BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HOMECOMING, INC.	)	
	)	
Under DHMH Solicitation	)	Docket No. MSBCA 1647
No. DHMH PS 92-275	)	
	)	

August 27, 1992

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.

Evaluator Bias - Bias will not be attributed to procurement officials based on inference and supposition.

APPEARANCES FOR APPELLANT: Patrick P. Spicer, Esq.
Norman, Spicer, Moore,
Stevenson & Haskins, P.A.
Bel Air, MD

APPEARANCES FOR RESPONDENT: Dawna M. Cobb
Sharon Krevor-Weisbaum
Assistant Attorneys General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the captioned solicitation was for varying alleged reasons conducted in violation of the General Procurement Law and COMAR Title 21 and that the agency [The Mental Hygiene Administration (MHA) of the Department of Health and Mental Hygiene (DHMH)] improperly failed to respond to the protest in an expeditious fashion. In the protest Appellant also alleges the procurement was tainted by racial animus, bias and prejudice.

Findings of Fact

1. In 1985, Appellant entered into a contract with the Harford County Department of Health (HCHD) to provide community based mental health residential services. Appellant was operating under this contract at the time of the hearing of this appeal.
2. As part of its on-going relationship with Harford County, MHA employs regional coordinators who monitor the residential provider grantees of each county, including Appellant.
3. On December 10, 1990, pursuant to the terms of the contract HCHD notified Appellant that it intended to terminate the contract for cause and re-solicit the services.

4. As a result of such decision HCHD issued a Request for Proposal ("RFP") for residential rehabilitation services on March 14, 1991.

5. By April 15, 1991, three vendors, including Appellant, had submitted a proposal in response to the HCHD RFP. However, on April 22, 1991, Appellant contested the legality of the HCHD RFP.

6. On May 17, 1991, the HCHD notified Appellant that the HCHD RFP would be terminated and a State procurement process initiated. HCHD requested that Appellant continue to serve clients for at least three additional months.

7. On July 19, 1991, the State procurement was initiated beginning with a notice published in the Maryland Register soliciting bids for a residential program for mentally ill adults in Harford County.

8. On July 19, 1991, the State RFP at issue, herein, was mailed to Appellant and eight other prospective offerors.

9. On July 25, 1991, a pre-bid conference concerning this RFP was held in the DHMH headquarters building. The acting Executive Director of Appellant was in attendance at this conference. Among the issues discussed was that only offerors whose technical proposals were determined eligible would have their financial proposals considered.

10. By August 13, 1991, three vendors including Appellant had submitted proposals in response to the RFP. Technical proposals were opened and scored by a four person evaluation team. Financial proposals would only be opened and evaluated for offerors who scored a minimum average of 70 points on evaluation of their technical proposal.

11. On August 26, 1991, MHA notified Appellant that its proposal had not been accepted because its technical proposal did not meet the minimum (average of 70 points) scoring requirement.

12. On August 30, 1991, Appellant filed a timely protest which it supplemented on September 6, 1991.

13. On April 21, 1992, the DHMH Procurement Officer denied Appellant's protest.

14. On May 4, 1992, Appellant filed an appeal with this Board. Funding for Appellant's activities under its 1985 contract with HCHD has continued uninterrupted. Pursuant to COMAR 21.10.02.11 no award for this solicitation was to be made pending resolution of this appeal by this Board.

15. Appellant's appeal provides in relevant part as follows:

A. The RFP is illegal and invalid because it fails to contain certain language required by the applicable regulations including, but not limited to the following:

(1) Failure to explain certain aspects of the rights of minority business enterprises with respect to the procurement.

(2) Failure to contain notice to prospective bidders to forward a copy of the bidders' proposal to the local health officer.

(3) Failure on the part of the State Department of Health and Mental Hygiene (DHMH) Mental Hygiene Administration (MHA) to notify the local health officer of the RFP pursuant to Section 2040 of the DHMH grants manual.

B. The award of the RFP to Alliance, Inc. violates the federal and state constitution, federal and state law and regulations inasmuch as the award was the result of racial animus. Our client is qualified or potentially qualified as a minority business enterprise having more than fifty percent of its membership and/or board of directors consisting of minorities.

C. That the award of the RFP to Alliance, Inc. is in violation of the public policy and intent of the State of Maryland and, more particularly, the policy intent of the law and regulations pertaining to delivery of services of mentally ill persons in the State of Maryland inasmuch as awarding the RFP in question to Alliance, Inc. will result in interruption of services and potential malad-

justment on the part of the clients of Homecoming.

