

BEFORE THE  
MARYLAND STATE BOARD OF CONTACT APPEALS

Appeal of ECONOMIC AND  
TECHNICAL CONSULTANTS, INC.

Under MPC RFT-1E1

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Docket No. MSBCA 1378

July 27, 1988

Negotiated Contracts - Evaluation of Proposals

The fact of previous non-selection for award on several similar procurements did not establish that the procuring agency was predisposed to treat Appellant's proposal in the instant procurement unfairly.

APPEARANCE FOR APPELLANT

None

APPEARANCE FOR RESPONDENT

Joseph P. Gill  
Assistant Attorney General  
Baltimore, MD

MEMORANDUM OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial by the Maryland People's Counsel (MPC) procurement officer of its bid protest asserting that its proposal was not fairly considered.

Findings of Fact

1. On December 18, 1987, MPC issued the subject Request for Proposals (RFP) for the Phase I selection of a pool of technically qualified experts who would agree under Phase I of the procurement to submit case specific cost proposals to evaluate individual rate applications filed during a two year period (March 1, 1988 - February 28, 1990) by major utilities in the State of Maryland. The major focus of the RFP for Phase I selection was on the ability to provide expert support in revenue requirements analysis.
2. The RFP advised offerors that as few as two or as many as seven offerors might be determined to be technically qualified in the Phase I evaluation and thus selected to submit cost proposals under a Phase II RFP.
3. The RFP for Phase I set forth three evaluation criteria and the percentage weight to be accorded each as follows: (1) the offeror's expressed understanding of project objectives 50%, (2) the offeror's implementation work

plan 20% and (3) the offeror's general experience in similar prior cases 30%. The major component of the offeror's expressed understanding of project objectives was understanding of the revenue requirements of a major utility in the State of Maryland.<sup>1</sup> The major component of the prior experience criterion involved prior experience in cases involving expert support in issues concerning the revenue requirements of major utilities in Maryland.

Appellant scored the maximum 20 points on the second criterion concerning implementation work plan, and evaluation of this criterion is not a subject of the protest and appeal.

4. The record reflects that Appellant's President, Mr. Jatinder Kumar, had provided expert testimony before the Maryland Public Service Commission in connection with Case No. 7384 on February 1, 1980 and on previous occasions (dates unknown) in Case Nos. 6738, 6810, 6839, 6860, 6865, 6977, 7033, 7065, 7070 and 7149. See Agency Report, Exhibit 3; Board Exhibit 1, pp. 8-9.

Appellant itself had previously provided services to MPC concerning analysis of cost of service/rate design in Maryland Public Service Commission Case Nos. 7972 and 8079 involving applications by the Potomac Electric Power Co. See Respondent's Exhibit 1.

5. In its proposal, Appellant listed the Maryland testimonial experience of Mr. Kumar, as set forth above, excepting the testimony in Case Nos. 7972 and 8079 which had yet to be given at the time of submission of the instant proposal. However, whether Mr. Kumar's testimony related to revenue requirements was not specified in the proposal.

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<sup>1</sup>See Footnote 2 below.

Appellant's proposal also reflected the Maryland experience of its associates, Dr. William R. Belmont and Mr. James P. Marquart. Dr. Belmont had appeared before the Maryland Public Service Commission in Case Nos. 6872, 6977, 6999 and 7159. Mr. Marquart had appeared before the Maryland Public Service Commission in Case No. 7469. However, as in the case of the listed experience of Mr. Kumar, the proposal did not specify what the appearances of Dr. Belmont and Mr. Marquart related to.

6. Eleven firms including Appellant submitted proposals in response to the RFP.

7. In mid-February, 1988, Assistants People's Counsel Gregory V. Carmean and Sandra Minch Guthorn evaluated the eleven Phase I proposals in accordance with the RFP criteria for evaluation set forth above. The evaluators separately read, reviewed and compared the proposals. They also separately graded them. Ms. Guthorn had sponsored the testimony of Mr. Kumar on February 1, 1980 in Case No. 7384. See Finding of Fact No. 4, supra. However, at the time she was evaluating Appellant's proposal, Ms. Guthorn had no recollection of her sponsorship of this testimony.

8. After the separate review, evaluation and grading, Ann Sistek, MPC Administrator and the procurement officer for this RFP, and Ms. Guthorn prepared a composite of the grading. The following scores were given:

|                      | <u>Ms. Guthorn</u> | <u>Mr. Carmean</u> | <u>COMPOSITE</u> |
|----------------------|--------------------|--------------------|------------------|
| KFG                  | 95                 | 100                | 97.5             |
| CRC                  | 85                 | 98                 | 91.5             |
| Hess & Lim           | 85                 | 98                 | 91.5             |
| The Columbia Group   | 85                 | 96                 | 90.5             |
| Berkshire Consulting | 90                 | 90                 | 90               |
| Woodwide Group       | 80                 | 84                 | 82               |

|              |    |    |      |
|--------------|----|----|------|
| Ben Johnson  | 80 | 83 | 81.5 |
| J. W. Wilson | 80 | 74 | 77   |
| LMSL         | 80 | 74 | 77   |
| SK&A         | 80 | 82 | 81   |
| Appellant    | 75 | 78 | 76.5 |

See Agency Report, Exhibit 2.

