

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF HARFORD ALARM)
COMPANY)
) Docket No. MSBCA 2371
)
Under University of Baltimore)
RFP No. UB003476)

November 18, 2003

Bid protest - Timeliness - Protests based upon alleged improprieties which are apparent before the closing date for receipt of proposals are untimely unless filed before the closing date for receipt of proposals.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: David P. Chaisson
Assistant Attorney General
Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from an agency final decision which denied its protest regarding the University of Baltimore (University) solicitation for an Access Control System for the University of Baltimore Campus. After reviewing the technical proposals submitted by all offerors, the Evaluation Committee found that the proposal submitted by Appellant did not satisfy certain solicitation requirements, and thus Appellant was not among those offering firms in the competitive range. Therefore, Appellant was not included in the short list of firms for further evaluation. This determination is the subject of Appellant's protest and appeal.

Findings of Fact

1. On May 22, 2003, the University issued the above referenced Request for Proposals (RFP) for an Access Control System (ACS) to enhance the safety and security on and around the University's campus. More specifically, the RFP solicited "... proposals to install and maintain new access control, alarm monitoring/intrusion detection, digital video surveillance, and identification card/badging SYSTEM, including ALL associated equipment and appurtenances (i.e. software, hardware, PC's, laptop, PDA's, monitors, cameras/mountings, DVR's, card readers, card stock, controllers, printers, switches/contacts, panels, server and back-up server, etc.) for University properties."
2. There were two amendments to the RFP which provided further clarification of the RFP specifications in response to questions from potential offerors. In addition to providing

- clarification, Amendment Number 1 extended the time for submission of proposals to July 2, 2003 and revised the deadline for questions regarding the RFP to June 27, 2003.
3. The RFP called upon offerors to perform the Contract in two parts. Part 1 called on contractors to design the System and incorporate University review and suggestions. Part 2 of the RFP required the successful offeror, after the University issued Notice to Proceed, to build out and implement the design.
 4. Offerors were required to submit both technical and financial proposals for consideration by a University Evaluation Committee.
 5. Pertinent to this appeal are the following provisions of the RFP:

2.7 SYSTEM DESCRIPTION

Provide new access control, alarm monitoring/intrusion detection, digital video surveillance, and identification card/badging SYSTEM, including ALL associated equipment and appurtenances (i.e. software, hardware, PC's, laptop, PDA's, monitors, cameras/mountings, DVR's, card readers, card stock, controllers, printers, switches/contacts, panels, server and back-up server, etc.). SYSTEM shall include all system wires, raceways, system component installation, component testing, and system checkout. SYSTEM shall be complete and ready for operation.

The SYSTEM shall provide a single seamlessly integrated relational database for all functionality. The SYSTEM shall absolutely not be proprietary and any equipment associated with the SYSTEM should be attainable from several manufacturers or sources. The SYSTEM should be comprised of the following modules:

2.7.1 Access Control: the ability to regulate access control, both on-line and off-line, at specific doors (the programming of off-line/stand alone or hard wired/on-line access control points should use the same software package. The "look and feel" of operating or programming either hardwired or stand alone access points should be the same.)

2.7.2 Alarm Monitoring: at identified locations (both intrusion and duress);

2.7.3 Cameras: record and store digital video activities (cameras, DVR's) occurring at the university at identified locations;

2.7.4 Identification of Badging capability.

This integration shall also provide complete functionality and bi-directional data exchange with Third Party Interfaces, specifically,

but not exclusively, PeopleSoft software, personal safety alarm systems so identified, a records & reporting system, and fire alarm pick-up points. This integration should be provided with fully multi-tasking, multi-threading Microsoft Windows 2000 Operating System.

