

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GUIDE PROGRAM OF)
MONTGOMERY COUNTY, INC.)
) Docket No. MSBCA 1482
Under Department of Juvenile)
Services RFP No. 89-JSA-0032(s))

April 2, 1990

Bid Protest - Timeliness - the Board's determination that the protest was timely based on its finding the offeror could not have determined the grounds for the protest until a debriefing session was held and was thus able to formulate a basis for its protest pursuant to COMAR 21.10.02.03B.

Competitive Negotiation - Evaluation - Offerors' proposals were evaluated pursuant to COMAR 21.005.03.03A. In such procurements, contract award is made to the responsible offeror whose proposal is the most advantageous to the State taking into consideration price and other relevant evaluation factors set forth in the RFP. The Board determined DJS acted in good faith and did not have other motives in directing a rescoring of the technical proposals. The Board further declined to hold as a matter of law that the General Procurement Law or COMAR (which are silent on the matter) preclude a rescoring of technical proposals.

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APPEARANCE FOR INTERESTED PARTY:
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OPINION BY MR. PRESS

Appellant appeals the Department of Juvenile Services (DJS) procurement officer's determination that: (1) its bid protest was untimely filed and (2) that in any event the rescoring of the proposals was appropriate.

Findings of Fact

1. On October 14, 1988, DJS issued a request for proposals (RFP) for shelter care¹ services at Cheltenham, Maryland, one of a series of RFP's issued in the DJS shelter care program.
2. Two offerors, Guide Program of Montgomery County, Inc. (Guide) and KOBA Institute, Inc. (KOBA) responded to the RFP. (See Attachment No. 3 of Bid Protest Decision). Guide was the incumbent contractor.² The scoring formula for the instant RFP was the following:

Evaluation Consideration - Technical Proposal Scoring:

The technical evaluations of all members of the Selection Committee will be compiled and the Average score established for each offeror. All offerors receiving 245 points (70%) or more by the Evaluation Committee will be deemed acceptable. All offerors with acceptable Technical Proposals will receive consideration of their financial bids or proposal. Offerors who receive a score on their Technical Proposal which is less than 70% will not be considered and their Financial Proposal will be returned unopened.

Relative values will be established by the following computation for the technical scores of each of the offerors being considered:

Average number of technical points x .2857 x .6 = X

Evaluation Consideration - Financial Proposal;

The evaluation of the Financial Proposal will be based on the amount of the costs submitted and appropriateness of the proposed cost model as it relates to the proposed services provision. Relative values will be established by the following computation for the Financial proposals of each of the offerors being considered:

¹"Shelter care" means the temporary care of children in physically unrestricting facilities pending a child's appearance in juvenile court. Such facilities are licensed and regulated by DJS pursuant to Md. Code Ann. Art. 83C, Section 3-12-123, and COMAR 12.22.03.

²Appellant had previously been providing shelter care service at Cheltenham under contract with DJS since approximately 1979.

$$\frac{\text{Lowest Proposal or bid}}{\text{Individual Proposal or bid}} \times 40 = Y$$

Total Scores

The technical scores (X) and financial scores (Y) for each above-listed offeror will be added and the offerors ranked. The bidder with the highest total will be recommended as the successful offeror. The overall weight of the Technical Proposal is 60% and the Financial Proposal is 40%.

3. On November 14, 1988, the technical proposals of the two offerors were received by DJS, and a team of three DJS employees selected by the Department's Deputy Director, Ben Jones, began the technical evaluation process. The technical evaluators chosen were all experienced in the area of shelter care.

The technical evaluation team completed its scoring of the technical proposals on November 18, 1988. The team did not have access to, nor was it informed of, the contents of the offeror's financial proposals. Upon the initial scoring of the technical and financial proposals Appellant received the highest technical and financial score.

4. On November 21, 1988, offerors were instructed by the Procurement Officer to submit "Best and Final" offer by November 28, 1988. Also on November 21, 1988, a financial team appointed by Deputy Director Jones submitted the offeror's financial proposals to him for review. Upon his review of the price proposal the Deputy Director concluded the prices were higher than the amount provided in the DJS budget for the scope of services set forth in the RFP (see page 3, Agency Report). DJS conducted internal discussions and determined that one reason prices were high was

that the child-care worker to youth ratio required by the RFP (1:3), one worker to three youths, was higher than needed for a shelter care program. It was determined these requirements should be eased.

