

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of )  
 )  
KENNEDY PERSONNEL SERVICES )  
 ) Docket No. MSBCA 1795  
Under DBFP IFB )  
TOH 94-01 )

August 9, 1994

Evaluation of Proposals An incumbent offeror must not assume that an evaluator will know the details of the incumbent's past performance, or presume that an evaluator may legally take that performance into account in comparing proposals.

APPEARANCE FOR APPELLANT

E. David Hoskins, Esq.  
Law Offices of Peter G.  
Angelos  
Towson, MD

APPEARANCES FOR RESPONDENT

William A. Kahn  
Gail R. Cohn  
Asst. Attorneys General  
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

Appellant timely appeals the denial of its bid protest by the Department of Budget and Fiscal Planning in the above-captioned procurement for temporary office services. The bid protest was denied on the grounds that Appellant had failed to provide any factual basis in support of the protest.

Findings of Fact

1. On January 3, 1994, the annual solicitation for temporary office help for the various agencies of the State, DBFP IFB No. DBFP TOH 94-01, was issued to 61 vendors, including incumbent Appellant. The Invitation for Bid (IFB)<sup>1</sup> contemplated multiple contract awards, for service in three geographical areas: 1) the Baltimore Metropolitan area, 2) the Annapolis Metropolitan area, and 3) the Baltimore-Washington International Airport corridor area. This is the first year that the Department has designated geographical

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<sup>1</sup>The IFB was a multi-step sealed bidding process. Technical offers and price bids were due to be submitted simultaneously.

areas, creating in effect three separate lists. Bidders were invited to submit bids for a single location or any combination of locations. Appellant's bid for the Baltimore area is the subject of this appeal.<sup>2</sup>

2. Pursuant to ¶5.2 of the IFB, bids would be evaluated first for technical merit on the basis of factors set out in ¶4.3 to determine the ten best technical bids (offers). Then the price bids of those ten vendors would be considered, and the sequence of recommended award (i.e. rank on the list of ten) would be determined on the basis of lowest cost.<sup>3</sup>

3. An evaluation committee consisting of four State employees, three of whom were employed by agencies would use the temporary services, reviewed the submissions, and made recommendations to the Procurement Officer.<sup>4</sup>

4. Following evaluation for technical merit of the bids for the Baltimore area, the procurement officer notified Appellant that it had not qualified as one of the top ten scorers and that it was ineligible for award.<sup>5</sup>

5. By letter of February 14, 1994, the procurement officer further advised Appellant that

*The Technical specifications of the IFB under Paragraph 4.3, Part B, consisted of nine sections. As indicated in the IFB, the sections weighted most heavily were B.1, B.2, and B.3, which together were worth a total of 90 points. Kennedy Temporaries' total score for sections B.1, B.2, and B.3 was 47.*

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<sup>2</sup>Insofar as appellant argues that he was denied an opportunity to be considered for contract award in the Annapolis and BWI Airport corridors, the Board dismisses that allegation on the grounds that it is untimely. Programmed Security, Inc., MSBCA 1433, 3 MICPEL ¶209 (1989).

<sup>3</sup>It was contemplated here, as has been the practice in the past, that an agency in need of temporary office help, using the appropriate list for its geographical area, would contact the first contractor on the list; if help was not available from that contractor, the agency would then call contractor No. 2, and so on until its needs were met.

<sup>4</sup>In a memorandum to the procurement officer, the evaluation committee found that Appellant's proposal was a "poorly written proposal with too much extraneous information and not enough specific information on their planned computerized testing..."

<sup>5</sup>Fourteen vendors bid for the Baltimore area. Of the fourteen, Appellant had the lowest technical score or 67. Of the successful bidders, scores ranged from 110 to 80.

In reviewing your response to those questions, your answers provided very little information to the evaluation committee. In specific instances, question 1... and question 3, you did not provide any information for the evaluators beyond an affirmative statement. Your responses indicated that Kennedy Temporaries had previously done the work required and would continue to do so in the future. This type of response does not provide any criteria for the evaluators to score you any higher than they did.