The RFP Evaluation Criteria states:

The Criteria that will be used by the committee for the technical evaluation of proposals for this procurement are listed below in descending order of relative importance:

3.3.1 Compliance with all requirements, criteria and specifications.

Functionality of modules:

Access Control: the ability to regulate access control, both on-line and off-line, at specific doors (the programming of off-line/stand alone or hard wired/on-line access control points should use the same software package. The "look and feel" of operating or programming either hardwired or stand alone access points should be the same.)

Additionally, the specifications provide (at Section 2.6) that certain mandatory ACS requirements must be provided by the ACS proposed by offerors. Such mandatory requirements are identified by the words **must, shall or will.**

6. Ten firms submitted proposals for the University's consideration. The University's Evaluation Committee reviewed all technical proposals and found that five of the proposals, including that submitted by Appellant, were unacceptable. Appellant was advised by letter dated July 23, 2003 that it had not been selected for the short list for further evaluation.
7. On July 31, 2003, Mr. Tony Lambros of Appellant called Blair Blankinship, Director of Procurement and Materials Management for the University and the Procurement Officer herein, to discuss the determination rejecting Appellant's proposal. During that telephone conversation, the strengths and weaknesses of Appellant's proposal were discussed, and Appellant was advised of the reasons why the University concluded that its proposal did not meet the specifications of the RFP.
8. Based on the Procurement Officer's final decision, the two key factors in finding the proposal unacceptable were:
 1. Appellant's proposal did not include the server hardware as required by the RFP; and

2. Appellant's proposal provided for the use of two separate software systems (one to control on-line locks and one to control off-line locks) while the RFP allegedly required that on-line and off-line access control points should use the same software package.
9. Additionally, the Evaluation Committee concluded that Appellant did not provide a turnkey system as required. By letter dated July 31, 2003, Appellant filed a protest of the July 23, 2003 decision asserting that the rejection of its proposal was improper because its proposal, in fact, met the server requirements of the RFP and should have been acceptable regarding the software system proposed. Additionally, Appellant challenged the RFP on proprietary grounds and asserted that its proposal met all RFP requirements including the requirement for a turnkey system.
10. After considering the stated bases of the protest, the Procurement Officer agreed with the determination of the Evaluation Committee that Appellant's proposal did not meet the specifications set forth in the RFP and was, therefore, unacceptable. The Procurement Officer also rejected Appellant's argument that the RFP was proprietary. Accordingly, the Procurement Officer denied the protest on the merits in a final decision dated September 11, 2003.
11. Appellant received the decision on September 12, 2003 and appealed to this Board on September 22, 2003.
12. Appellant did not comment on the Agency Report, and neither party requested a hearing.

Decision

We shall first consider Appellant's challenge to the RFP on proprietary grounds. The University's Procurement Policies and Procedures (UPPP) require that a protest based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals shall be filed before the closing date and time for receipt of initial proposals. UPPP, Section X(B)(3). One of the alleged bases for Appellant's protest is that the RFP is exclusive, proprietary and misleading due to a clarification in Amendment Number 1. Specifically, Appellant alleges in its protest that:

Relative to your selections of possible awardees, you mentioned Amag/Linel products are under consideration. Section 2.7 of the bid states, "The system shall absolutely not be proprietary." Amendment number one, answer 7, states a contradictory reply, in that, one value added reseller (?) And the factory are acceptable. Therefore, the RFP is exclusive, proprietary, and misleading. If an Amag or Linel vendor is to be one of the awarded firms, there exists proprietary supplier/dealer agreements between the selected vendor and the factory. We can not obtain either product due to these restrictive proprietary agreements. University of Baltimore will absolutely embed a proprietary product and single source vendor to the campus, if this remains your course of action.