5. Subsequently, offerors were sent a letter by the Procurement Officer on December 2, 1988, advising that they would be contacted by the Deputy Director's officer for further discussion or negotiation, and the child-care worker to youth ratio was changed from (1:3) to (1:5). Ongoing discussions within DJS, however, indicated that because the staff ration was a regulated licensing requirement, the Department was required to continue to use the higher ratio. Therefore the offerors were advised to use the higher ratio (1:3) in their best and final offers (see attachment No. 11 of the Bid Protest Decision). However, DJS then determined to implement changes to the regulations through emergency procedures to permit a 1:5 ratio, and the offerors were verbally requested to submit their best and final offers using the lower ratio (1:5) because it was determined that by the time the contract was implemented on July 1, 1989, the new regulations would be in place.

6. Immediate action was not taken on the submitted offers as DJS had continuing concern about the staff-youth ratio for the shelter care program and thus directed its efforts to the promulgation of the regulations which would lower the aforementioned ratio. Ultimately DJS issued emergency regulations effective February 17, 1989. (See Agency Report, page 4).

7. When Deputy Director Jones reviewed the technical evaluation scores of both offerors on or about April 12, 1989, he concluded the evaluations were "flawed". In this respect the record reflects the following:

A I thought that in scoring the technical evaluation, technical proposals for these providers, these bidders that they had made errors. I was concerned about that, I wanted those errors corrected. As manager responsible for this, I had to ensure that staff and I can't - it is impossible for me as the Assistant Secretary or Deputy Director to evaluate every proposal myself so you have to delegate responsibility to your staff. And you know I have a responsibility to your staff. And you know I have a responsibility to ensure that they handle that delegation well. If I had picked up errors in scorings of those technical evaluations, it was my responsibility to ensure that they take very seriously their charge. And I felt it was important in that respect to have them to reevaluate or reassess their scores and review that proposal to determine their scores and whether they felt they were appropriate.

They had every option and no one instructed them in my mind, I didn't clearly to change it.

Q All right, what I wanted to ask you was, was a determination made to inform the evaluation team of where you thought they were in error?

A It was my understanding in consultation with our procurement officer which is part of his responsibility to ensure that I as program manager who shared this responsibility with him don't over step my authority. I think it would have been skewing the thinking and influencing the thinking of the evaluation team if we had said, I think that you gave them too many points here to too few points or what have you. So we were very careful to avoid any contact or any suggestions to the evaluation team that they should change their score to positively or negatively with respect to these proposals.

Q Mr. Jones, don't you think that by going back to them and telling them to rescore, you were giving them the message that you didn't like their original score?

A I can only assume that I was giving them the message that I thought there were problems with the way they had score the proposals initially.

Q How did you expect them to correct the problems if you didn't point out where the problems were or where you thought there was an error?

A The only way I can respond to that, Mr. Tjaden is that as a manager in government, it is my responsibility again not to influence the procurement process unnecessarily and unduly. Therefore, they could have as much as given Guide greater points in certain areas. So, when you talk about influence, I think we have to keep in mind that they were given this rather nebulous charge in some respects and asked to go back and look at your scores and see if you would change them in any way, shape, form or fashion. They could have changed them to the positive side as well as negatively. I had no contact with the technical evaluation team because I did not want to influence them.

8. At Mr. Jones direction the Procurement Officer met with the technical evaluation team on April 18, 1989 to instruct them to reevaluate the proposals. The technical evaluators were not told why they were asked to reevaluate the scores and were not given any financial information. They were told to change scores only if they believed upon review the scores should be changed.³ Upon the rescoring of the technical proposals, Koba received a higher score than Appellant. The difference in the rescoring of the technical proposals was enough to give Koba the overall higher score [considering the overall score on both technical and price

³The procurement officer took notes to the meeting with the evaluators which reflect the following:

PURPOSE: To go back and re-evaluate the Technical Proposal for Cheltenham Structured Shelter Site.