MPC determined to select the top five firms with composite scores of 90 or above for Phase I.

9. Appellant had the lowest composite score. Its proposal was individually rated last by Ms. Guthorn and ninth out of eleven by Mr. Carmean. In reviewing Appellant's proposal in accordance with the three evaluation criteria the evaluators' views, although arrived at separately, were similar. With respect to the first evaluation criterion, Expressed Understanding of Project Objectives, Mr. Carmean noted that while Appellant's proposal reflected it had worked in Maryland, it did not indicate that such work was principally in the revenue requirements area. Rather, its primary qualifications and publications seemed to focus on the areas of rate design<sup>2</sup> and general economic testimony. See Agency Report, Exhibit 4; Tr. pp. 69-70, 73-74. Mr. Carmean gave Appellant 38 of 50 points credit for this first evaluation criterion. Similarly, Ms. Guthorn noted in her evaluation that Appellant's experience

<sup>2</sup>Analysis of revenue requirements differs from analysis of rate design or cost of service. A revenue requirements analysis involves assessment of a utility's operating expenses, depreciation, taxes and a rate-of-return allowance on the utility's investment in rate base. An evaluation of revenue requirements is performed in accordance with accounting principles. Rate design/cost of service relates to the rates each class of consumers (industrial, commercial, governmental, consumer or other) is required to pay under the application. In contrast to revenue requirements analysis, a rate design evaluation is performed in accordance with economic principles.

seemed more in the area of rate design or cost of service rather than revenue requirements. Ms. Guthorn also indicated that Appellant's discussion of revenue requirements was general, not specific. See Agency Report, Exhibit 5; Tr. pp. 53-54. Ms. Guthorn gave Appellant 40 of 50 points credit for this first criterion.

Appellant received full credit for the second evaluation criterion, Implementation Work Plan, and, as stated above, evaluation of this criteria does not concern us.

The third evaluation criterion related to the general experience of an offeror. Mr. Carmean noted that Appellant's proposal did not reflect that it had provided revenue requirements testimony in Maryland and that its experience in this area as compared to the experience reflected in the proposals of the higher ranked offerors appeared weak. See Agency Report, Exhibit 4; Tr. pp. 73-74. Ms. Guthorn also found that the revenue requirements experience stated in Appellant's proposal was less significant than that stated in the proposals of the higher ranked offerors. Tr. p. 55. For this criterion (total of 30 points) Mr. Carmean and Ms. Guthorn gave Appellant 20 and 15 points, respectively.

10. On March 2, 1988, MPC sent letters to those offerors who were selected under Phase I advising them of their selection. On the same date, MPC also sent rejection letters to the offerors who were not selected in Phase I.

11. By letter of March 9, Appellant filed a protest with MPC. Appellant's basis for the protest was as follows:

I cannot believe that ETC's qualifications and experience were at a level inferior to anyone in the area of revenue requirement. Since the selection was based on the technical proposal, as no cost proposal was required nor submitted, I find it hard to believe that the selection was fair.

12. On March 15, 1988 the MPC Procurement Officer denied Appellant's protest, advising Appellant that the technical evaluation was scored by the evaluators in accordance with the criteria outlined in the RFP and that Appellant's proposal had received "one of the lowest composite technical scores."

13. On March 30, 1988 Appellant filed an appeal from the Procurement Officer's decision. As grounds for the appeal, Appellant stated: "We believe that the MPC has, in the past, as well as in this case, treated ETC unfairly, and its rejection of ETC'S proposal in RFP 1E1, Revenue Requirement is unjustified."

14. Appellant has been sent, including the instant RFP, a total of 22 such RFP's by MPC since it issued its first RFP (under the State's General Procurement Law) in November 1982. These RFP's sought a variety of expert support in services ranging in topics from revenue requirements to cost of service and rate design. Appellant did not respond to 13 of those RFP's. It was selected once in 1986 (RFP2/3c). In the remaining nine where it was rejected, various other firms were also rejected. See Respondent's Exhibit 1.

#### Decision

At the hearing of this appeal, Mr. Kumar articulated his belief that Appellant had been treated unfairly in past RFP's issued by MPC and that such past conduct was suggestive of continued biased or unfair evaluation in the instant RFP. Further evidence of bias was stated by Mr. Kumar to be shown by the mere fact that Appellant received such low scores in the first and third evaluation criteria dealing with expressed understanding of project objectives and general experience. Specifically, Appellant alleges that it was unfairly treated in the past because (1) it was only selected under a MPC

Phase I RFP on one occasion since 1982 and (2) because its qualifications in the revenue requirements area are not "inferior to anyone in the area of revenue requirements" as particularly demonstrated by Mr. Kumar's expert testimony on February 1, 1980 in Case No 7384. Appellant also asserts that the evaluators only considered the experience and qualifications of Mr. Kumar and ignored the qualifications of Doctor Belmont and Mr. Marquart, whose resumes were included in Appellant's proposal, in the revenue requirements area.

