

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF DELMARVA )  
COMMUNITY SERVICES, INC. )  
 ) Docket No. MSBCA 2302  
Under DHR Solicitation CSA / )  
RCP-02-001S )  
 )

September 24, 2002

Competitive Negotiations - Price Evaluation - In a competitive negotiation procurement, the procuring agency may select the higher priced, technically superior proposal in the State's best interest if the additional cost is warranted by the increase in quality provided by the technically superior proposal.

Procurement Officer - Conflict of Interest - Absent evidence of actual bias a person who has been or is a contract monitor under a previous or current contract may serve as the procurement officer on a solicitation involving the same services even where the incumbent on the previous contract might be expected to submit a bid or proposal.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Turhan E. Robinson  
Assistant Attorney General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Bay Shore Services, Inc.  
Edgar A. Baker, Jr., Esq.  
Seidel, Baker & Tilghman, P.A.  
Salisbury, MD

OPINION BY BOARD MEMBER HARRISON

This bid protest appeal arises out of the Department of Human Resources (DHR) award of a contract for "Developmental Disabilities" Respite Care services on the Eastern Shore of Maryland. Appellant alleged that: (1) the Evaluation Committee erroneously did not recommend it for award, and (2) it received an inadequate debriefing. DHR denied the protest on the merits and on timeliness grounds. We find the protest to be timely. However, we shall uphold the decision of the Procurement Officer on the merits of the protest and deny the appeal.

### Findings of Fact

1. Respite Care means short-term care of an individual with a developmental or functional disability or an individual with a head injury who, notwithstanding age, meets the definition of developmentally disabled, which is provided within or outside the individual's home for the purpose of giving temporary relief to the individual or to the family. Article 88A, §128(a), Annotated Code of Maryland. Respite Care services are designed to help relieve the stresses associated with caregiving by providing occasional periods of rest and renewal for the family caregivers; thus supporting their ability to continue providing care to their family member at home over the long term.
2. To provide such Respite Care services, DHR issued an RFP on April 1, 2002. A pre-proposal conference was held on April 15, 2002, and all questions and DHR responses received before and after the pre-proposal conference were sent on April 26, 2002 to all known recipients of the RFP. The closing date for receipt of proposals was May 10, 2002.
3. Offerors were to submit separate proposals for services for developmental disabilities and functional disabilities. The RFP provided for awarding multiple contracts for the various geographic regions of the State involved, but no more than two (2) contracts in any given region. One of the regions was the Eastern Shore. This appeal involves the award of a contract for services for developmental disabilities on the Eastern Shore. Timely proposals for developmental disabilities on the Eastern Shore were received from Appellant and Bay Shore Services, Inc (BSS), the Interested Party herein. Appellant also submitted a proposal for functional disabilities on the Eastern Shore.
4. An Evaluation Committee was convened which was comprised of individuals knowledgeable about developmental and functional disabilities. Ms. April Seitz, the Respite Care Procurement Officer, facilitated the work of the Evaluation Committee.
5. Ms. Seitz had been for approximately five (5) years the contract monitor for the previous contract for Respite Care on the Eastern Shore where Appellant was the incumbent. The record does not reflect whether these Respite Care services were for functional disabilities as well as developmental disabilities.
6. Ms. Seitz briefed the Evaluation Committee on the evaluation process and their duties and responsibilities before the members were provided the proposals for evaluation. On May 21, 2002, and continuing for three days, the Evaluation Committee met to discuss all the proposals, to evaluate and rank the proposals, and to make recommendations for contract award for all proposals submitted for a total of nine regions and disability-types.
7. The evaluated technical proposals were then ranked for each region and disability-type, with "1" designating the highest ranking in each region and disability-type. For the Eastern Shore developmental disability procurement, the Evaluation Committee ranked Appellant's technical proposal "2" out of the two (2) proposals received, and BSS's technical proposal was ranked "1".
8. After the technical proposals were ranked, the financial proposals were opened by the Procurement Officer and reviewed by each committee member. The financial proposals were evaluated based on the average of the hourly costs proposed by the offeror for each of the three years of the Contract. The highest financial ranking in each region was designated as "1" which reflected the lowest average hourly cost for each region disability-type. A composite ranking of each proposal was arrived at by combining the technical and financial

proposal rankings, with greater weight given to the technical proposal than to the financial proposal.