However, this concern was not raised by Appellant prior to submitting its proposal. The original deadline for questions related to the RFP was June 13, 2003, and the deadline for submission of proposals was June 19, 2003. Due to the number of questions submitted by offerors and the number of clarifications needed from the University, the University issued Amendments Number 1 and 2, which included all questions and answers clarifying the RFP and which extended the deadline for questions to June 27, 2003 and the deadline for submission of proposals to July 2, 2003. After both amendments were issued, Appellant did not submit any questions or file a protest with the University before the revised date for submission of proposals. To the extent that Appellant now asserts that Amendment Number 1 rendered the RFP proprietary, that alleged impropriety was apparent at the time Amendment Number 1 was issued which was before the revised date for submission of proposals. Thus, this complaint, if valid at all, related to the solicitation and was apparent to Appellant before the deadline for submission of proposals. As a practical matter, protests relating to the terms of a solicitation must be filed on or before the date that bids or proposals are due to afford the contracting agency an opportunity to consider the protest while corrective action, if warranted, is still possible. See Gordon R.A. Fishman, Comp. Gen. Dec. B-257634, 94-2 CPD ¶133 (1994). Appellant failed to assert the alleged proprietary specification prior to the deadline for submitting proposals. Thus, the instant protest is untimely.

The Board has held that where the grounds for a protest are apparent prior to bid opening or the date for receipt of proposals, a protest filed after bids are opened or proposals are due is untimely and is not entitled to further consideration. See International Business Machines Corp., MSBCA 1071, 1 MSBCA ¶22 (1982) (protest filed two months after bid opening required dismissal); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983) (timeliness requirements of COMAR 21.10.02.03A are "strictly construed"); B&M Supermarket, MSBCA 1758, 4 MSBCA ¶341 (1993) at p. 4 (failure to challenge an allegedly improper RFP binds the offeror to the terms of the solicitation).

In the instant case, Appellant did not challenge the propriety of the RFP specifications prior to the July 2, 2003 deadline for submission of proposals. The record reflects that the first time Appellant advised the University of any complaint relating to the requirements of the RFP was in its letter of protest after its proposal had already been rejected. Matters related to any alleged improprieties in the solicitation are matters that must be raised prior to the time for submission of proposals and will not now be considered by the Board.

However, even if the protest on proprietary grounds was timely, we would find that the RFP is not proprietary as alleged by Appellant. The RFP does not request any system by brand name, part number or other reference. The clarifications offered in RFP Amendments Number 1 and 2 further emphasize the requirement that the system be "open" and not be proprietary. Specifically, Amendment Number 1 makes it clear that the University would accept products that are available for purchase by the University from two or more Value Added Resellers or one Value Added Reseller and the Manufacturer. This stipulation is intended to prevent the University from having a sole source supplier (a system that can only be supplied by a single source). Thus, the RFP is not proprietary as alleged.

However, the real issue in this appeal is not whether the RFP may have been proprietary but whether the Appellant's proposal was properly disqualified for failing to meet the requirements set forth in the RFP. The two key reasons for disqualification were noted by the University.

One of the two key reasons Appellant's proposal was rejected was that it failed to comply with the University's preference that both on-line and off-line controls operate utilizing the same software.

As noted above, the RFP in dealing with access control provided:

Access Control: the ability to regulate access control, both on-line and off-line, at specific doors (the programming of off-line/stand alone or hard wired/on-line access control points should use the same software package. The "look and feel" of operating or programming either hardwired or stand alone access points should be the same.)

We are advised in the Agency Report and in the Procurement Officer's decision that having both on-line and off-line controls utilize one software system is an important feature of the ACS for the University. Specifically, we are told that one software system would be easier to learn, would require lower maintenance, would require fewer updates, and would enable the University to capture data (i.e. authorized users, University employees, and building and room locations) once in a common database for access by controllers for on-line and off-line locks.

