

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of LOUISE T. KEELTY, ESQ.)	
)	
)	Docket No. MSBCA 1195
Under Department of Health & Mental Hygiene RFP for Hearing Officers to Nursing Home Appeal Board)	
)	
)	
)	

September 26, 1984

Responsibility - Determination - The procurement officer had a reasonable basis for his affirmative determination of responsibility in this negotiated procurement whether he was required to comply strictly with the stated definitive responsibility criteria or had discretion in their application.

Responsibility - Determination - Failure to determine if an offeror satisfied preliminary criteria prior to evaluating the technical and price proposals was not fatal to this negotiated procurement since offeror responsibility is determined as of the time of contract award.

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OPINION BY MR. LEVY

This is an appeal from a Department of Health and Mental Hygiene (DHMH) procurement officer's final decision denying Appellant's protest of the proposed award of the captioned contract to four other candidates. Appellant maintains that DHMH did not determine properly that the candidates for this contract were responsible and failed to comply with certain other procedural requirements mandated by the request for proposals (RFP), the Code of Maryland Regulations (COMAR), and the Public Information Act. DHMH, on the other hand, contends that Appellant's appeal is without merit.

Findings of Fact

1. On October 28, 1983, DHMH issued an RFP for the services of qualified parties to act as hearing officers for the Nursing Home Appeal Board. The RFP announced a presubmittal conference on November 9, 1983 and

established December 2, 1983 as the date for receipt of proposals. A November 15, 1983 addendum to the RFP announced a second presubmittal conference on November 28, 1983 and concomitantly extended the proposal due date to December 20, 1983.

2. The cover letter to the RFP provided, in pertinent part, as follows:

* * *

It is important to note that bidders must be private attorneys who are members of the Maryland Bar and who are knowledgeable in Medicare and/or Medicaid reimbursement principles. (Underscoring added).

* * *

3. The RFP contained the following pertinent provisions:

* * *

III. OBJECTIVE

* * *

The Department is soliciting bids for the purpose of hiring private attorneys knowledgeable and experienced in both the application of Title XVIII and Title XIX Reimbursement principles and the Maryland Administrative Procedure Act to serve as hearing officer(s). . . . [p. 2].

* * *

V. CONTRACT PLAN

* * *

I. Selection Committee and Selection Criteria:

A committee composed of the designated representatives of the Department will review all proposals and make the selection(s) of a hearing officer(s) to provide services as stated in the specifications. This committee reserves the right to disqualify any and all bids deemed unresponsive, or any or all bidders deemed non-responsible as a result of the review.

The technical evaluations of all members of the Selection Committee will be totaled. An average score will be established for each bidder. The highest possible score is 300 points. All bidders with a score of 225 or more points on the technical proposal evaluation will receive consideration of their financial bids. Those with less than 225 points will not be considered further.

For the financial evaluation, the lowest bidder of those receiving 225 points or more on their technical score will receive a value of one x 200, which is the maximum point total available for price and which is 40% of the 500 total possible points.

$$\frac{\text{lowest bid}}{\text{individual bid}} \times 200 =$$

Should the committee find it necessary, the next step in the selection process will be to re-evaluate the technical proposal in conjunction with the financial proposal and oral presentations.

The technical scores and financial scores for each above listed bidder will be added and the bidders ranked.

A bidder may be required to make an oral presentation to clarify his/her proposal. If an oral presentation is necessary, the bidder will be notified and the presentation scheduled at a convenient time. [p. 5].

* * *

VIII. SELECTION OF CRITERIA PROPOSALS

A. OVERVIEW

* * *

Proposals from those bidders complying with the mandatory requirements will be studied in depth and evaluated in accordance with criteria described below. Bidders must be a member of the Bar of the State of Maryland and must be knowledgeable in Medicare and/or Medicaid reimbursement principles.

* * *

The evaluation process will result in the selection of several proposals with the most favorable combinations of high technical value and costs. These bidders will be contacted if an interview or oral presentation is deemed necessary. After interviewing these bidders, a reevaluation of the technical proposal will be performed.

B. Technical Evaluation Criteria:

The selection committee, after determining compliance with all mandatory requirements set forth in these specifications, will review the technical proposal of each bidder in accordance with the evaluation criteria contained in Appendix B. [p. 8]. (Underscoring added).