6. Appellants response on February 14, 1994 by way of protest stated the following grounds:

We feel that the procedure for this contract was flawed, biased, unethical, discriminatory, and detrimental to the taxpayers of the State of Maryland and small businesses such as ours.

7. On February 22, 1994, the procurement officer denied this "protest":

You provide no factual basis to support these allegations, nor indicated how the procurement was flawed, biased, unethical, discriminatory and detrimental to small businesses. Your protest thus is without supporting evidence, and must be denied.

8. On February 23, 1994, the Board of Public Works approved the contract awards for March for march 1, 1994 through December 31, 1994 following a finding that execution of the contracts without delay was necessary to protect the State's interest.

9. On March 3, 1994, Appellant timely filed its hand-written appeal with this Board:

Kennedy has provided excellent service to virtually all agencies of the state government for approximately fifteen years without complaint, and was unjustly eliminated from consideration for participation in the above named contract which became effective March 1, 1994. We feel we were discriminated against due to vague

*criteria, subjective and unfair application of that vague criteria, incompetence, misleading statements and personal bias.*

10. On March 21, 1994, Respondent filed a motion to dismiss the appeal on the grounds that Appellant had failed to satisfy the requirements of Code of Maryland Regulations (COMAR) 21.10.02.04<sup>5</sup>

11. On April 16, 1994, a hearing on the Motion to Dismiss was held during which there arose a factual dispute on a material matter as a result of testimony offered by Appellant suggesting that similar responses from other offerors received higher scores resulting from dislike of Appellant by the Procurement Officer.<sup>6</sup> Believing that there were therefore material facts in dispute<sup>7</sup> the Board determined to take the Motion to Dismiss under advisement until after the hearing on the merits. Thereafter, DBFP filed its Agency Report.

12. In its comments on the Agency Report, filed May 24, 1994, Appellant, now represented by counsel, summarized grounds for appeal. These grounds, some raised for the first time in the comments, included, *inter alia*: 1) inappropriate change from basing the procurement solely on price to a multi-stepped bidding approach; 2) failure of the procurement process to take into account a bidder's "track record"; 3) an IFB requirement of automated testing of temporary personnel; 4) implementation of a three-part geographical system which required that a successful

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<sup>5</sup> COMAR 21.10.02.04 requires that the written protest shall

*include as a minimum the following:*

*C. A statement of reasons for the protest; and*

*D. Supporting exhibits, evidence, or documents to substantiate the reasons for the protest . . . .*

<sup>6</sup> Appellant is a sole proprietorship. Mr. Kennedy represented himself at this hearing.

<sup>7</sup> Appellant at this hearing suggested that there may have been "faxed" documents which were not in evidence which would have supported his position. Such documents failed to materialize at the hearing on the merits.

bidder in any area have an office located in that area; and 5) that the evaluation committee double-counted when evaluating the responses of other bidders.

13. At the hearing on the merits the Board dismissed new grounds numbered 1-3 listed in ¶12 above as untimely in that they were known prior to the closing date for receipt of bids, January 24, 1994, and should have been raised prior to that date, as required by COMAR 21.10.02.03. The Board further dismissed grounds numbered 4 and 5 listed in ¶12 as untimely in that they were apparent on or before February 14, 1994, and should have been raised within seven days of that date. Programmed Security, Inc., MSBCA 1433, 3 MICPEL ¶ 209 (1989).

14. The Board at the hearing advised the parties that the only possible timely issue remaining for decision was the implication in Appellant's protest letter, as further amplified at the hearing on the Motion to Dismiss, that its technical proposal was treated differently than those received from other bidders.

#### Decision

After evaluation of all the bids, Appellant had not qualified as one of the top ten scorers, and was therefore, under the terms of the IFB, ineligible for award. Appellant's bid was not evaluated in a vacuum, but in relation to those proposals submitted by its competitors.

Because of the Appellant's allegations of bias and personal animosity, and the absence of the responses of the successful offerors or a proffer that the successful offerors' responses were not similar to Appellant's, the Board took the Motion to Dismiss under advisement and heard additional evidence from the parties at the hearing on the merits. But for the allegations of bias, and references to missing documents alleged to evidence that bias, the Board would have agreed that Appellant's protest letter was insufficient to satisfy the requirements of COMAR 21.10.02.04 that it state the grounds of its protest clearly with supporting evidence, and would have granted Respondent's Motion to Dismiss at the time of the hearing on that motion.