Members instructed to read RFP (Request For Proposal) and Technical Proposals again; get a copy of scores in past; and score again.

Also, to see page 36 of the Technical Proposal and answer the questions in their entirety and compare to score sheets.

and their old scores.

Told to return to Marcus Filson no later than Tuesday, April 25, 1989.

Members do not have to change their scores if they don't choose, but they can if they do choose.

proposals] and Koba was awarded the contract.

9. After Appellant was notified it was not to be awarded the contract, it requested a debriefing on June 6, 1989, which took place on June 27, 1989. At the debriefing Appellant was advised that the technical proposals had been rescored. Appellant filed a protest complaining about the rescoring on June 29, 1989. For several months thereafter, DJS continued to address questions raised and requests for information made by Appellant in connection with its protest (see Appellant's Comments on Agency Report, page 2).

10. The Procurement Officer denied Appellant's protest on November 9, 1989 on timeliness grounds and on the merits of finding that the rescoring of proposals was appropriate. Appellant filed an appeal with this Board on November 17, 1989.

Decision

Appellant asserts that it has filed a timely protest, and this Board agrees. The parties agreed to meet for a debriefing session on June 27, 1989, at which time Appellant asked a number of questions and made other requests for information relating to the RFP. The credible evidence submitted to this board indicates that only following the aforementioned meeting was Appellant actually made aware that a rescoring had occurred and was thus able to formulate a basis for its protest which was timely filed on June 29, 1989. See COMAR 21.10.02.03B.

Turning to the merits of Appellant's protest, this Board finds the offerors' proposals were evaluated pursuant to COMAR 21.05.03A

which states:

"A. Evaluation. The evaluation shall be based on the evaluation factors set forth in the request for proposals and developed from both the work statement and price. Technical proposals and price proposals shall be evaluated independently of each other Final evaluations, including evaluation of the recommendation of the evaluation committee, if any, shall be performed by the procurement officer and the agency head or designee."

Appellant's protest resolves around the circumstances pertaining to the rescoring of the technical aspect of their proposal. Appellant infers DJS was determined they should not be awarded the contract and therefore subverted the procurement process. This Board recognizes this was a procurement by competitive negotiation. In such procurements, contract award is made to the responsible offeror whose proposal is the most advantageous to the State taking into consideration price and other relevant evaluation factors set forth in the RFP. Since Appellant upon the initial scoring of the proposals, had the higher score (considering both price and technical scores) and the RFP indicated award would be made to the offeror with the highest overall score, Appellant understandably may have had reason to be suspicious of a possible subversion of the procurement process. However, we are not convinced that Appellant has met its burden of proof and shown that DJS has been arbitrary, capricious or had personal motives in not awarding the contract to Appellant. Appellant emphasized and brought to the Board's attention that the Deputy Director conveyed to representatives of Appellant his view that he desired to avoid working with any contractors he found difficult to deal with.

However, the Board has not seen or heard any corroborative evidence, that would assist Appellant in meeting its burden to show that this is why the rescoring was ordered the Board finds that the record reflects that the proposals of Appellant and the interested party were evaluated fairly and equally.

There is creditable evidence that the technical and financial proposals were evaluated independently of each other, and that the scoring of the technical proposals in both instances was based solely on the factors set forth in the RFP and not on any outside influences. Each of the evaluators of the technical proposals testified at the hearing, and each denied that any attempt was made to influence or otherwise interfere with their exercise of independent judgment on the rescoring. Nor does the record support the Appellant's assertion that because the Deputy Director of the Department directed the rescoring that it would have been understood that he wanted the evaluators to change their score. We note in this regard that the change in scoring of the technical proposals does not reflect a wide variance in points. In view of these aforementioned factors, and the evidence submitted, we are unable to agree with Appellant that the facts reflect that DJS failed to act in good faith or had other motives in directing the rescoring of the technical proposals. We further decline to hold as a matter of law that the General Procurement Law or COMAR (which are silent on the matter) preclude a rescoring of technical proposals.

Therefore, the Board denies Appellant's appeal.