* * *

4. Appendix B of the RFP provides the evaluation criteria and its corresponding weight that the members of the selection committee are to use for the candidate's individual evaluation, as follows:

<u>TECHNICAL</u>	<u>Weight Assigned</u>
A. <u>Statement of Problem:</u>	
1. Understanding of the nature of the work	15
2. Overall presentation of the proposal which outlines the scope of the problem, describes the complexity of the problem and describes how to provide adequate hearing services to the Nursing Home Appeal Board	15
B. <u>Capability and Demonstrated Experience of the Bidder:</u>	
1. Qualifications, including education, prior experience, knowledge of the health care industry of Maryland, experience with Medicare & Medicaid reimbursement principles, knowledge of the laws, rules, regulations & procedures relating to nursing home cost settlement	25
2. Demonstrated experience and ability to conduct and administer hearings and to present data, comments and opinions effectively and to handle controversial issues	15
C. <u>Availability of Bidder:</u>	
Bidder's available time to perform services	<u>5</u>
 Total	 <u>75</u> ¹

FINANCIAL

Lowest bidder will receive a value of 1 based on the fraction - $\frac{\text{lowest bid}}{\text{individual bid}}$

Each bidder's fraction will be multiplied by 200 (40% of the total of 500). This score will be added to the technical score and the bidders ranked.

¹Appendix B provides that the scoring should be from superior (4) to Unsatisfactory (0). Therefore, the maximum score for technical is 300 points (4 x 75) and accounts for 60% of the total possible points of 500.

5. The selection committee evaluated the technical proposals from the eighteen candidates who submitted proposals. Nine of these proposals failed to attain the required minimum score of 225 points and were dropped from further consideration. The remaining candidates, including Appellant, were interviewed by the committee. Appropriate revisions thereafter were made to the evaluated scores based upon the interview process.

6. By memorandum dated February 6, 1984, the selection committee recommended to Mr. William Groseclose, the contract monitor, that contracts be awarded to Ms. Joan Bossmann, Ms. Erica Laufer, Mr. Thomas Peddicord and Mr. William Schildt. On February 27, 1984, Henry Good, the procurement officer, notified the nine finalists that contracts would be awarded to the four attorneys recommended by the selection committee.

7. Appellant requested and received a debriefing on March 16, 1984. Jay Levy, Assistant Attorney General and member of the selection committee, conducted the debriefing on behalf of DHMH.

8. On March 19, 1984, Appellant wrote the procurement officer to request copies of the technical and financial proposals submitted by the four candidates who were recommended for contract award. Appellant also requested copies of the transcripts of the interviews conducted by the selection committee, together with copies of the completed evaluation criteria forms filled out by each member of the selection committee.

9. Appellant filed her bid protest with the procurement officer on March 23, 1984 alleging the following grounds:

A. Failure to conduct an individual debriefing in accordance with requirements of COMAR 21.05.03.06.

B. Failure to comply with The Public Information Act, Article 76A, Maryland Annotated Code.

C. Failure to conduct any evaluation of preliminary criteria.

D. Failure to objectively evaluate the technical proposals.

E. The selection process was not conducted in a fair and equitable manner in accordance with Article 21, Section 1-101, et. seq., Maryland Annotated Code.

10. On May 31, 1984, the procurement officer responded to Appellant's March 19, 1984 request for documents. Appellant was provided with the requested technical and financial proposals and transcripts of the personal interviews but was not permitted to review copies of the individual evaluation criteria forms. The procurement officer maintained that these were intra-agency memoranda and protected from public inspection.

11. Also on May 31, 1984, the procurement officer issued his final decision denying Appellant's protest.

12. A timely appeal was filed with this Board on June 15, 1984. On July 24, 1984, Appellant filed a letter with the Board alleging, as an additional ground of protest, that the individual interviews with the candidates were used in the evaluation process in a manner inconsistent with the RFP.²

Decision

The central issue raised by the instant appeal is whether the DHMH procurement officer properly determined that the four candidates designated to receive contracts were responsible offerors. Appellant maintains that the selection committee, and ultimately the procurement officer, failed to apply or consider at any time the specific criteria for determining responsibility as set forth in the RFP.

