

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF MICHAEL SCOTT)
COHEN, LLC)
) Docket No. MSBCA 2223
Under Allegany County Dept.)
of Social Services, Contract)
No. ACDSS/LGA-01-002)
Legal Assistance RFP)

May 29, 2001

Responsiveness - Negotiated Procurements - While strict responsiveness is not a concept that normally arises in a negotiated procurement, an offeror is required to meet the definitive responsibility requirements of the RFP.

APPEARANCE FOR APPELLANT: Michael Scott Cohen, Esq.
Cumberland, MD

APPEARANCE FOR RESPONDENT: Turhan E. Robinson
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None
Stacey L. Sallerson, Esq.
Sole Proprietor

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its bid protest that the Interested Party did not meet the technical requirements of the Request for Proposal regarding legal experience.

Findings of Fact

1. The above captioned Request for Proposal (RFP) for legal services was issued on October 20, 2000.
2. The services sought involved representing the Allegany County Department of Social Services (ACDSS) before the Allegany Circuit and District Courts in child welfare and adult services matters. The contract period was for three years from February 1, 2001 to January 31, 2004.
3. Two proposals were received. One was from the Appellant Michael Scott Cohen, LLC (Mr. Cohen) and the other was from Stacey L. Sallerson, Esquire, Sole Proprietor (Ms. Sallerson).
4. Section 3.4.6 Requirements of the RFP provided in part that:

1. The individual attorney representing ACDSS must be a member in good standing of the Maryland State Bar Association and be currently admitted to practice before the Maryland Court of Appeals. . .
2. The attorney must have a minimum of two (2) years experience in preparing and representing juvenile and adult cases in a court of law.
5. Ms. Sallerson received her law degree in May 1999, and was admitted to the Maryland Bar in December of 1999. Therefore the evaluation committee did not believe she met the two years of experience required by the RFP. Ms. Sallerson was notified on December 10, 2000, that her proposal was not reasonably susceptible of being selected for award.
6. Ms. Sallerson filed a protest with ACDSS on December 2, 2000.
7. The Procurement Officer agreed to meet with Ms. Sallerson on January 12, 2001, to review her resume and discuss why the evaluation committee believed her firm was ineligible for award.
8. The financial proposal of Mr. Cohen, who was admitted to the Maryland Bar in December, 1992 was submitted to the evaluation committee. Mr. Cohen's proposal identified an offer of \$420,000 to perform the services required by the RFP. The ACDSS budget for the procurement was \$159,000. The Procurement Officer, on December 26, 2000, requested Mr. Cohen to submit a Best and Final Offer by reviewing the RFP and his proposal for areas where he could make price adjustments. On January 4, 2001, the Procurement Officer met with Mr. Cohen for discussions prior to the submission of his BAFO. Mr. Cohen submitted a BAFO of \$300,000 on January 19, 2001, based upon his oral proposed changes to the RFP's performance requirements. The RFP performance requirements orally requested to be changed included shifting witness initial contact and issuance of subpoenas from the Attorney to ACDSS.
9. On January 12, 2001, the Procurement Officer met with Ms. Sallerson to discuss her protest. Ms. Sallerson presented documentation and/or information indicating (1) as a law student she provided legal preparation in support for title VII class action cases; (2) during her tenure (September 1999 - August 2000) as a law clerk to judges of the Allegany County Circuit Court she was involved in drafting opinions in civil, criminal and family law cases; (3) she has provided legal advice to *pro se* litigants; and (4) actively represents families in administrative hearings.
10. The additional information of case preparation and representation persuaded the Procurement Officer that Ms. Sallerson has met the experience requirements of the RFP. Accordingly, the Procurement Officer sustained her protest.
11. Ms. Sallerson's financial proposal was opened. Ms. Sallerson proposed \$175,000 to perform the required RFP services. On March 8, 2001, Ms. Sallerson met with the Procurement Officer for discussions prior to submission of a BAFO. Ms. Sallerson submitted a BAFO of \$165,00 with no changes to the RFP performance requirements.
12. The Procurement Officer and evaluation committee re-evaluated both proposals and BAFOs of Mr. Cohen and Ms. Sallerson. The evaluation consensus regarding Mr. Cohen's proposal was that the modifications he required for performance changed the performance requirements of the RFP while still exceeding the budget amount. The determination was further made that the difference in price did not justify the difference in experience between the two Offerors. ACDSS decided to recommend Ms. Sallerson to the Department of Budget

and Management on grounds that (1) Ms. Sallerson's proposal was only \$6,000 more than the budgeted amount in comparison to Mr. Cohen's proposal which was \$141,000 more than the budgeted amount; and (2) Ms. Sallerson offered compliance with all performance requirements of the RFP while Mr. Cohen's proposal required modifications to certain of the performance requirements.