It is clear from a review of the technical proposals submitted / Appellant and the other bidders that the proposal of Appellant was noticeably lacking in detail in relation to the other proposals. Appellant's bid, as characterized by Respondent in its Agency Report

rather than focusing on the information requested, pointed to its past performance and its status as incumbent. Kennedy's bid included a plethora of extraneous, unsolicited material and a paucity of actual data. . . No less than 74 . . . pages [of 82 pages in the technical bid] were copies of correspondence from former customers.

While Appellant's bid was replete with extraneous material, it skimmed over the "desirability requirements", those items which were clearly set out in the IFB as critical to the evaluation of the proposals. For example, Desirability requirement number 1 related to vendor response time. The significance of this requirement was clearly set forth in the IFB:

*Being able to respond quickly to a request for temporary office help is a very important requirement that is being emphasized in this bid. The definition of respond is communicating back to the requesting agency with as short a time period as possible that a qualified temporary will or will not be available for work that same day or the next business day. The State is looking for a response time of 2 hours or less.*

The IFB requested that bidders

*describe how quickly [they] can respond to a request for temporary office help when a call is made on a non-State holiday, Monday through Friday, between the hours of 8:00 AM and 4:00 PM*

Appellant responded:

*Immediately. For the past 15 years we have responded promptly to all State of Maryland requests for temporary office help whenever and wherever requested and will continue to do so in the future.*

By contrast, virtually all offerors within the top ten ranking not only gave specific timeframes, (15-20 minutes; 30 minutes or less) but gave specific information, for example, describing office

procedures for identifying by skill level potential workers, how and when the requesting agency would be notified of a selected worker, or that one was not available. <sup>8</sup>

Appellant's reliance on its incumbency was also evident in its response to the second desirable requirement, which requested, *inter alia*, for information as to "office techniques and procedures that will enhance your ability to service the State contract." (IFB Section B2(e)). Appellant responded

*Kennedy Personnel Services will provide the same techniques and procedures that have enabled us to deliver top quality employees . . . as we have done for the past 15 years. . . .*

Successful bidders, in contrast, provided a basis for comparability by describing variously their hiring process, their assignment process, testing procedures, performance of background checks, ascertainment of desired work schedules and transportation limitations.

The record reflects that Appellant was not treated disparately because of any bias, personal or institutional, against it, but because of the clear difference in the responses provided to the IFB. Parroting the specifications and stating that the offeror will meet or exceed the minimum requirements provides no basis for careful comparison with other offerors, Amperif Corp., Comp. Gen. Dec. B-211992, 84-1 CPD ¶409 (1984), and a decision to exclude offerors which provide such answers is not an abuse of discretion. Macke Building Services, MSBCA 1283, 2 MICPEL ¶132 (1986); Beilers Crop Service, MSBCA 1066, 1 MICPEL ¶25 (1982). A finding that Appellant's technical offer is not acceptable is reasonable where the Appellant fails to provide detailed information requested by the solicitation. Macke, supra.

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<sup>8</sup> Respondent deemed the responses of the other offerors to be proprietary and confidential, and submitted representative answers to the Board under seal.

An incumbent offeror must be particularly careful not to assume that an evaluator will know the details of its past performance, or presume that an evaluator, knowing of the offeror's past performance, may legally take that performance into account in comparing proposals.

Accordingly, the appeal is denied.

It is therefore, Ordered this 9<sup>th</sup> day of August, 1994 that the appeal is denied.

Dated:

8/9/94

Candida Steel

Candida S. Steel  
Board Member

I concur:

Robert B. Harrison III

Robert B. Harrison III  
Chairman

#### 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 1795, appeal of KENNEDY PERSONNEL SERVICES under Department of Budget and Fiscal Planning IFB TOH 94-01.

Dated:

8/9/94

*Mary F. Priscilla*  
Mary F. Priscilla  
Recorder