In Custom Management Corporation/Ogden Food Service Corporation, MSBCA 1086/1090, October 22, 1982 at pp. 6-8, this Board stated that:

Under Maryland law, a procurement officer has broad discretion in determining whether a bidder is responsible and such a determination will not be disturbed unless clearly unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulations. Compare Solon Automated Services, Inc. v. University of Maryland, et al.; Miscellaneous Law No. 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982) (and cases there cited). Consistent with this principle, affirmative determinations of bidder responsibility normally will not be disturbed since such decisions involve business judgment based on a host of subjective factors going to the capability to perform the work. Compare Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD ¶ 64; Keco Industries v. United States, 428 F.2d 1233, 1240 192 Ct.Cl. 773 (1970). However, where the IFB contains specific, objective, or definitive responsibility criteria, an affirmative determination of bidder responsibility must have a reasonable basis founded on an application of those specified criteria. Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD ¶ 365, reconsidered at 54 Comp. Gen. 715 (1975), 75-1 CPD ¶ 138; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD ¶ 376; Haughton Elevator Division, Reliance Electric Corporation, 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294; International Computaprint Corporation, 55 Comp. Gen. 1043 (1976), 76-1 CPD ¶ 289. See: Patterson Pump Company, Comp. Gen. Dec. B-204694, March 24, 1982, 82-1 CPD ¶ 279; see also, Vector Engineering, Inc., Comp. Gen. Dec. B-200536, July 7, 1981, 81-2 CPD ¶ 9. This is essential to assure the fair and equitable treatment of all persons who deal with the State procurement system. MD Ann. Code, Art. 21, § 1-201 (1981 Repl. Vol., 1982 Supp.); compare International Computaprint Corporation, supra; Haughton Elevator Division, Reliance Electric Corporation, supra. (Underscoring added).

²DHMH has made no objection to the late addition of this ground for protest and, in fact, agreed to allow Appellant to amend her protest in light of a second debriefing she had subsequent to filing her appeal.

The Custom Management decision, however, was overturned by Judge Thomas Ward of the Circuit Court of Baltimore City in In Re: A'Dell Food Service, Inc. v. The Maryland State Board of Contract Appeals, Case No: 109503, Docket: 25-P, Page: 299 (March 10, 1983). While the Circuit Court opinion does not discuss or distinguish the principles relied upon by this Board, it does apply a different standard for the review of affirmative responsibility determinations where definitive criteria exist. In essence, the Circuit Court decision recognizes procurement officer discretion to find responsibility even where definitive criteria are not literally complied with. In Re: A'Dell Food Services, Inc., supra, p. 8.

Here Appellant contends that candidate Bossmann was not a private attorney and that neither she nor candidate Schildt had sufficient knowledge and experience of Medicare and/or Medicaid reimbursement principles. Appellant argues, therefore, that the selection committee and the procurement officer acted unreasonably in determining these people to be responsible offerors. Regardless of the review standard applicable, however, we disagree with Appellant and conclude that the procurement officer had a reasonable basis to make an affirmative determination of responsibility with regard to both candidates.

The evidence demonstrates that Ms. Bossmann is a sole practitioner. Although she does work 35 hours per week on a contractual basis with another State agency, she is not an employee of the State of Maryland and, from time to time, performs legal work for other clients. Both Ms. Bossmann and Mr. Schildt further demonstrated a degree of knowledge concerning Medicare and/or Medicaid reimbursement principles. The adequacy of their knowledge, of course, is a matter more suitable for consideration by agency experts. Aquatel Industries, Inc., MSBCA 1192, August 30, 1984, p. 5. We are satisfied, however, that a reasonable basis existed for the procurement officer's determination that Ms. Bossmann was a private attorney and that she and Mr. Schildt had the required knowledge of Medicare and/or Medicaid reimbursement principles.