13. On March 19, 2001, Appellant was notified that its proposal was not accepted for award. Mr. Cohen filed a protest with the Procurement Officer on March 22, 2001, on grounds that Ms. Sallerson did not have the experience required by Section 3.4.6 of the RFP and thus should be disqualified. ACDSS denied the protest on March 30, 2001. A debriefing in accordance with COMAR 21.05.03.06 was provided Mr. Cohen on April 3, 2001. The Department of Budget and Management approved a contract award to Ms. Sallerson on April 5, 2001.
14. On April 6, 2001 Appellant filed an appeal with this Board from the denial of its protest by ACDSS.
15. Appellant filed Comment on the Agency Report. No party requested a hearing.

Decision

Appellant's protest, in contesting the experience of Ms. Sallerson to perform under this RFP, involves an issue of responsiveness. While strict responsiveness is not a concept that normally arises in a negotiated procurement since the agency's needs are not usually described by detailed specifications, an offeror is required to meet the definitive responsibility requirements of the RFP. That is to say that the government may set forth certain minimum or pass/fail requirements that an offeror must meet for its proposal to be considered acceptable for evaluation purposes. See ATI Systems and Federal Signal Corporation, MSBCA 1911, 1913 and 1918, 5 MSBCA ¶387 (1995). In a contract for legal services, years of experience as an attorney may constitute a reasonable threshold requirement.

The RFP, § 3.4.6, provides a requirement that the attorney must have a minimum of two (2) years experience in preparing and representing juvenile and adult cases in a court of law. We believe that a reasonable interpretation of this requirement is that a person must have been an attorney licensed to practice law in order to "represent" juvenile and adult cases in a court of law. The record reflects that Ms. Sallerson was admitted to the Maryland Bar in December, 1999 and that such admission was her first bar admission or license to practice law. Thus at the time Ms. Sallerson submitted her proposal in December, 2000 she had not been licensed to practice law for two years.

Respondent argues that this appeal involves a discretionary determination by a Procurement Officer of an offeror's responsibility or ability to perform the required services.

We recognize that under Maryland procurement law, a procurement officer has broad discretion in determining whether a bidder is responsible, and such a determination will not be disturbed unless it is clearly unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulations. See, Customer Engineer Services, Inc., MSBCA 1332, 2 MSBCA ¶156 (1987); Custom Management Corporation and Ogden Food Service Corporation, MSBCA 1096/1090, 1 MSBCA ¶28 (1982). This Board has consistently held that it will not disturb the Procurement Officer's determination regarding responsibility unless the decision was arbitrary, capricious or clearly

erroneous. See Covington Machine & Welding Co., MSBCA 2051, 5 MSBCA ¶436 (1998); Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶168 (1987). The Board's rationale for granting Procurement Officers such discretion was addressed in Charles Center Properties, MSBCA 1629, 3 MSBCA ¶297 (1992) where the Board quoted with approval from a decision of the Comptroller General (43 Comp. Gen. 228, 230 (1963)) as follows:

"Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgement. Such judgement should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the [procurement] contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the [State's] Government's behalf. 39 Comp. Gen. 705, 711."

Charles Center Properties, *supra*, at p. 9. See also N.B.R., Incorporated, MSBCA 1830, 4 MSBCA ¶364 (1994).

If the issue in this appeal was whether Ms. Sallerson was responsible, the Board would uphold the determination of the Procurement Officer, based on this record, that Ms. Sallerson was responsible. However, we believe the essence of the protest involves whether the Procurement Officer could waive the requirement that a person be licensed to practice law for a minimum of two years. The Procurement Officer waived this requirement and allowed Ms. Sallerson to substitute other experience. In this regard we find that the Procurement Officer erred. There was no pre-proposal opening challenge to the two year license requirement, nor do we find such a requirement to be inherently unreasonable. We further find such requirement to be a mandatory condition to the acceptability of a proposal. Ms. Sallerson would not have been a licensed attorney for a minimum of two years prior to the start of the contract. Ms. Sallerson will not have been licensed for two years until December of 2001. Thus, her proposal did not and could not meet a mandatory condition of the RFP and was thus not capable of being made acceptable. Accordingly, we sustain the appeal and remand the matter to ACDSS.

So Ordered this 29th day of May, 2001.

Dated: May 29, 2001

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
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 2223, appeal of Michael Scott Cohen, LLC under Allegany County Dept. of Social Services, Contract No. ACDSS/LGA-01-002 Legal Assistance RFP.

Dated: May 29, 2001

Mary F. Priscilla
Recorder

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