

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF HOUSING AND)
DEVELOPMENT SOFTWARE, LLC)
) Docket No. MSBCA 2247
Under Department of Housing)
and Community Development)
RFP #S00R1200024)

October 30, 2001

Negotiated Contracts (Competitive) - Basis for Award - The General Procurement Law and COMAR require that in negotiated procurements selection be based on a determination of the proposal or best and final offer which is the most advantageous to the State, considering price and other evaluation factors set forth in the request for proposals.

APPEARANCE FOR APPELLANT:

Scott A. Livingston, Esq.
Lydia B. Hoover, Esq.
Rifkin, Livingston, Levitan & Silver, LLC
Baltimore, MD 21201

APPEARANCE FOR RESPONDENT:

Jan M. Bryant
Assistant Attorney General
Crownsville, MD 21032

APPEARANCE FOR INTERESTED PARTY:
(Application Oriented Designs, Inc.
(AOD))

None

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its protest of proposed award of a contract under this negotiated procurement to AOD.

Findings of Fact

1. The Department of Housing and Community Development (DHCD) serves as Maryland's housing finance agency and provides low-interest construction and permanent financing for multifamily housing developments, and low interest financing for construction and rehabilitation projects, help for the homeless, and shelters and rental assistance.
2. The funds to support this effort are subject to the annual budget process and derived from proceeds of tax exempt revenue bonds and notes, State general obligation bonds, State grants, and federal grants and subsidies.

3. It is desirable that DHCD track, collect, maintain and report information about multifamily projects in a timely and efficient manner. In order to enhance the collection of data and reporting processes, DHCD determined that processes should be automated and converted into one unified information management system (System).
4. DHCD issued the above captioned solicitation on January 30, 2001 to solicit proposals from qualified offerors to provide and implement a System that met DHCD's needs.
5. The RFP outlined the needs to be met by a proposal to include five (5) business processes as identified by a cross divisional DHCD staff who would be utilizing the System. Section 4 of the RFP and Exhibit F to the RFP describe the functional requirements that any proposal must achieve in order to be responsive to the solicitation. DHCD would accept a custom solution, a custom off the shelf solution (COTS) or an off the shelf solution. The offerors had the option of supplying any of these solutions as long as the solution addressed DHCD's needs identified in the RFP. Evaluation criteria were established in Section 7 of the RFP. The RFP also stated that the technical proposal would be given greater weight than the price proposal in the award determination and that the Evaluation Committee shall "recommend to the Procurement Officer the award of the contract to the responsible offeror whose combined technical and price proposal is determined to be the most advantageous to DHCD and the State." The RFP did not contain a provision for liquidated damages for late completion of the System nor did the State elect to require a performance bond.
6. DHCD received four (4) responses to the solicitation. After receipt of the responses, oral presentations were called for.
7. Prior to the offerors' oral presentations, the Evaluation Committee, consisting of 8 DHCD employees, from divisions to be affected by the work performed by the successful offeror, created hypothetical problems to be addressed at the presentation. The Procurement Officer sent a letter containing the hypothetical problems and presentation format to the four offerors.
8. DHCD conducted the oral presentations over a two week period. Each offeror was allotted a three-hour time frame to address the hypothetical problems and any questions the Evaluation Committee might have had.
9. The Evaluation Committee used an evaluation worksheet to evaluate the offerors' technical proposals. After the oral presentations were completed, the evaluation worksheets were submitted to the Procurement Officer. The Procurement Officer ranked the proposals based on the aggregate scoring of the evaluators as set forth in the evaluation worksheets.
10. After the technical proposals had been ranked, the price proposals were opened in the presence of the Evaluation Committee. The price proposals were higher than the \$426,000.00 budget for the project. Because the price proposals were over budget and because a wide spread existed between the lowest and highest price proposal, the Procurement Officer contacted each offeror and asked questions about their price proposal.
11. The Procurement Officer and Evaluation Committee determined that the offerors should submit a Best and Final Offer (BAFO). This determination was based on the information gathered from the offerors' response to questions about the price and the offerors' presentations. The request for a BAFO was issued on June 15, 2001. The BAFO request changed the original RFP in the following ways:

1. It made WEB enabled technology a mandatory requirement and not optional as stated in the RFP;
 2. It required offerors to propose a solution that had the same functionality of the HFA Manager software and compatibility with HUD's new technology for the processing of Section 8 payments;
 3. It defined the role of the DHCD project manager; and
 4. It restructured the way in which the vendor would be paid.
12. All four vendors responded to the BAFO request. The Procurement Officer reviewed the BAFO and applied a normalized formula to the price and technical proposals. The normalized scores from the technical and price proposals were combined and offerors ranked accordingly.
 13. The average technical score of Appellant and AOD are set forth in Joint Exhibit One (attached hereto as Exhibit A) as are the BAFO price proposals of Appellant and AOD.¹ The difference between the average technical score of 1131 points for AOD and 1053 points for Appellant (out of a total points achievable for the technical proposal of 1500) is approximately 5%. The AOD price of \$1,511,235.00 is \$984,441.00 more than the Appellant's price of \$526,794.00. The total achievable points achievable for technical as noted was 1500. The total points achievable for financial (price) was 500. Thus total combined points achievable for technical and price were 2000 with technical worth 75% and price worth 25%. Under the normalized scoring system based on total points as set forth in Exhibit B, Appellant achieved a total of 1895 points (1395 technical points plus 500 price points) and AOD achieved a total of 1674 points (1500 technical points plus 174 price points).
 14. A recommendation by the Procurement Officer to award the Contract to AOD was approved by the Deputy Secretary of DHCD and on July 20, 2001, the Procurement Officer notified the offerors that AOD was the proposed awardee of the Contract.
 15. The record reflects that three (3) of the eight (8) evaluators scored Appellant's technical proposal the highest, three (3) scored AOD's technical proposal the highest and two (2) scored the technical proposal of a third offeror the highest.
 16. After the BAFO the Evaluation Committee and the Procurement Officer discussed the concerns they had with the Appellant and reached a "consensus" that AOD was the preferable offeror. These concerns principally were that (1) Appellant was a young company that was fast growing and might be or become unable to devote necessary time and resources to DHCD because of other contract commitments; (2) Appellant might not be able to perform for the price offered; (3) Appellant was slow in responding to the Procurement Officer's requests for information; (4) Appellant's certified minority business enterprise (MBE) subcontractor who was to perform the role of project manager did not appear at the oral presentation as requested; and (5) questions about whether Appellant

¹ Attached as Exhibit B is Agency Report Exhibit 7 setting forth the BAFO ranking of all four offerors. The average technical scores are set forth as are the total technical points achieved. The average technical scores are converted to technical points achieved with the highest score getting 1500. The lowest price received 500 financial points.

could deliver a multi-module, integrated system within the schedule Appellant proposed.

17. Appellant addressed all of the concerns at the hearing and the Board finds that the record reflects that, notwithstanding that the RFP did not call for liquidated damages or a performance bond, Appellant could perform and provide the System on schedule for the price proposed with appropriate commitment of time and resources to meet any contingencies.

18. The record also reflects that two factors that were not evaluation factors were considered by the Procurement Officer in her award recommendation to the Deputy Secretary of DHCD. The first was that AOD proposed non-visual access and Appellant did not, Appellant having requested an exemption from the non-visual warranty, as permitted by the RFP, on grounds it would increase the price of the procurement by more than 5%. The Procurement Officer believed that providing non-visual access enhanced AOD's proposal but, as noted, non-visual access was not an evaluation factor. The other was that AOD was the only one of the three (3) firms still in contention² that was certified as a Maryland MBE firm. MBE certification, however, was not an evaluation factor.

While not evaluation factors in this procurement, MBE status to the extent it helps a unit meet its MBE goals and non-visual access are governmental goals that are worthy and may factor into the inherently subjective nature of an evaluation process and we find no fault in the consideration of such matter by the Procurement Officer. See Raid, Inc., MSBCA 2197, 5 MSBCA ¶ (Sept. 20, 2000). However, they were not evaluation factors and could not properly be considered as such.

Given the scores of the evaluators for the evaluation factors set forth in the RFP (as set forth in Agency Report Exhibit 5 attached hereto as Exhibit C), the fact that Appellant could perform as required for the price offered and personnel proposed and that Appellant's custom off the shelf (COTS) products would enable Appellant to develop the system in approximately half the time required by AOD we find that the technical proposals of Appellant and AOD are essentially equal and if not equal, based on this record, it cannot be said that AOD's proposal is clearly superior. Such equality or lack of clear technical superiority is reflected in the scores of the evaluators and is not overcome by any concerns they or the Procurement Officer may have had about Appellant's ability to perform or lack of non-visual access and MBE status.