Appellant also contends that SVIII A & B of the RFP directs the selection committee to review the technical proposals of each candidate only after determining that the bidders satisfied the mandatory preliminary criteria and were responsible bidders. The failure to do this, it is alleged, was prejudicial to the Appellant since the subsequent determination of responsibility was clouded by the subjective evaluation of the technical proposals and the appeal of a lower price proposal. We disagree with this view, however, since the time of contract award is the important time for the determination of an offeror's responsibility. Roofers, Inc., MSBCA 1129, April 8, 1983, p. 6. While the responsiveness of a bid is determined at the time of bid opening, responsibility is not. This principal is equally applicable in negotiated procurements. Comp. Gen. Dec. B-174455, 51 Comp. Gen. 588, March 22, 1972. In the instant appeal we do not find language in the RFP that clearly appraises the offerors that the failure to comply with the mandatory criteria at the time of opening the proposals will prevent their further consideration of the proposals. Even if such language were present, the Comptroller General has stated in Comp. Gen. Dec. B-163156, 47 Comp. Gen. 539, April 11, 1968, at pp. 542-543, that:

. . . it has been our position that when questions of a potential contractor's responsibility are involved, specific advice in an invitation that noncompliance with a qualification requirement may result in rejection of the bid is not necessarily determinative of the question of responsibility.

Based on these principles, we conclude that the failure of the selection committee or procurement officer to determine if the candidates satisfied the preliminary criteria prior to evaluating the technical and price proposals was not fatal to this negotiated procurement.

Appellant next raises the issue of the failure of the procurement officer to conduct an individual debriefing in accordance with the requirements of COMAR 21.05.03.06. Appellant's June 15, 1984 notice of appeal states that the debriefing conducted by Jay Levy was so inadequate that she was unable to learn whether the agency fairly and objectively evaluated the technical proposals. We assume, however, that the Appellant has been satisfied on this point since her attorney's July 24, 1984 letter to the Board advises that a second debriefing conference was held with the procurement officer and Charles France, another member of the selection committee. As a result of the second conference Appellant was allowed to amend her protest with the concurrence of DHMH, to include an additional ground of protest. Any inequities that may have existed as a result of the first debriefing conference were apparently eradicated by the second conference, even though it was held after the appeal to this Board was filed.

Similarly, the issue of DHMH's failure to comply with the Public Information Act, Article 76A of the Maryland Annotated Code, appears to have been satisfied. The record reflects that all requested documents had been turned over to Appellant except for the individual evaluation sheets of the selection committee members. While this Board ruled that these documents were not discoverable (Tr. pp. 4-5), the unauthored contents of those documents in fact were made available to Appellant's attorney prior to the hearing and he was unable to establish his need for them to prepare his case. Since Appellant was allowed to amend her protest as a result of the late document availability, we find no prejudice demonstrated.

The final issue for our determination is the selection committee's alleged use of the personal interview in a manner contrary to the language of the RFP, SV(I):

A bidder may be required to make an oral presentation to clarify his/her proposal.

Appellant maintains the interviews served a broader purpose by providing the selection committee with a means to evaluate further the candidates going beyond the points in the technical proposals that were to be clarified at the interviews. Appellant argues that this was prejudicial since it potentially worked to elevate some bidders' scores on the basis of criteria not announced in the RFP.

DHMH on the other hand maintains that the above quoted part of SV(I) merely states one of the purposes of the interview. Another purpose was to allow the committee to make personal evaluations of each bidder. This position is supported by the language in SV(I) of the RFP which provides:

Should the committee find it necessary, the next step in the selection process will be to re-evaluate the technical proposal in conjunction with the financial proposal and oral presentations. (Underscoring added).

and SVIII A, which provides:

The evaluation process will result in the selection of several proposals with the most favorable combination of high technical value and costs. These bidders will be contacted if an interview or oral presentation is deemed necessary. After interviewing these bidders, a re-evaluation of the technical proposal will be performed. (Underscoring added).

This language suggests that something more than a presentation of the oral proposal might be expected from the candidates and that proposals would be re-evaluated. We find nothing in the record to establish that the selection committee went beyond the stated criteria in making its evaluation. The oral interviews only elaborated on those criteria and gave committee members the opportunity to make personal evaluations. See also COMAR 21.05.03.03.

For all of the above reasons the Appellant's appeal is denied.

Should the committee find it desirable, the next step in the
evaluation process will be to determine the technical aspects of
compatibility with the electrical system and cost estimates.
Understanding needs.

and Miller, which provides

The evaluation process will result in the selection of a single provider
with the most favorable combination of high technical skills and value.
These matters will be considered in the context of the overall
contract award. This information will be used in the selection of
the technical contract will be reviewed. (Attachment 2)

The contract award will be based on the results of the evaluation process.
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For all of the above reasons the appropriate award is hereby