MPC denied that Appellant was unfairly treated or that the evaluators were biased or failed to properly evaluate Appellant's proposal. Despite Appellant's contentions, we find that it has failed to meet its burden to show that it was unfairly treated or that the evaluators were biased or failed to properly evaluate its proposal.

Appellant contends that it was unfairly treated in this RFP as a result of an inference to be drawn from its experience in other past MPC RFP's since it has only been selected once for Phase I. The record reflects that Appellant has been sent twenty-two RFP's by MPC since it issued its first RFP (under the State's General Procurement Law) in November, 1982. Appellant did not respond to thirteen of those RFP's and for the nine (including the instant RFP) for which it was rejected various other firms were also rejected. Appellant has presented no evidence concerning the facts and circumstances of the selection process in the eight previous RFP's in which it actually competed and was rejected. The mere fact that Appellant was selected in only one of the eight previous RFP's to which it responded since November, 1982 does not demonstrate bias or that it was treated unfairly and never had a realistic chance for selection in the instant RFP.

At most, evidence of previous non-selection on a number of procurements, standing alone, may raise an inference of unfair treatment or bias. However, unfair treatment or actual bias in the State's procurement process will not be found to exist merely on the basis of inference or supposition. However difficult it may be for an Appellant to prove the motivation of State procurement officials by concrete fact rather than inference, one seeking to establish that its competitive position was affected improperly by bias or unfair treatment by State officials bears this burden. See Transit Casualty Company, MSBCA 1260, 1 MSBCA ¶119 (1985) and cases cited therein at p.43. Appellant has not met its burden in this regard.

We now examine Appellant's contention that the mere fact that it received a low score from the evaluators in two of the three stated evaluation criteria demonstrates that the evaluators treated its proposal unfairly, i.e. were biased or had made a predetermination that Appellant not be selected. In this regard, Appellant particularly asserts that the fact that Mr. Kumar had previously testified as an expert on February 1, 1980 in case No. 7384 and was sponsored in such testimony by one of the evaluators, Ms. Guthorn, demonstrates that Appellant had the necessary experience to be selected. At the hearing of this appeal, Ms. Guthorn acknowledged that when evaluating Appellant's proposal she did not recall sponsoring Mr. Kumar's testimony some eight and one-half years earlier in Case No. 7384. However, it can not be ascertained from Appellant's proposal that such testimony involved revenue requirements. Such testimony was also given at a time when Mr. Kumar was an employee of another firm. In any event, we are satisfied that Appellant was not prejudiced in Ms. Guthorn's evaluation of its



proposal by her failure to recall that over eight years earlier she had sponsored Mr. Kumar's testimony in a proceeding before the Public Service Commission.

Concerning Appellant's more general complaint that the evaluation was inconsistent with its experience, we note that experience and expertise in revenue requirements was at the heart of this RFP. The RFP clearly reflects this need for revenue requirements experience and expertise. The first criterion, Expressed Understanding of Project Objectives, emphasized an offeror's "demonstrated understanding" of revenue requirements issues and gave as an example whether the offeror had provided similar services to "other consumer advocates, consumer groups, other intervenors or Commission staffs." The third criterion, General Experience of Offeror, specifically requested an offeror's experience in "similar prior cases" involving revenue requirements. Together, the first and third criteria total 80% of the evaluation. Both evaluators testified that Appellant's proposal lost points because of Appellant's lack of specific discussion of revenue requirements and its apparent comparative lack of experience in the revenue requirements area reflected by a comparison of its proposal with those submitted by the other offerors.

Appellant's proposal did reflect considerable experience and expertise in the rate design area.<sup>3</sup> However, analysis of revenue requirements differs from analysis of rate design or cost of service. While Appellant's proposal reflected substantial experience and qualifications in rate design and general economic testimony, its revenue requirements background, particularly in Maryland, as stated in its proposal was perceived by the evaluators to be weak as compared to other offerors. Contrary to Appellant's contention that

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<sup>3</sup>See Footnote 2, supra.

the evaluators did not consider the experience of Dr. Belmont and Mr. Marquart, we find that their experience as set forth in their resumes was considered by the evaluators and that the evaluators reasonably determined that Appellant's proposal viewed in its entirety did not reflect significant experience in the revenue requirements area.

On the basis of the composite scoring of the eleven proposals submitted in response to this RFP, Appellant's proposal was ranked last as compared to the others. Appellant has provided an insufficient evidentiary basis for this Board to disturb the evaluators' considered findings with respect to Appellant's proposal.

The Board has noted that 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 Service, 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). The Board has also noted that in evaluating technical proposals in response to a RFP it is necessary to evaluate technical factors in order to determine which proposals are most advantageous to the State and that the review of these technical factors requires the exercise of judgment which necessarily is subjective. Transit Casualty Co., supra, 2 MSBCA ¶119 at p.55.

Based on the record, we find that the evaluators' low scoring of Appellant's proposal involved a reasonable exercise of their discretion which we shall not disturb. Accordingly, the appeal is denied.