

- proper record administration]
- 1.06 Patient Care Report [for use as a hard copy record]
- 1.07 System Warranty and Support [correcting any software problems]
- 1.08 Longevity [Offeror's time in business and references]
- 1.09 Staff Training [program to train users in software use]
- 1.10 Project Length and Status Report [Keeping MIEMSS informed]
- 1.11 Ownership [State to own software and related rights]
- 1.12 Economic Benefit Factors [to the State]

4. The RFP lists one "other specifications" which deals with prior experience developing EMS software. It states:

"OTHER SPECIFICATIONS

1.13 Prior EMS Software Development

The Offeror **should** have prior experience developing functional EMS related software. Offerors should list the software, a brief overview of what the software does, and whom it was developed for (including contact name(s), phone number(s)), and web page address (if applicable)." [emphasis in the original]

Unlike the 12 mandatory requirements which the proposal must meet, prior experience in developing functional EMS related software is not mandatory as noted by use of the word should.

5. The RFP sets forth criteria for evaluation of proposals as follows:

"TECHNICAL PROPOSAL EVALUATION CRITERIA

The criteria that will be used by MIEMSS for its evaluation of each qualifying proposal are listed below. The State will determine the acceptability of each Vendor and may request assistance from any source in evaluating acceptable Vendors. Factors numbered 1. and 2. are approximately equal in value.

1. The ability of the Offeror, **based on its capabilities and experience**, to provide a quality software application to the State

and to deliver and support the desired software application. [emphasis supplied]

2. The manner in which the software performs all of the mandatory specifications of this RFP and the extent and manner in which it performs other specifications.”

6. On April 5, 2002, before any proposals were opened an Addendum (Addendum Number One) was issued to the Offerors to make clear to the Offerors that the proposals would be evaluated based on their responses to the mandatory and “other specifications” in the RFP. With the exception of economic benefit, the mandatory criteria were more important than the “other specifications” (prior EMS software experience).
7. The Addendum provided:

“The proposals to the RFP have not yet been opened.”

If you wish to modify your proposal based on this addendum, you must submit your modification by **Friday April 12, at 2:00 P.M.** After that date the proposals will be opened and evaluated.

- A. Technical Proposal Evaluation Criteria, Section C, is revised to read as follows:

TECHNICAL PROPOSAL EVALUATION CRITERIA

The criteria that will be used by MIEMSS for its evaluation of each qualifying proposal are listed below. The State will determine the acceptability of each Offeror and may request assistance from any source in evaluating acceptable Offerors. These criteria are in descending order of importance. Technical merit is more important than price.

1. Offeror’s responses to the mandatory specifications requirements. See sections 1.01 through 1.11 under the Mandatory Specifications and Options
 2. The experience and capability, including references of the Offeror. See section 1.08 under the Mandatory Specifications and Options.
 3. The Offeror’s Prior EMS software development experience. See section 1.13 under the Mandatory Specifications and Options.
 4. The economic benefit of the Offeror’s proposal to Maryland. See section 1.12 under the Mandatory Specifications and Options.
8. In response to the Addendum two Offerors submitted modifications to their proposals.

Appellant did not modify its proposal. Instead, before any proposals were opened and before any modifications were due, on April 8, 2002 Appellant filed a protest to the Addendum. The reason stated for the protest was:

“We feel revising the evaluation criteria for technical proposal ten days (10) after the closing date for submission of proposals is contrary to standard government contracting procedures. This addendum places our offer at a serious disadvantage.”

9. The Procurement Officer denied Appellant’s protest because:
 - “ . . .of the nonsubstantive nature of Addendum Number One, the opportunity for Offerors to revise their proposals prior to the opening of the proposals should they chose to do so after receiving Addendum Number One, and the failure of Quasars, Inc. to present any facts suggesting how Addendum Number One has in any way disadvantaged the proposal submitted by Quasars, Inc....”
10. Appellant then filed an appeal to this Board.

In its appeal Appellant argues or asserts that:

 - Considering a non-mandatory requirement, **prior EMS experience**, at any level in any way will be **a substantive change** made to the original RFP. At the pre-bid conference on March 5, 2002, we questioned about the importance of the non-mandatory requirement, **prior EMS experience**, in the evaluation of a vendor. We were told that it was only a non-mandatory requirement and would not be part of evaluation. The conference was entirely recorded on an audiotape. But written Questions and Answers submitted by the agency about the conference stated the answer to the question differently: it stated that prior EMS experience would be helpful but not essential.
 - In the original RFP, the technical proposal evaluation was based on two factors with equal weighting. The second criterion, as quoted in the agency’s letter, states that “the manner in which the software performs all of the mandatory specification of this RFP **and the extent and manner in which it performs other specifications**. We beg to submit that the second criterion was only evaluating the software performance against the mandatory and other specifications **but did not require** any prior EMS experience.
 - In Addendum One, the agency introduced the non-mandatory requirements as criterion 3 in descending order of priority order with no weighting listed to any criterion. Since we do not have any prior EMS experience we would be scoring zero on this particular criterion and definitely this requirement puts us at a great disadvantage. We are a