D. The award of the RFP to Alliance, Inc. was arbitrary, capricious, punitive, fraudulent and/or corrupt inasmuch as, inter alia.

(1) The history of the relationship between Homecoming and MHA and the local health department including written and/or oral statements made by representatives of the aforementioned agencies to Homecoming would not allow Homecoming a fair and equal opportunity to compete with other bidding agencies relative to the RFP above referenced.

(2) Homecoming's financial proposal was not considered inasmuch as the bid selection committee rated Homecoming's technical proposal to fail to meet minimum standards. Said action prohibited Homecoming from demonstrating that its bid was financially more favorable to the State inasmuch as Homecoming's program is currently in existence and needs little or no start up funds relative to other bidders.

(3) That members of Homecoming and/or its employees had been advised by certain persons that Alliance, Inc. was already awarded the bid although the bidding procedure was not complete.

(4) That in early 1991 Alliance, Inc. received funds for Level V beds previously earmarked for Homecoming, reflecting that Alliance, Inc. was already favored by MHA.

(5) That the bidding process was not competitive and was essentially perfunctory in light of MHA's specific intent to penalize and retaliate against Homecoming for contesting the attempt on the part of MHA to terminate Homecoming's program on a 90 day for cause basis which said attempt occurred in or about December, 1990.

(6) That the attempt on the part of MHA to defund Homecoming for cause was an effort on the part of MHA to punish and/or retaliate against Homecoming for performing its lawful business in hiring and firing employees, which said right inures to the benefit of Homecoming as a private, not-for-profit corporation.

(7) That MHA's issuance of the RFP in question during a period other than the normal period during which

RFP's are issued, which said action was a result of an aborted RFP in March of 1991, reflects that MHA merely used the bidding process as a pretext to eliminate Homecoming as recipient of State funds.

(8) That Alliance, Inc. was advised that it had been awarded the bid or would be awarded the bid even after the RFP issued in March of 1991 was aborted (the March, 1991 RFP having been aborted as a result of various objections and complaints raised by Homecoming to the March, 1991 RFP).

(9) That Homecoming was advised in December, 1990 by MHA and the local health department that it could not expend funds for attorneys fees reflecting an intend on MHA's part to constrain Homecoming from contesting the termination attempts on the part of MHA and pursuing its available legal remedies relative to same.

(10) That the bid of Alliance was legally improper and/or judged in a non-competitive fashion.

E. The award of the RFP to Alliance, Inc. resulted from an illegal RFP inasmuch as the RFP was issued during an ongoing fiscal year without authorization by law or regulation.

F. That the members of the bid selection committee operated in an arbitrary, capricious, and biased fashion as against Homecoming in evaluating Homecoming's technical proposal relative to other bidders.

G. That the denial of the bid protest by the agency was arbitrary, capricious and illegal inasmuch as the responses provided by the agency in its decision relative to Homecoming's bid protest were without basis in law and/or in fact. See, for example, the response of the agency to ground number 1 B and C; ground 4 A, C, E, F and I. The responses provided by the agency in connection with the grounds for appeal specifically noted above, as well as in connection with other grounds, constitute expressions of opinion and/or illegal conclusions drawn by the agency.

H. That the agency failed to respond to the protest filed by Homecoming in an expeditious fashion and, therefore, violated applicable State law and regulation inasmuch as the bid protest was filed on or about August 30, 1991 and no decision was rendered by the agency until on or about April 24, 1992, the date when Homecoming received the agency's decision.

I. That Homecoming was prejudiced as a result of the failure of the agency to respond to Homecoming's, protest as above described.

J. That Homecoming states that no award of the contract at issue can be made pending a resolution of the above noted appeal in accordance with the directives set forth in Section 21.10.02.11 of COMAR and other applicable law and regulation.

K. That the denial of the bid protest by the agency was arbitrary, capricious and illegal inasmuch as, inter alia, Homecoming was never allowed a fair opportunity to compete for the award of the RFP because, inter alia, the agency had predetermined that Homecoming would not be awarded the RFP.

L. That the denial of the bid protest and other action taken by the agency was arbitrary, capricious and/or illegal inasmuch as, inter alia, Homecoming was a sole source non-competitive grantee and subsequently was determined to fail to quality technically to be awarded the RFP at issue despite having received good ratings for its program and services several years preceding the issuance of the RFP at issue in this appeal. Further, no similar program has been treated as Homecoming despite being similarly situated.

16. Appellant did not file written comment on the Agency Report.

17. At the hearing of the appeal, following presentation of Appellant's case and a motion for summary disposition by DHMH, Appellant voluntarily dismissed grounds B (racial animus or

racial bias), J (no contract award can be made pending appeal) and A (1) (failure to explain certain aspects of the rights of minority business enterprises with respect to the procurement).

