

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF RAID, INC.)
)
) Docket No. MSBCA 2197
Under Maryland State Archives)
RFP 2000-1)

September 20, 2000

Competitive Negotiation - Technical Proposal Evaluation - The Appeals Board's function in a competitive negotiation procurement is not to evaluate proposals in order to determine which should have been selected for award but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of the Maryland procurement law. The Board will not disturb an agency's determination regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of the procurement statute or regulations.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Richard E. Israel
 Assistant Attorney General
 Annapolis, MD

APPEARANCE FOR INTERESTED PARTY Peter L. Winik, Esq.
(ViON Corporation) Latham and Watkins
 Washington, D.C.

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from a decision of the Maryland State Archives (Archives) which denied its protest concerning the award of a contract for electronic data storage equipment.

Findings of Fact

1. On March 31, 2000 the Archives issued a Request for Proposals (RFP) for the acquisition of storage devices for the Electronic Archives.
2. The RFP provided that "in evaluating the proposals, technical merit will receive greater weight than price."
3. The RFP lists six technical evaluation criteria in descending order of importance. These were as follows:

1. Net capacity of each storage device.
 2. Specification of the disk drive offered.
 3. Maximum capacity of the storage system beyond the base.
 4. Availability of cache and/or firmware upgrade.
 5. Server failover capacity.
 6. Suitability of management software offered.
4. The RFP also includes a section entitled "Scope of Services and Specifications". The matters described therein include:

Disk drives to be 36 GB capacity. Bidders must indicate the manufacturer of the disk drive to be furnished and provide manufacturer's product specification for disk drives.

Dual controllers with read/write cache, automatic failover to hot spare drives, and dual redundant power supplies. Vendor to indicate if cache and/or firmware can be upgraded. Controllers, disks, fans, and power supplies must be hot swappable. Storage array must be capable of supporting server failover.

5. Seven firms submitted proposals by May 3, 2000, the closing date specified in the RFP. Two firms were disqualified; one for submitting financial and technical information together and the other for offering used equipment.
6. The remaining five firms included Appellant and the Interested party (ViON).
7. For each of the remaining firms, a technical proposal checklist based on specifications in the RFP was prepared. The checklist for Appellant, dated May 3, 2000, bears the notation "not specified" for four of sixteen items. It was noted that the Appellant's proposal was "potentially" responsive to the specifications but that clarification was required. Clarifications were provided by Appellant.
8. There was also a preliminary evaluation for the five technical proposals based on the six technical evaluation criteria in the RFP. The evaluation was jointly conducted by a technical evaluation committee, which was composed of three Archives employees, and the Procurement Officer.
9. In Appellant's preliminary technical evaluation, dated May 3, 2000, Appellant scored 11 points out of a possible 30 points. Following the submission of the clarifying information by Appellant referenced above, there was a final technical evaluation dated June 5, 2000 in which Appellant scored 32 points of a possible 60.
10. The following chart listing the technical evaluation criteria in descending order of importance shows the result of the June 5, 2000 final technical evaluation of all five firms.

	MIS	ViON	RAID	GTSI	CF
1. Net capacity of each storage device.	6	5	5	5	4
2. Specification of the disk drive offered.	10	7	5	6	7
3. Maximum capacity of the storage system beyond the base.	10	6	7	5	1

4. Availability of cache and/or firmware upgrade.	10	7	5	5	5
5. Server failover capacity.	5	5	5	5	1
6. Suitability of management software offered.	5	5	5	6	1
	46	35	32	32	19

11. Following the final evaluations of the offerors' technical proposals, the Technical Evaluation Committee in consultation with the Procurement Officer prepared a written report, dated June 6, 2000. The report described the Committee's evaluation of the Appellant's proposal, as follows:

RAID Inc.'s proposal was not very specific as to the end product they would be delivering. The proposal provided a summary of the different components, which would be used to solve the Archives' storage needs. The proposal then includes technical white papers of each component separately and independent of each other, not specifications of the entire system configured together. The net capacity of the storage array was provided for a total of 1.8TB capacity above base. The disk specified was a Quantum disk drive. Information provided by the vendor on the drive and search of the Quantum site failed to yield estimated mean time before failure for the drive. All other products reviewed had this information readily available. The cache per disk controller was to be 128 MB ungradable to one GB. This configuration was also below most other specifications provided. The solution did support server fail over and redundant components. The software interface was described as either a GUI based configuration utility or a terminal emulation based utility for configuration and monitoring of the device.

