

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF H. GIL PEACH )  
& ASSOCIATES, LLC WITH )  
SCHAEFER SURVEY RESEARCH )  
CENTER OF THE UNIVERSITY OF )  
BALTIMORE AND THE UNIVERSITY ) Docket No. MSBCA 2431  
OF MARYLAND )  
)  
)  
Under Public Service )  
Commission RFP PSC # 09-03-04 )

November 4, 2004

Bid Protest - Timeliness – Protests based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals must be filed before bid opening or the closing date for receipt of initial proposals.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Miles H. Mitchell  
Deputy General Counsel  
Maryland Public Service  
Commission  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None  
(PA Government Services, Inc.)

OPINION BY CHAIRMAN HARRISON

This timely appeal arises from the Public Service Commission (PSC) Procurement Officer's denial of Appellant's protest concerning the award of the PSC's Contract for program evaluation of the Electric Universal Service Program pursuant to the above captioned procurement. In its protest, Appellant asserted that the selection committee (Review Team) failed to: (1) show consistency in following provisions of the Request for Proposals (RFP); (2) follow the weighing provisions of the RFP; (3) follow the "Order of Importance" set forth in the RFP; (4) fully evaluate the proposals as provided for under the RFP; (5) properly rank the proposals in the "survey and sampling" area; (6) evaluate the differences in experience as between the candidates; and (7) contact the Appellant for a "best and final offer."

The Procurement Officer denied Appellant's protest on the ground that it was untimely, as prescribed in COMAR 21.10.02.03A. In his decision, the Procurement Officer noted that

under the regulation cited above, protests concerning a solicitation impropriety apparent before bid opening or the closing date for receipt of initial proposals must be filed before the bid opening or the closing date for receipt of initial proposals.

#### Findings of Fact

1. This appeal concerns the PSC's procurement of program evaluation services associated with the Electric Universal Service Program (EUSP), a program administered by the Department of Human Resources – Office of Home Energy Programs (DHR/OHEP) under policy oversight by the PSC. The EUSP is intended to assist low-income electric customers in meeting their electric needs through bill assistance payments, arrearage retirement assistance and weatherization assistance.
2. The above captioned RFP for EUSP evaluation services was issued on April 14, 2004. The evaluation services solicited under the RFP sought contractor services to examine all facets of the program to determine whether the statutory purposes and approved goals as set out in the program's enabling legislation and relevant PSC order were being met.
3. The objectives of the evaluation are: to identify areas for program improvements; to document the impacts from program operations; and to provide the PSC and DHR/OHEP the data and assessments needed to perform oversight and administration. The minimum prescribed evaluation components include: an impact evaluation; a low-income residential customer survey; and a process evaluation.
4. The PSC received eight offers (technical and price proposals) in response to this solicitation. The proposals were evaluated by the Electric Universal Service Program Evaluation Review Team (Review Team) consisting of a utility customer relations manager (Allegheny Power), the EUSP's chief administrative officer (the Director of DHR/OHEP), an attorney for the PSC's Technical Staff (Assistant Staff Counsel), and a PSC economist who serves as the Review Team Coordinator (Senior Regulatory Economist). The RFP provided for evaluation of six criteria in "descending order of importance."
5. On June 10, 2004, after reviewing and evaluating the eight proposals, the Review Team notified the Procurement Officer of its determination — selecting PA Government Services, Inc. (PA-GSI) as the successful vendor to conduct the EUSP evaluation. In notifying the Procurement Officer of its determination, the Review Team listed the responding technical proposals in descending order from highest technical score to lowest. Appellant was ranked first, and PA-GSI was ranked second. Regarding the price proposals, Appellant's price was approximately \$5,600 more than that of PA-GSI.
6. In support of its selection of PA-GSI, the Review Team noted that all technical proposals were ranked independently. Technical proposal ranking was based on the company's ability to fulfill Part III — Qualifications and Part IV — Scope of Work of the RFP. The Review Team noted that "[t]he reviewing body gave greater weight to the technical proposal, as stated in the RFP."
7. On June 15, 2004, the Procurement Officer sent letters to all offerors notifying them of the selection of PA-GSI as the successful offeror and providing all offerors the opportunity for debriefing pursuant to COMAR 21.05.03.06. Appellant responded by letter dated June 19, 2004 requesting a debriefing, which was held on June 28, 2004. The Board finds, based on the written record, that all grounds of Appellant's protest were

- known or should have been known upon the conclusion of the debriefing on June 28, 2004.
8. On July 15, 2004, Appellant submitted a protest, citing COMAR 21.10.02.01, concerning the PSC's award of the above captioned Contract.
  9. On August 10, 2004, the PSC's Procurement Officer denied Appellant's protest as untimely and as lacking substantive merit.
  10. Appellant appealed to this Board on August 20, 2004. Appellant did file comment on the Agency Report. However, no party requested a hearing, and thus the appeal is decided on the written record.