18. Pursuant to the State's motion for summary disposition made following the presentation of Appellant's case, the Board for the reasons set forth below dismissed the remaining grounds of the protest and appeal; some on legal grounds and some on factual grounds viewing the evidence of record in a light most favorable to Appellant.

Decision

We shall discuss in the order set forth above the various grounds of the protest and appeal and the disposition thereof by the granting of summary disposition or voluntary dismissal.

A. Appellant contends that the RFP is illegal and invalid because it failed to contain the following:

(1) ...rights of minority business enterprises
(2) ...notice to forward a copy of the bidders' proposal to the local health officer
(3) ...notification to the local health officer of the RFP.

A(1). While Appellant voluntarily dismissed A(1) we believe further discussion is warranted.

Under COMAR Title 21 (21.05.08) there are only 2 mandatory written solicitation requirements concerning MBE's.

COMAR 21.05.08.03 requires the mandatory statement that, "Minority business enterprises are enccuraged to respond to this solicitation."

This notice is contained on the title page of the RFP and is repeated in Part III, Section H Contract Requirements, Item #4 on Page 9 of the RFP.

21.05.08.04 states that, "An MBE subcontract participation goal is a mandatory provision for each solicitation for contracts that will provide MBE subcontract opportunities...."

A decision was made by the DHMH that this procurement did not

readily provide subcontracting opportunities. Therefore, by intent, no MBE subcontracting requirement was specified. Accordingly, this clause does not apply to the procurement at issue.

Because the two MBE written notice requirements of COMAR Title 21 were met or were not applicable, Appellant's allegation is without merit.

A(2). Appellant asserts failure to notify bidders to forward a copy of their proposal to the local health officer pursuant to 2040 of the DHMH grants manual constitutes a fatal flaw in the procurement process.

HCHD was involved in all aspects of this solicitation. An HCHD official was appointed to the evaluation committee by the Harford County Health Officer. Accordingly, it was unnecessary to have offerors submit proposals directly to the local health officer.

In November 1989 the DHMH Procurement Officer directed that local health officers not receive proposals directly from offerors but rather through the procuring office. This change was intended to preserve the confidentiality and integrity of the procurement process and was applicable to the solicitation at issue.

Under COMAR 21.10.02.03 (A) Appellant was required to protest this contention prior to the time and date for submission of proposals. Thus, its protest was untimely. See Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶ 49(1983); Neoplan USA Corporation, MSBCA 1186 and 1202, 1 MSBCA ¶ 84 (1984).

A(3). Contrary to Appellant's allegation, the local health officer was informed of the RFP as required by the DHMH grants manual as is evident by his appointment of a representative to serve on the RFP evaluation committee. For the reasons discussed in A(2) above, the protest was also untimely. The motion to dismiss Appellant's appeal on the above grounds was therefore granted and the appeal on such grounds is denied.

B. Appellant next contends that the proposed award to Alliance, Inc., was the result of racial animus, prejudice or bias.

This ground of appeal was voluntary dismissed by Appellant at the hearing of the appeal and will not be discussed further.

C. Appellant next asserts that an award to Alliance, Inc. violates public policy and intent by resulting in the interruption of service to the clients of Appellant.

Pursuant to COMAR 21.14.01.06 C (1) (b), a sole source multi-year contract with an incumbent provider of services is permissible if a licensed or certified health practitioner (who may not be employed by a DHMH provider) makes a written clinical assessment that a change in provider would have a detrimental impact on an individual third party client's health, welfare, or progress. Under COMAR 21.14.01.06 C (1) (a) a sole source multi-year contract can also be awarded if the circumstances described in COMAR 21.05.05.02 (a) apply. In this case neither circumstance existed. No such clinical assessment has been done as required by 21.14.01.06 C (1) (b), and, in fact, the MHA, pursuant to its discretionary authority, determined that no reason existed for such a continuation. Further, the requirements of 21.05.05.02 are not met since there is more than one source to provide these services. Therefore, since neither of these circumstances exists, COMAR 21.14.01.03 A directs that Competitive Sealed Proposals is the preferred method for procuring human, social, cultural, and educational services.

The use of the preferred procurement method, herein, does not violate public policy or intent and the appeal on such alleged grounds is denied.

D. Appellant next alleges that the awarding of a contract to Alliance, Inc., was arbitrary, capricious, punitive, fraudulent and corrupt. As set forth in Finding of Fact No. 15, Appellant alleges ten separate reasons for this conclusion. We shall address each in order.