The proposal was limited to specification sheets of the components being offered without reference to their expertise or similar installations. The proposal was not responsive to the requirements in Section 2, 1.29 through 1.38.

The report described the committee's evaluation of the ViON proposal, as follows:

ViON's proposal was extremely well put together as it impressed everyone with its professional breakdown of every single aspect of implementing a storage solution for the Archives. The proposal clearly summarized the 500 GB and 1TB solution. It then continued to provide a specific checklist outlining exactly what their company was providing and how it met our requirements and implementation needs. Their solution, the Hitachi 5486 rack mounted storage system met and exceeded all technical requirements. The net capacity for the device met requirements and provided for approximately 358 GB of space left above base. The disk drive specified was a Seagate drive, whose technical merits easily make it suitable for our needs. One GB disk controller cache will be provided, and is expandable to 4GB, a very good solution that met requirements. The Hitachi unit supports server fail over and redundant components. The software provides resource and configuration management in both Solaris and Windows environments.

The proposal individually addressed each technical requirement; clearly explaining how their solution could meet and exceed our needs. The proposal included a detailed work plan for site preparation, installation, and placing the devices into service. ViON provided their company's history and experience with government customers. The proposal was fully responsive to all requirements in Section 2, 1.29 through 1.38.

12. After completing the technical evaluation, the Procurement Officer in consultation with the Technical Evaluation Committee, considered the financial proposals. The following chart summarizes the price of each of the five vendors for two devices of differing capacities.¹

Vendor	Cost of .5TB Device	Cost of 1 TB Device	Additional
Mainline [MIS]	214,390	262,390	NA
ViON	61,890	116,980	NA
GTSI	63,112	95,588	NA
Raid Inc.	37,305	55,020	NA
Custom Fit	32,884	67,690	Installation

13. Although it was the opinion of the Evaluation Committee that MIS offered the best solution, the cost of the MIS proposal for either device exceeded available funds. Based upon the opinion of the Evaluation Committee that the second best solution was offered by ViON, it was decided to recommended award of the contract to ViON for the .5TB device at its proposed cost of \$61,890.
14. Following a debriefing by conference call, Appellant submitted a letter dated July 12, 2000 to the Procurement Officer which protested the award of the contract. A second letter dated July 18, 2000 supplementing the protest was also submitted. The basis of the protest was that the Archives based its technical evaluation on specifications or criteria which were not identifiable in the RFP; to wit: that the Archives considered the estimated mean time before failure for the proposed disk drive and the adequacy of cache per disk comptroller, and that these matters were not stated to be evaluation criteria nor addressed in the technical specifications of the RFP or request for clarification. Appellant also argued that (1) its proposal satisfied the technical specifications of the RFP (2) the Archives determination that its solution was not responsive in certain respects was incorrect and (3) that its price was substantially less than the price offered by ViON.
15. By letter dated July 28, 2000, the Procurement Officer denied the protest noting that the RFP allowed the Archives to select what it regarded as a better solution with a higher price over a lesser, although responsive, solution with a cheaper price. The Procurement Officer noted that the specifications and criteria in the RFP generally addressed disk drives and the availability of cache and stated that the competitive sealed proposal process does not require de-

¹ The RFP stated that vendors should submit prices for storage devices with a 500 GB (.5TB) and 1000 GB (1TB) storage array.

tailed specifications but contemplates a description of the work or services which allow vendors to offer their best solutions. In this regard the Procurement Officer's letter stated that the solution of other vendors offered information on the mean time before failure of the disk drives and that Appellant did not. The Procurement Officer also noted that Appellant's cache per disk controller was scored as average, while other vendors offered a superior solution.