9. The RFP did not disclose that greater weight would be given to the technical proposal than to the financial proposal. The General Procurement Law (SF §13-104(b)(2)) and COMAR 21.05.03.02A(2) require that the RFP provide an indication of the relative importance of each evaluation factor, including price. We find that the price proposal under the RFP would be interpreted by the offerors to be equal in importance to the technical proposal in terms of evaluation.
10. In the protested Eastern Shore procurement, Appellant received a ranking of "1" for the financial proposal and BSS received a ranking of "2". Best and final price offers were requested from both offerors. The best and final price offers were lower than the original financial proposals. However, the ranking of the financial proposals remained unchanged. BSS's cost proposal was approximately 19% higher than Appellant's cost proposal.
11. The RFP provided for "recommendation for award of a single contract in each region for each disability type to the qualified offeror(s) whose proposal is determined to be the most advantageous to the State based on the results of the final technical and financial evaluations." Because of the importance of the technical proposal to the quality of the Respite Care services to be delivered and the strength of BSS's technical proposal, BSS received the highest technical ranking and was therefore recommended for award for the Eastern Shore region for developmental disabilities.
12. Appellant was informed by letter on June 12, 2002 that its developmental disabilities proposal for the Eastern Shore was not recommended for award because it did not receive the highest ranking. The letter advised Appellant of its right to a debriefing, and on June 17, 2002, Appellant called the Procurement Officer and requested a debriefing. It was agreed that the debriefing would take place on June 24, 2002 at 4:00 P.M. by telephone.
13. The debriefing on June 24, 2002 lasted approximately one hour and thirty minutes. It was conducted by the Procurement Officer with Appellant's Executive Director and the coordinator of the Delmarva Family Support Services. During the debriefing, the Procurement Officer informed Appellant of what could and could not be discussed in a debriefing, and discussed the strengths and weaknesses of Appellant's proposal, as identified by the Evaluation Committee. At the end of the debriefing, Appellant requested information which COMAR prohibits from being disclosed such as:

- (a) the identity of Evaluation Committee members;
- (b) the specific rankings assigned by each individual committee member;
- (c) the names of the other offerors;
- (d) the rankings received by the other offerors; and,
- (e) a request to read the proposals of the other offerors.

The Procurement Officer explained that this requested information could not be disclosed in accordance with State procurement regulations.

14. Appellant repeated the request for this information on July 5, 2002. The Procurement Officer responded to this letter on July 23, 2002, again indicating why the requested information could not be disclosed.
15. Appellant filed a protest with the Procurement Officer on June 26, 2002. DHR denied the

protest on July 23, 2002, and Appellant timely appealed the protest denial to this Board on August 2, 2002. Appellant did not comment on the Agency Report, and no party requested a hearing.

16. The issues raised by the protest are (1) whether the proposals were properly evaluated and recommendation for award properly made in accordance with the evaluation criteria in the RFP and (2) whether the Procurement Officer's position as contract monitor for Appellant's existing contract constituted a conflict of interest. Issues that appear to have been raised for the first time on appeal are (1) whether the Evaluation Committee properly exercised its discretion not to conduct oral presentations and (2) whether the Procurement Officer conducted the debriefing in accordance with COMAR 21.05.03.06.

### Decision

We shall first discuss the issues raised by the protest. First, were the proposals evaluated and recommendations for award made in accordance with the evaluation criteria in the RFP? We find that the record reflects that they were, with the exception of the weight to be attributed to the technical proposal versus the cost proposal. However, for reasons discussed below, we will not remand the matter for further evaluation based on an equal weighting of the technical and cost proposals.

After obtaining all approvals required by law, the Procurement Officer shall award the procurement contract to the responsible offeror who submits the proposal or best and final offer determined to be the most advantageous to the State considering the evaluation factors set forth in the RFP. Maryland Annotated Code, State Finance & Procurement Article, §13-104(f).