While use of one software system is clearly of importance to the University it was not made mandatory by use of the words must, shall or will. *See* Finding of Fact No. 5. Nevertheless, Appellant's proposed ACS does not meet the University's preference for one software system. Indeed, Appellant contends that it is not possible for one software system to operate both on-line and off-line locks. In its July 31, 2003 protest, Appellant states, "Off line readers do not use the online software. How does any offeror comply with the single software issue?" However, Appellant offers no basis to support this contention. It is asserted in the Agency Report that proposals from other offerors proposed systems that utilize one software system for both on-line and off-line controls. It is further asserted that the University conducted market research prior to issuing the RFP, which led it to believe that such a system is feasible. Appellant did not comment on the Agency Report, and no hearing was requested. As such, there is no challenge to the State's assertions.

We turn now to the second key reason for rejection of Appellant's proposal which was Appellant's alleged failure to identify server hardware in its proposal.

Appellant's proposal is asserted to be vague in its response to the requirement that the ACS include server hardware.¹ The RFP required all offerors to submit technical proposals that would describe the ACS to be provided, including equipment, and that would describe how the ACS would meet the University's needs.

Section 2.15 of Appellant's proposal addressed the ACS description, and Section 2.26 provided a schedule of the components included in its proposal. However, Appellant's proposal failed to specifically identify server components to be provided under its technical proposal. After reviewing Appellant's proposal, the Evaluation Committee concluded that Appellant's proposal did not include the required server hardware. To the extent that Appellant contends that a server is included with the badging system, it concedes in its July 31, 2003 protest that the server, as well as other details in the specification, was not specifically listed in its proposal.

Appellant's proposal was also rejected by the University because allegedly it did not provide a turnkey system. We find that Appellant's proposal does not provide a turnkey system as required by the RFP. The University's RFP called for proposals to design and install a complete or turnkey Access Control System for the University campus.² Appellant's proposal falls short of this requirements and would, if accepted, require the University to provide equipment, software and/or coordination to the ACS. By its own admission, Appellant's proposal falls short of meeting the University's needs stated in the RFP. Appellant concedes in Section 4.41 of its Executive/Management Summary that its proposed ACS meets only 95% of the University's needs as stated in the RFP.

The University's RFP clearly advises that the ACS may require its own back-up or "UPS" protection. In Section 2.15 of its proposal, Appellant points out that the "hot server" back-up feature sought in the RFP is not provided for. Rather, Appellant states that:

[t]he "hot server" back up feature is possible but requires software agreeable between UB servers and your MIS department. While this is able to be performed, it is not a direct function of the Keyscan system, but is relational to a server to server function that must be tested and approved by your IT personnel. System V Software can reside on any server.

The ACS as proposed by Appellant is not a complete or turnkey system. Appellant's proposal would require that the University furnish or configure systems, including the "hot backup" components. The Evaluation Committee properly found that Appellant's proposal failed to satisfy the requirements of the RFP. As such, rejection of the proposal by the Procurement Officer was appropriate.

¹The provision of server hardware, as is the case with the single versus separate software issue, does not appear to be a mandatory requirement. See Section 2.7, Finding of Fact No. 5, *supra*.

²"SYSTEM shall be complete and ready for operation. ... The SYSTEM shall provide a seamlessly integrated relational database for all functionality." RFP Section 2.7, *supra*.

Based on the above, we find that the Procurement Officer's decision rejecting Appellant's protest was proper. We recognize that the Procurement Officer was of the opinion that the provisions regarding the use of single software for on-line and off-line controls established a mandatory requirement. However, as noted above, these provisions were not made mandatory by use of the words must, shall or will. It is also clear that offerors should have appreciated the importance to the University of this issue. Based on this record, even if this issue is viewed as a discretionary item rather than a mandatory requirement, we will not remand the matter for a further determination of this issue by the University. Thus the appeal is denied. Wherefore it is Ordered this 18th day of November, 2003 that the appeal is denied.

Dated: November 18, 2003

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

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:

- (a) the date of the order or action of which review is sought;
- (b) 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
- (c) 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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2371, appeal of Harford Alarm Company under University of Baltimore RFP No. UB003476.

Dated: November 18, 2003

Michael L. Carnahan
Deputy Recorder

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