16. Appellant appealed to the denial of its protest to this Board on August 9, 2000.

Decision

The competitive negotiation process is used when an award can not be based solely on price. It involves an evaluation of technical factors as well as price in order to determine which proposal is most advantageous to the State. The evaluation of technical factors requires the exercise of discretion and judgement which is necessarily subjective. B. Paul Blaine Associate, Inc., MSBCA 1123, 1 MSBCA ¶58(1983). Moreover, such an evaluation is competitive in nature in that the proposals are considered in relation to one another. Ardinger Consultants and Associates, MSBCA 1890, 4 MSBCA ¶383(1995). Thus, the determination of the relative merits of the various proposals is a matter for the procuring agency. This determination is entitled to great weight. The role of the Board of Contract Appeals is not to substitute its judgement for that of the agency. Accordingly, the Board "will not disturb an agency's determination regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations." Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368(1994) at pp. 5-6 quoting AGS Genasys Corp., MSBCA 1325, 2 MSBCA ¶158(1987) at p. 12.

In the RFP process herein prospective vendors were asked to offer their best solution. For the guidance of prospective vendors, the RFP included certain specifications, including those relating to disk drives and controllers' cache. Moreover, the RFP included six criteria for evaluating the solutions, one of which was the specification of the disk drive and another availability of cache and/or firmware upgrade. It was stated that technical merit would be accorded greater weight than price. After a preliminary evaluation, vendors, including Appellant, were given the opportunity to clarify their proposals. The report of the Technical Evaluation Committee, which was prepared in consultation with the Procurement Officer, reflects an understanding of the technical issues and an exercise of subjective judgment in the matter.

Nevertheless, Appellant specifically argues that its proposal satisfied the technical specifications and that the estimated mean time before failure and adequacy of cache per disk controller should have been identified in the technical proposal specifications or evaluation criteria. This argument, however, fails to consider the distinction between an Invitation for Bids where award is based solely on price of a particularly described item and Request for Proposals where technical merit of an offer is also considered. If the State knew exactly what it wanted, it would not be proper to use an RFP.

As this Board has observed,

where [an] RFP does not articulate the approach, product technology or methodology to achieve its objectives, it is impossible for the State to anticipate every relevant characteristic of the potential offers, and thus the

State cannot assign evaluative weights to such unknown characteristics. Rather than determining in advance the advantages of A over B, the State invited the offerors to argue the advantages of their particular methodology. Then, . . . the Procurement Officer and technical evaluator must exercise their subjective judgement as to which proposals satisfy the State's objectives and then quantify their subjective judgements to determine which proposal best meets those needs. This can only be done through use of broad criteria, not potentially limiting standards.

Freestate Reporting, Inc., MSBCA 2143, 5 MSBCA ¶476 (1999) at p. 11 citing, Morton Management, Inc., GSBCA No. 9828-P-R, 90-1 BCA ¶22608(Jan. 12, 1990).

The RFP advised that the proposals would be evaluated on the basis of six specified criteria and that technical merit would receive greater weight than price. There is no evidence that this methodology for determining the best offer was not adhered to. This process also meant the Archives could select a better solution at a reasonable price rather than a lesser solution at a cheaper price. Moreover, the RFP included criteria and specifications relating to disk drives and the availability of cache. In the case of mean time before failure for the disk drives, other proposals addressed this matter in their solutions and received a correspondingly higher evaluation. With respect to the cache per disk controller, Appellant's response was determined not to be as favorable as the solution offered by certain other vendors including ViON. In these circumstances, we do not find that the Archives has acted in an arbitrary or unreasonable manner in selecting the higher priced offer of ViON; nor does the record otherwise reflect that there has been a violation of the procurement statute or regulations. Accordingly, Appellant's appeal is denied.

Wherefore, it is Ordered this 20th day of September 2000 that the appeal is denied.

Dated: September 20, 2000

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 2197, appeal of RAID, Inc. under Maryland State Archives RFP 2000-1.

Dated: September 21, 2000

Mary F. Priscilla
Recorder