The record reflects that DHR evaluated the proposals of BSS and Appellant and made the recommendation for award to BSS in accordance with the evaluation criteria and recommendation for award requirements contained in pages 29-33 of the RFP, with the exception of the weighting of the cost proposal versus the technical proposal. The proposal submitted by Appellant was determined by the Evaluation Committee not to be clear and detailed as required by the RFP. For example, the Evaluation Committee identified that in the "Understanding of the Population" section in Appellant's proposal, Appellant could have submitted demographic information it was required to collect about its current clients via the deliverable, the DHR Report Form "Monthly Client Service Report," rather than provide old information from other sources. The Evaluation Committee found that, given Appellant's long history of providing Respite Care services to the developmentally disabled population, Appellant did not take the opportunity to highlight how its own experience strengthens its knowledge of that population. Also, the Evaluation Committee found that Appellant repeated verbatim language from the RFP, presenting it in its proposal as its own response to various sections of the RFP. The Evaluation Committee interpreted this as a weakness in Appellant's proposal.

Appellant asserts that, since it was recommended for award to serve persons with functional disabilities on the Eastern Shore, it also should have been recommended for award to serve persons with developmental disabilities because the proposals were virtually the same. However, the record reflects that the population of clients with functional disabilities has different needs and different

limitations from clients with developmental disabilities, and the knowledge base and available resources in the community to serve these two populations also differ. Thus, as argued by Respondent's counsel in the Agency Report, submission of the same proposal for both requirements would result in an inadequate proposal of one of the two requirements because core issues and requirements would not be addressed.

The RFP permitted a recommendation for award to the offeror submitting the proposal most advantageous to the State based on the results of the final technical and financial evaluations. The Evaluation Committee ranked BSS's proposal (technical and cost) number 1 for developmental disabilities for the Eastern Shore because the Evaluation Committee found that the BSS technical proposal was superior to that submitted by Appellant even though Appellant's financial proposal was lower. Procurement officials may award a contract to the higher priced, technically superior proposal if it is determined that the higher priced, technically superior proposal is also the proposal most advantageous to the State. United Technologies Corp. And Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989); Information Control Systems Corporation, MSBCA 1198, 1 MSBCA ¶81 (1984). Compare Housing & Development Software, LLC, MSBCA 2247, 5 MSBCA ¶500 (2001). Herein we have found that the technical proposal and price proposal would be understood to have equal weight or importance under the RFP. BSS's cost proposal was approximately 19% higher than Appellant's cost proposal. BSS's technical proposal was found by DHR to be the technically superior proposal. Based on this record, we believe it would elevate form over substance to require DHR to reevaluate its award determination, which was based on a composite ranking with greater weight given to the technical proposal than to the cost proposal rather than giving equal weight to each. It does not appear that the result would change if we were to remand the matter for reevaluation because the record reflects that BSS's technical proposal was superior and that award could still be made to BSS notwithstanding its higher price.

Appellant has the burden of proving that the Procurement Officer's award of the Contract herein was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion. The Appellant's disagreement with the evaluation of its proposal or the recommendation for award is not sufficient to meet this burden. The Appellant has not presented to the Procurement Officer in the protest or to the Board in its appeal any evidence that would meet its burden. The Board has consistently ruled that it will only determine whether the determinations of procurement officials regarding the evaluation of the technical merits of proposals are arbitrary, capricious, unreasonable or contrary to law or regulation, since procurement officials' determinations concerning the relative technical merits of proposals are discretionary and entitled to great weight. Mere disagreement with the judgment of the evaluators assigned to the evaluation panel for the procurement is insufficient to show that the evaluation of proposals is unreasonable. AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987). Therefore, the Board will not disturb the Evaluation Committee's and Procurement Officer's recommendation for award herein because the burden and decision-overturning requirements established by Board precedent have not been met. RAID, Inc., MSBCA 2197, 5 MSBCA ¶485 (2000); United Technologies Corp., supra; AGS Genasys Corp., supra; B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58 (1983); Beilers Crop Service, MSBCA 1066, 1 MSBCA ¶25 (1982).

Inferentially, Appellant's protest raised the issue of whether the Procurement Officer's position is a conflict of interest with her position as contract monitor for the previous contract for Respite Care on the Eastern Shore where Appellant had been the incumbent provider.<sup>1</sup> Apparently, Appellant believes that the Procurement Officer should have conveyed Appellant's good performance of the services involved in the previous contract to the Evaluation Committee.

