rule 4 File). On November 1, 1989 Mr. Vanderbosch responded to Ms. McGuire's letter by informing her that she could not protect her appeal rights beyond the seven (7) calendar days provided for in COMAR 21.10.02.03B. He again advised Ms. McGuire to contact the procurement officer, for an appointment. (Tab 4, Rule 4 File).

4. On November 3, 1989 Ms. McGuire again contacted Mr. Vanderbosch by telephone, followed by a letter, to discuss the content of Mr. Vanderbosch's November 1, 1989 letter. (Tab 5, Rule 4 File). She also unsuccessfully attempted to reach the procurement officer by telephone.

Ms. McGuire reviewed the successful proposal on November 8, 1989, and by letter dated November 10, 1989 and filed with the procurement officer on November 14, 1989, she protested the award of the captioned contract to BMIC on behalf of Appellant. The ground for Appellant's protest was BMIC's failure to address the basic requirements of the solicitation in its proposal. (Tab 6, Rule 4 File).

The procurement officer, by letter dated December 19, 1989, issued a final decision denying Appellant's protest on the basis that the protest was not timely filed. (Tab 7, Rule 4 File). By letter dated December 26, 1989 and received by this Board on December 28, 1989, Appellant appealed the denial of its protest.

#### Responsiveness

5. Section IV - Scope of Services, of the RFP lists the minimum requirements of the physical examinations to be conducted by the Contractor. Physical examination was to include blood and urine analysis through laboratory testing. BIMC's proposal, as acknowledged by MdTA, did not specifically provide that blood and urine analysis would be included in a physical examination. The proposal did contain a provision which stated that the physical examination provided by BIMC would be performed in accordance with State requirements.

6. In response to the evaluation committee's request for clarification regarding the content of BIMC's physical examination, BIMC provided information to satisfy the committee that its standard physical examination would include the required blood and

urine analysis. The procurement officer contacted the Maryland Aviation Administration (MAA), which has an existing contract with BIMC for pre-employment and medical evaluations. MAA advised that BIMC is providing blood and urine analysis under the their contract.

7. The committee was satisfied with BIMC's oral clarification and decided to award it the contract. The award was made even though the clarification was never reduced to writing.

8. Because the price quotes were opened after the scores for the other evaluation criteria were recorded, prices quoted for laboratory tests, were not considered in the evaluation.

#### Decision

##### TIMELINESS

At the conclusion of that portion of the hearing dealing with the timeliness issue the Board made a determination and placed it on the record that Appellant's bid protest was timely filed under the requirements of COMAR 21.10.02.03B which states the following:

"In cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."

The Board's determination that the protest was timely was based on its finding that Appellant could not have determined the grounds for the protest until it reviewed the BIMC proposal and that Appellant made reasonably diligent efforts to obtain such proposal in a timely manner.

##### RESPONSIVENESS

This Board is confronted with the remaining issue of whether

the successful proposal from BIMC included the requirement of the solicitation regarding blood analysis. Appellant contends that BIMC's proposal was not responsive because it did not conform to the RFP specification requiring a blood analysis.

However, this appeal involves a competitive negotiation procurement; where responsiveness, "the legal obligation to perform the required services in exact conformity with the specifications, is an inapposite standard for determining whether proposals may be considered, since the agency's needs usually are not adequately described by detailed specifications." Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA ¶94 (1985). Accordingly, offerors may submit acceptable or potentially acceptable proposals within the general framework of the work described by the RFP. COMAR 21.05.03.03B provides that the procurement officer may determine that for purposes of conducting negotiations proposals are acceptable or are capable of being made acceptable within his reasonable discretion. Compare Adden Furniture, Inc., MSBCA 1219 1 MSBCA ¶93 (1985). See also; M/A-COM, Inc., MSBCA 1258, 2 MSBCA ¶112 (1985).

Although the proposal of BIMC, did not specifically provide for a blood and urine analysis as a part of the physical examination, the Board finds that MdTA acted reasonably in accepting BIMC's proposal. MdTA was satisfied BIMC's proposal contained a provision which stated physical examinations would be performed in accordance with State requirements. BIMC's proposal allowed MdTA to make a judgment as to whether BIMC's service was

best for the State.<sup>1</sup> MdTA's review and judgment were made on the basis of what was stated in the written proposal as supplemented by BIMC's oral clarification.

This Board finds that MdTA in making this award to BIMC, impliedly indicated it found the BIMC offer to be acceptable. Moreover, even though the BIMC agreement to perform in accordance with the proposal and State requirements for blood and urine analysis is oral, this Board finds Appellant's contention regarding the impropriety of an oral clarification of a proposal under COMAR 21.05.03.03C (3) (a) constitutes a matter of contract administration which MdTA has apparently resolved. It is not the function of this Board, as part of the bid protest procedure, to substitute its judgment for that of an agency unless we find its judgment was legally erroneous, arbitrary or capricious.

For the foregoing reasons, the appeal is denied.

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<sup>1</sup>This Board has noted in evaluating the relative desirability and adequacy of proposals, a procuring agency is required to exercise business and technical judgment. This is a discretionary action which may not be disturbed or superseded in the absence of a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of law or regulations. See Beilers Crop Services, MSBCA 1066, 1 MSBCA \*25 at p. 5 (1982); Mid-Atlantic Vision Service Plan, Inc., MSBCA 1368, slip op. at p. 23 (Feb. 18, 1988); Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA \*94 at p. 10 (1985).