### Decision

COMAR 21.10.02.03A provides that — “[a] protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals.” COMAR 21.10.02.03B provides that — “[i]n cases other than those cover 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.”

In denying Appellant's protest, the PSC Procurement Officer noted that although each ground of Appellant's protest purports to assert a failure on the part of the evaluation committee (Review Team) with respect to proper evaluation under the terms of the RFP, the substance of the protest goes to the format of the RFP itself. The essence of Appellant's protest is that because the RFP provided broad latitude and flexibility to the Review Team for purposes of evaluating and selecting the successful offeror, a quantitative numerical rating system rather than an order of importance rating system should have been applied to determine the outcome of the evaluation process.<sup>1</sup> However, the descending order of importance rating system is apparent from a review of the RFP itself. Also apparent from a review of the RFP is that award could be made on the basis of the combination of the originally submitted technical and price proposals without further discussions or revisions; i.e., there was no requirement in the RFP to contact offerors for a best and final offer.<sup>2</sup> Having failed to raise objections to the content of the RFP before the closing date for receipt of initial proposals, Appellant's protest of such content afterward was untimely and was properly dismissed. Harford Alarm Company, MSBCA 2371, 6 MSBCA ¶559 (2003).

With respect to matter not apparent from a review of the RFP itself, a bidder or offeror must be guided by the provisions of COMAR 21.10.02.03B. The Board has held that when a bidder or offeror is on actual or constructive notice of facts that might constitute grounds for protest the bidder or offeror, pursuant to COMAR 21.10.02.03B, must protest within seven days after the date of receiving notice of those facts. Juice Co., Inc., MSBCA 2387 (Feb. 13, 2004). Moreover, as the Board noted in that case, “[w]hen the facts would be apparent from a review of documents available for public inspection, the seven-day period under COMAR 21.10.02.03B begins to run from the date the document is available for review, not from the date the bidder

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<sup>1</sup> Appellant makes this numerical versus order of importance argument, notwithstanding that COMAR 21.05.3.03A(4) provides that “[n]umerical rating systems may be used but are not required” for purposes of evaluation.

<sup>2</sup> To the extent that Appellant's protest concerning lack of best and final offer is based on what it learned at the debriefing (that it was ranked first on technical and had a price that was approximately \$6,000.00 higher than PA-GSI) such protest as discussed below was required to be filed seven days after the debriefing.

actually reviews the document.” *Citing Utz Quality Foods, Inc. and Coca-Cola Enterprises, Inc.*, MSBCA 2060 and 2062, 5 MSBCA ¶441 (1998). *See also Chesapeake System Solutions, Inc.*, MSBCA 2308, 5 MSBCA ¶525 (2002) at pp. 3–4.

Following the Appellant’s debriefing on June 28, 2004 all other grounds of protest not apparent from a review of the RFP itself that recite alleged improper evaluation by the Review Team would or should have been known by Appellant.<sup>3</sup> Appellant did not file its protest, however, until July 15, 2004, more than seven days after its debriefing on June 28, 2004, when it knew or should have known of all grounds of protest not raised by the content of the RFP itself. Accordingly, the Board lacks jurisdiction to consider any grounds of the Appellant’s protest, and its appeal must be dismissed.

Accordingly, it is Ordered this 4<sup>th</sup> day of November, 2004 that the appeal is dismissed with prejudice.

Dated: November 4, 2004

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Robert B. Harrison III  
Chairman

I Concur:

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Michael W. Burns  
Board Member

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Michael J. Collins  
Board Member

<sup>3</sup> Appellant contends in its comment on the Agency Report that its agent at the debriefing who viewed the PA-GSI proposal requested a copy of it but was asked to wait until the proposal was put on Respondent’s website. The proposal was put on Respondent’s website on Monday, July 5, 2004. The protest was not filed until July 15, 2004, more than seven days after any grounds based on the PA-GSI proposal should have been known, whether counted from the debriefing on June 28, 2004, as determined by the Board, or the posting on Respondent’s website, as argued by Appellant. The Board rejects Appellant’s contention that the protest was received by the Procurement Officer on Tuesday, July 13, 2004 rather than Thursday, July 15, 2004. But even if it was received on Tuesday, July 13, 2004, the protest was still not timely, whether counted from the debriefing date or the date of the posting on Respondent’s website.

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 2431, appeal of H. Gil Peach & Associates, LLC with Schaefer Survey Research Center of the University of Baltimore and the University of Maryland under Public Service Commission RFP PSC # 09-03-04.

Dated: November 4, 20004

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Michael L. Carnahan  
Deputy Recorder