A Procurement Officer is defined by statute and regulation as an individual given authority by an Executive Branch agency to enter into, administer, or make determinations and findings with respect to a procurement contract. Maryland Annotated Code, State Finance & Procurement Article, §11-101(o); COMAR 21.01.02.01.B.(67). The Procurement Officer's performance of duties in serving as facilitator to the Evaluation Committee is within her statutory and regulatory responsibilities. We decline to hold that a person who has been or is a contract monitor under a previous or current contract may not serve as the Procurement Officer on a solicitation involving the same services, even where the incumbent on the previous contract might be expected to submit a bid or proposal. The Procurement Officer did provide the Evaluation Committee with more information about Appellant's past performance when specific information was requested. However, it was not her responsibility, nor would it have been appropriate, for the Procurement Officer to serve as an advocate for an incumbent contractor. Based on this record, we find no actual evidence of bias on the part of the Procurement Officer toward either offeror in this appeal.

Although not apparently a ground of protest below we find that the Evaluation Committee properly exercised its discretion not to conduct oral presentations. Oral presentations were not mandated by the RFP.<sup>2</sup> However, oral presentations could have been requested at the discretion of the Evaluation Committee.

Oral presentations were not requested by the Evaluation Committee from any of the offerors in any other region as part of their discretionary authority under the RFP; nor did the Evaluation Committee have any questions about the proposals submitted by Appellant and BSS. The Evaluation Committee determined in their evaluation of both proposals that there were strengths and weaknesses. However, the Evaluation Committee did not deem it necessary to permit offerors a second opportunity to improve the quality of their proposals, apart from the subsequent request for best and final offers. There was not a pattern of misunderstanding of the RFP indicated by offerors in their proposals that suggested a need for clarification through oral presentations.

While also apparently not a ground of protest below (but addressed in the Agency Report) we find that, in fact, the Procurement Officer conducted the debriefing in accordance with COMAR 21.05.03.06.

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<sup>1</sup> In the Summary of Questions and Answers from the April 15, 2002 Pre-Proposal Conference provided to all attendees, including Appellant, it was noted that incumbents would not have an advantage in the selection process and that all offerors would be judged by the same criteria for their technical and financial proposals.

<sup>2</sup> If not presented in Appellant's protest below, we lack jurisdiction to determine this issue. Since it is addressed by counsel for Respondent in the Agency Report, we also shall address it, notwithstanding that our comments may be *dicta*.

COMAR 21.05.03.06 provides that:

A. When a contract is to be awarded on some basis other than price alone, unsuccessful offerors shall be debriefed upon their written request submitted to the procurement officer within a reasonable time. Debriefings shall be provided at the earliest feasible time after the procurement officer makes a final determination recommending the award of the contract pursuant to Regulation .03F of this chapter. The debriefing shall be conducted by a procurement official familiar with the rationale for the selection decision and contract award.

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

C. A summary of the debriefing shall be made a part of the contract file.

The record reflects that the Procurement Officer conducted the debriefing as soon as feasible. She informed Appellant of the limitations of what could be discussed in accordance with COMAR 21.05.03.06. She proceeded to discuss with Appellant the strengths and weaknesses of its proposal. She informed Appellant that overall it did not convey the depth of its knowledge and experience in its proposal, given the length of time it has been providing services to the developmental disabilities population. During the debriefing Appellant requested information on the Evaluation Committee's specific rankings and comments, information on competitors, and specifics of the proposals of competitors. The Procurement Officer properly informed Appellant that the requested information was not discloseable under Maryland law. Based on the record, the Board finds that the debriefing was conducted and information disclosed in accordance with Maryland statutes and regulations.

In summary, the DHR Procurement Officer properly made the recommendation for contract award in accordance with the General Procurement Law and COMAR.

For all of the foregoing reasons, the appeal is denied.

Wherefore, it is Ordered this 24 day of September, 2002 that the appeal is denied.

Dated: September 24, 2002

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**Robert B. Harrison III**  
Board Member

I Concur:

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**Michael J. Collins**  
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 2302, appeal of Delmarva Community Services, Inc. under DHR Solicitation CSA / RCP-02-001S.

Dated: September 24, 2002

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Loni Howe  
Recorder