D(1) The Appellant has failed to meet its burden of proof, to show how, due to its prior history with the State, it could not obtain fair and equal opportunity to compete with other bidding agencies. The Appellant's assertion of unfairness here is based

upon alleged evaluator bias. One of the evaluators, Mr. Stan Kotula, as Director of Mental Health and Addictions for HCHD, sent Appellant the letter notifying it of its termination on December 10, 1990. Mr. Kotula, on behalf of HCHD, was also involved in a dispute with Appellant over whether it owed $20,000 to HCHD. Another evaluator and the Howard County health officer had knowledge of these facts. Appellant claims that such actions by Mr. Kotula and knowledge thereof constituted evaluator bias. Appellant did not call any of the evaluators to testify. Bias will not be attributed to procurement officials based on inference or supposition. Transit Casualty Company, MSBCA 1260, 2 MSBCA ¶ 119 (1985).

Two of the four members of the evaluation committee had little or no knowledge of the prior history and relationship between Appellant and the MHA and therefore should not have been influenced. These two evaluators gave technical scores of 38 and 53, whereas the two members with prior knowledge gave scores of 44 and 48. This relatively tight grouping of scores, plus the fact that the lowest score was given by an evaluator without prior knowledge, undercuts Appellant's allegation of bias.

D(2). Contrary to Appellant's assertion, the evaluation committee was correct in not opening Appellant's financial proposal. Both Part II, section F, item 6 on page 5 of the RFP and Part VII, section B2 on page 23 of the RFP provided notice that financial proposals would only be opened for those offerors which attained an average of at least 70 points on their technical rating, which Appellant did not. This issue was specifically discussed at the pre-bid conference at which Appellant's acting executive director was in attendance.

If this provision of the solicitation was unacceptable to Appellant, it was incumbent upon Appellant to have filed a protest prior to the time and date for receipt of proposals. See COMAR 21.10.02.03 A; Neoplan USA Corporation, supra. We do not find that the language of COMAR 21.05.03.03 that "[T]he evaluation shall be... developed from both the work statement and price" requires

that price proposals must be opened and evaluated in the face of a deficient technical proposal.

D(3) Appellant has offered no proof that MHA officials made any statements concerning the award of the RFP, prior to the completion of the bidding process. The Respondent contends that no such statements were ever made and the Board so finds.

D(4) Alliance, Inc. did not receive any level V beds which might otherwise have been awarded to Appellant. Therefore, this allegation is factually incorrect. In fact, Prologue, Inc., another MHA provider received this award.

D(5) Appellant re-asserts evaluation bias in this ground of appeal. No evidence has been presented that there was an intent to penalize and retaliate against Appellant. Nothing in the record substantiates that bias existed on the part of the committee evaluators or agency personnel involved in the procurement. As this Board has previously noted:

"Selection of an evaluation panel is a matter falling primarily within the discretion of the procuring agency and will not be questioned absent evidence of actual bias. 'A protestor alleging bad faith on the part of government officials bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with a specific and malicious intend to injure the protestor.' Furthermore, even if the protestor demonstrates actual bias in the selection of the evaluators, the panel's decision will be upheld unless such bias is clearly shown to have permeated the decision." Calsc Communications, Inc., MSBCA 1377, 2 MSBCA ¶ 185 (1988); Transit Casualty Company, supra.

D(6) There was no attempt to interfere with Appellant's lawful business prerogative to hire or fire employees. However, the termination of its executive director evidenced a pattern of instability in the agency which, in the State's opinion, prevented Appellant from providing quality care to its clients.

D(7) Within COMAR 21 there is no "normal" period when RFP's are issued. Since all requirements of COMAR Title 21, and

specifically 21.05.03 were met, this was a valid procurement for which DHMH has the authority and discretion to engage in.

D(8) There is no evidence in the record that any State personnel advised Alliance, Inc., that it would be awarded the contract with HCHD.

D(9) Contrary to Appellant's allegation, MHA has a policy of not paying for legal services incurred by provider agencies. This policy applies to all MHA providers and provides no indication of racial bias, favoritism or retaliation against Appellant.

D(10) Appellant has offered no facts to support its claim that the bid of Alliance, Inc. was legally improper and/or judged in a non-competitive fashion.

Accordingly, Appellant's appeal on the ten (10) various grounds set forth above is denied.

E. Appellant next contends that the award to Alliance, Inc. was from an illegal RFP.

The record reflects that the July 1991 RFP at issue conformed to all laws, rules, and regulations. There is no State prohibition against issuing an RFP during a fiscal year. In fact, the Procurement Officer and the Department of Budget and Fiscal Planning attempt to have contracts bid at various times during the fiscal year since it would be impossible and impractical to issue all bids at the same time. Appellant provides no facts or legal support for this claim. Accordingly, the appeal on such grounds is denied.