Small and Economically Disadvantaged Business establishment, we would not have expended our valuable resources and time in submitting the proposal had it been made clear to us even after we specifically asked the question during the pre-bid conference. [format in the original]

11. Neither party requested a hearing and the appeal is decided on the written record.

Decision

Appellant's argument or assertion that consideration of prior EMS experience constitutes a substantial change to the RFP fails to consider item number one of the technical specifications criteria in the RFP which is set forth above. That criterion specifies that evaluation will be based on the Offerors' experience:

1. The ability of the Offeror, **based on its capabilities and experience**, to provide a quality software application to the State and to deliver and support the desired software application. [emphasis supplied]

Thus, from the outset the RFP listed experience developing EMS software ("other specifications") as an evaluation criteria. Lack of prior EMS experience would not disqualify an offeror. Such lack would, however, be considered in evaluation of a proposal.

Appellant asserts that it was told at the pre-proposal conference held on March 5, 2002 that prior EMS software experience would not be considered in evaluating proposals.

Regardless of what it asserts it heard at the pre-bid conference,¹ Appellant admits in its appeal that it received a written Questions and Answers format based on the pre-bid conference which stated in relevant part:

"Q. Will vendors with prior EMS software development experience be given priority?

A. Prior EMS software development is not a mandatory requirement. It will help those who have it, but not disqualify those who do not have it."

(Q & A Page 3)

Despite admittedly receiving the written Questions and Answers, Appellant proceeded to submit a proposal.

¹The Board finds that the transcript of the tape recording as set forth in the Agency Report could be read to support Appellant's assertion that prior EMS experience would not be considered in evaluating proposals. It could also be read in the manner set forth in the written questions and answers format sent to vendors. This is of no legal significance, however, and does not provide grounds for protest as explained in the text of this opinion.

More importantly, statements at the pre-proposal conference may not modify the RFP. The agenda to the pre-proposal conference on March 5, 2002 expressly provided, consistent with COMAR 21.05.02.07E and COMAR 21.05.03.02D, that:

“Notice: Nothing stated at the pre-proposal conference may change the request for proposals unless a change is made by the procurement officer by written amendment.” [emphasis in the original]

Most importantly, the Procurement Officer had the right to amend the RFP at any time under COMAR 21.05.02.08 and 21.05.03.02E and the express terms of the RFP.

The RFP provides in relevant part:

“REVISIONS TO RFP

The State reserves the right to amend this RFP at any time. If it does become necessary to amend any part of this RFP, the Procurement Officer will furnish an addendum to all prospective Vendors known by MIEMSS to have received a copy of the RFP. All addenda will be identified as such and will be sent by certified mail, and/or by facsimile machine or other reasonable means.” [emphasis added]

The Procurement Officer furnished the Addendum to all of the Offerors and gave them the opportunity to modify their proposals as required by the terms of the RFP.

The Procurement Officer had the right to authorize changes to the RFP even if such changes were substantive, provided she issued an addendum incorporating the changes.

To the extent the Addendum changes the RFP, the Addendum is an amendment properly issued. Appellant’s protest and appeal are grounded in the assertion that the State may not amend in a substantive way the provisions of an RFP to include evaluation criteria. However, as noted, such assertion is not correct. Thus, the appeal must be denied even assuming arguendo that the Addendum made substantive changes to evaluation criteria.

The record reflects, however, that the Addendum did not in fact change the RFP in any material way and did not inappropriately disadvantage Appellant nor any other offeror. Appellant alleges that it is an SBA8(a) certified Small and Economically Disadvantaged Business with MBE/DBE certification from the State of Maryland. Such status does not preclude the State from considering prior EMS experience or the lack thereof.

Offerors were apprised by language in the RFP as originally issued that EMS software experience was a non-mandatory matter that would be considered in evaluating proposals. There has been no change in the RFP regarding the non-mandatory specification concerning EMS software

experience. The Addendum merely makes clear that the mandatory and “other specifications” will be used to evaluate the proposals and that, with the exception of economic benefit, the mandatory requirements are more important than EMS software experience.

For the foregoing reasons therefore the appeal must be denied. Wherefore, it is Ordered this 28th day of May, 2002 that the appeal is denied.

Dated: May 28, 2002

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2279, appeal of Quasars, Inc. under MIEMSS RFP #02-MIEMSS-0003.

Dated: May 28, 2002

Loni Howe
Recorder