19. Appellant sent a letter to DHCD dated July 30, 2001, articulating the reasons for its formal protest.³ Appellant protested the award recommendation based on the following specific allegations:

1. DHCD's Chief Information Officer (CIO) (who was an evaluator) had a conflict of interest;
2. DHCD relaxed technology requirements in the Best and Final stage to favor AOD; and

² The fourth offeror was no longer in contention due to having a low average technical score (481) and a price of over \$2,000,000.00

³ On July 24, 2001, DHCD had received a letter from Appellant formally protesting the award recommendation to AOD and requesting a copy of the State's protest procedures. On July 26, 2001, DHCD sent Appellant copies of the regulations governing protests and requested the Appellant provide specific reasons for the protest.

3. AOD submitted inaccurate information to DHCD concerning cancelled contracts.
20. The Board finds that a fair reading of Appellant's July 30, 2001 letter also raises a protest that Appellant's technical proposal provides a better solution than does AOD's.
21. By letter dated August 9, 2001, DHCD rendered a final agency decision on the protest that addressed the alleged relaxed technology requirements and alleged submission of inaccurate information grounds of protest on the merits and dismissed the conflict of interest allegation on timeliness grounds. There was no discussion concerning the superiority of solution of the AOD technical proposal versus the Appellant's.
22. On August 15, 2001, Appellant filed an appeal with this Board. Appellant did not seriously pursue the issue of conflict of interest during the appeal. The allegations of relaxation of requirements and presentation of inaccurate information were raised during the evidentiary hearing only as incidental to Appellant's focus on the issue of superiority of technical proposal.⁴

Decision

The Board needs to decide whether a difference of approximately 5% in technical points between Appellant and AOD, where the record reflects that both offeror's could perform, justifies award based on the higher score technical offer of AOD at a price that is \$984,441.00 greater. In a competitive negotiation procurement the procuring agency may select the higher priced, technically superior proposal in the State's best interest if the additional cost is warranted by the increase in quality provided by the technically superior proposal and the RFP, as the one herein, emphasizes technical over price. Similarly, if selection officials determine that technical proposals are equal they may use price to select the most advantageous proposal for the State. See United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989), Concurring Opinion and cases cited at pp. 58-60. In the Opinion by Chairman Harrison in United Technologies Corp. at p. 46, he observed the "requirement of the General Procurement Law and COMAR that in negotiated procurements selection be based on a determination of the proposal or best and final offer which is the most advantageous to the State, considering price and other evaluation factors set forth in the request for proposals."

The United Technologies appeal dealt with purchase of a superior product at a higher price. However, as we did then, we still recognize today the subjective nature of evaluation and the discretion to be accorded officials engaged in negotiated procurements. However, and notwithstanding that the record reflects that the Procurement Officer and the Evaluation Committee conscientiously and professionally performed their duties, we find that the proposed award herein is not consistent with the General Procurement Law and COMAR. The General Procurement Law and COMAR require award to the responsible offeror who submits the proposal or

⁴ If Appellant's protest had been limited to the issues of conflict of interest, relaxation of requirements and inaccurate information we would deny the appeal. Appellant failed to demonstrate the existence of a conflict of interest, the relaxation of requirements or that AOD provided DHCD with inaccurate information to a degree that it was not responsible or that made its response not responsive to the requirements of §6.2P of the RFP (which sought information regarding any contract terminations or outstanding legal actions that an offeror may have had).

best and final offer determined to be the most advantageous to the State considering the evaluation factors set forth in the request for proposals (to include price) and also requires getting the maximum benefit from the purchasing power of the State. Such requirements do not permit, where two competitors are capable of performing, award on the basis of a technical proposal that receives only a few more points than its competitor's and does not provide a clearly technically superior solution yet costs nearly 300% more than the competitors proposal. See State Finance and Procurement Article, Sections 11-201(a)(7) and 13-104(b); COMAR 21.01.01.03E and 21.05.03.03F. See also System Development Corporation, B-213726, 84-1 CPD 605 (1984).

We accordingly sustain the appeal and remand the matter to DHCD with the recommendation that award be made to the Appellant based on its best and final offer.

Wherefore, it is Ordered this 30th day of October, 2001 that the appeal is sustained.

Dated: October 30, 2001

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

Anne T. MacKinnon
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:

- (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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2247, appeal of Housing and Development Software, LLC under Department of Housing and Community Development RFP #S00R1200024.

Dated: October 30, 2001

Mary F. Priscilla
Recorder

THE HISTORY OF THE

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...