F. Appellant complains further in this ground of appeal that members of the evaluation committee acted in a biased fashion against Appellant.

Appellant has failed to show how members of the evaluation committee were in any way biased against it. Appellant fails to provide any factual support for this claim. "A protester alleging bad faith on the part of government officials bears a very heavy burden." Calso Communications, Inc., supra. The fact that two of the evaluators knew nothing about the prior relationship between Appellant and MHA and the fact that these evaluators scored

Appellant essentially the same as the evaluators who knew of the prior relationship, refutes Appellant's allegations. Accordingly, the appeal on such grounds is denied.

G. Contrary to Appellant's next assertion of error, the agency denial of Appellant's protest satisfies the requirements of COMAR 21.10.02.09 relative to the Procurement Officer's final decision herein. Accordingly, the appeal on such grounds is denied.

H. Appellant next claims that DHMH violated State law by failing to respond to its protest in an expeditious manner.

In accordance with COMAR 21.10.02.02 all protests are to be filed with the Procurement Officer, and as per COMAR 21.10.02.09, are to be decided by the Procurement Officer.

The record reflects that at the time this protest was received the DHMH Procurement Officer was in the process of answering nine protests received in July 1991. Within six weeks of the receipt of this protest, the Procurement Officer received 44 additional protests, and had 5 of the 9 previous protests appealed to the Maryland State Board of Contract Appeals and appeared for three hearings before the Appeals Board.

In February and March 1992 three more protests were received, producing a total receipt of 57 protests since July 1, 1991, versus an annual average of three such protests in previous years.

Through April 30, 1992 the unit supervised by the DHMH Procurement Officer had received 268 more procurement actions than in the comparable period of the previous year, or an increased workload of 46.3%.

This Board finds that DHMH has responded to Appellant's protest in as expeditious a time as possible given State resources, the procurement workload and the seriousness of the many allegations contained in the protest. Accordingly, the appeal on such grounds is denied.

I. Appellant next asserts it was prejudiced by such delay in issuance of a decision on its protest. The Appellant has provided no explanation of how it was prejudiced by the fact that DHMH did

not respond to its protest in a shorter period of time. Appellant has been funded throughout this period of time, including expansion funding. Accordingly, the appeal on such grounds is denied.

J. DHMH, contrary to Appellant's next assertion of error has made no award of any contract during the pendency of the protest, and appeal herein. This ground of appeal was withdrawn at the hearing of the appeal.

K. Appellant alleges next that it was denied the opportunity to fairly compete. Appellant has failed to show how it was denied the opportunity to fairly compete. Appellant has provided no factual support for its allegation that the State had determined prior to the completion of the evaluation process that Appellant would not be awarded the contract. Accordingly, the appeal on such grounds is denied.

L. Appellant further complains of arbitrary treatment that it was not continued on a sole source basis. Appellant had a contractual arrangement with HCHD. It did not have a contract with the State. Thus it was not a sole source non-competitive grantee of the MHA.

Appellant's failure to qualify technically is based upon the rating criteria contained in the RFP and not upon the evaluations of the Office of Licensing and Certification Programs (OLCP). OLCP has different standards of acceptability than the rating criteria for this solicitation. Therefore, acceptable evaluations from the OLCP are not necessarily inconsistent with being unacceptable under a solicitation.

Despite these differences, however, there are certain deficiencies which were noted in Appendix B to the May 16, 1991 OLCP evaluation which are congruent with some of the issues noted by the evaluation committee. For example:

Section I Item B - it is stated that most of the residents have been with the program and at the same levels for an extended period of time. The OLCP evaluation team correctly identified that there had been no "movement along the continuum of wellness", a factor which is of clinical importance to MHA.

Section II, Item 7 - Quality Assurance (QA), informed that while there has been gradual improvement in QA, "the process is still rudimentary".

Further, contrary to Appellant's assertions there has been at least one other instance where an incumbent vendor was not continued on a sole source basis. In July 1989, the services provided to clients of MIC-ROB Non-Profit, Inc. (M-R), were put out for bid. M-R was not the winning vendor for this solicitation.

For the foregoing reasons the appeal is denied.

Dated: August 27, 1992

Robert B. Harrison III
Chairman

I concur:

Sheldon H. Press
Board Member

Neal E. Malone
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1647, appeal of Homecoming, Inc. under DHMH solicitation No. PS 91-278.

Dated: August 27, 1992

Mary F. Priscilla
Recorder