

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF SHPS, INC.)
COST MANAGEMENT SYSTEMS)
) Docket No. MSBCA 2171
)
Under Dept. of Health & Mental)
Hygiene Contract No. DHMH)
DOC-01-6276)

June 5, 2000

Minority Business Enterprise - Under COMAR 21.11.03.10A(3)(a) a certified MBE prime contractor may meet a solicitation's MBE subcontract goal with its own forces.

APPEARANCES FOR APPELLANT: Robert F. Carney, Esq.
 Cynthia E. Rodgers-Waire, Esq.
 Whiteford, Taylor & Preston, L.L.P.
 Baltimore, MD

APPEARANCE FOR RESPONDENT: Joel Tomari
 Assistant Attorney General
 Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None
(IHAS, Inc.)

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from the denial of its protest regarding proposed award of the above - captioned Contract to the Interested Party.

Findings of Fact

1. The Maryland Department of Health & Mental Hygiene is responsible for administering the Medicaid Program (Program), established at Title XIX of the Social Security Act, in the State of Maryland. The Program provides health services to eligible individuals. The services provided include inpatient hospital services. In order to maintain the fiscal integrity of the Program, the Program audits claims for services paid to hospitals to identify and recover erroneous payments.
2. On November 16, 1999, the Program issued a Request for Proposals (RFP) to perform on-site hospital reviews to identify and recover monies paid for items which were erroneously billed to the Program by hospitals. More specifically, the RFP solicited a contractor to develop and implement a system of bill auditing that included on-site review of itemized hospital bills,

medical records, admission and length of stay certifications and paid invoices. Where appropriate, the contractor would also initiate recoveries and inform hospitals of their appeal rights.

According to the RFP, the system implemented by the contractor would ensure that:

1. All paid medical services were properly ordered and rendered;
 2. All paid medical services occurred during Medicaid covered days;
 3. Services provided during medically unnecessary days were not paid;
 4. Overpayments are identified and recovered; and
 5. Billing abuses are identified.
3. The services solicited under the RFP are to be provided for the period July 1, 2000 through June 30, 2004. The contractor's fee for the services provided under the Contract consisted of a fixed percentage of any overpayments recovered by the contractor under the Contract.
 4. On January 11, 2000 technical and cost proposals were submitted by the following offerors:

Healthcare Resolution Services, Inc. (HRS)
Integrated Healthcare Auditing and Services, Inc.
(IHAS), the Interested Party
Lindsey & Salita, LLC
SHPS, Inc. Cost Management Systems
(SHPS), the Appellant

5. Appellant is the incumbent vendor for the Program's inpatient hospital audit Contract. The Interested Party is the Appellant's subcontractor under that contract. The Interested Party is also the prime vendor for the Program's outpatient hospital audit Contract.
6. An evaluation committee consisting of four Program personnel involved in the administration and oversight of the provision of hospital services to Medicaid recipients and familiar with the Program's auditing needs evaluated the technical proposals.
7. Following review of the technical proposals, the proposal submitted by Lindsey & Salita was declared not reasonably susceptible of being selected for award. Clarifying questions were asked of HRS, the Interested Party and Appellant. Following review of the clarifying questions, the proposal submitted by HRS was declared not reasonably susceptible of being selected for award.
8. The evaluation committee then reviewed the remaining offers of Appellant and the Interested Party. The RFP specified that the Committee would afford "substantially more weight" to the technical proposal than to the financial proposal of the offerors. "If, however, the technical ranking is essentially equal for two or more offerors," the RFP stated, "the cost as described in the financial proposal may become the primary determinant of award."
9. The evaluation committee judged the technical proposals of both Appellant and the Interested Party to be excellent, determining that they were essentially equal. However, the Interested Party submitted a more favorable financial proposal than Appellant. Accordingly, the evaluation committee recommended to the Procurement Officer that the Interested Party be awarded the Contract.
10. The Procurement Officer accepted the evaluation committee's recommendation, finding that

the Interested Party's proposal was the most advantageous to the State. He notified the parties of the selection of the Interested Party on February 29, 2000.

11. Appellant filed a protest on March 6, 2000 as supplemented on March 9, 2000. The grounds of protest were essentially that (1) Appellant had been and was the incumbent contractor whose performance could not be surpassed (2) Appellant's commitment of human and technical resources directly dedicated to the Program provides an economic value to the State that cannot be mandated or exceeded and (3) the Interested Party acts solely as an auditor for the Appellant under the existing Contract and has no experience in inpatient refund recovery for the Program. The Procurement Officer denied the protest by letter dated March 14, 2000. This appeal followed on March 24, 2000.
12. In its comments on the Agency Report filed on May 23, 2000, Appellant asserted that Appellant's bid was non-responsive for not complying with the MBE subcontractor requirements of the RFP and for failing to designate which portions of its proposal were confidential.¹

Decision

Appellant argues that the Procurement Officer acted arbitrarily in awarding the Contract to the Interested Party because the Interested Party's technical proposal "could not be equal" to Appellant's. In support of its argument, Appellant summarizes the technical evaluation criteria, highlighting its ability to meet each criterion. Based on this record, however, Appellant has not met its burden to establish that the Procurement Officer acted unreasonably in awarding the Contract to the Interested Party.

An evaluation committee consisting of Program personnel familiar with Medicaid payment to hospitals, the offerors' past performance and the Program's auditing needs concluded that the technical proposals of the Interested Party and Appellant were essentially equal but that, overall, with consideration of price the Interested Party's offer was more advantageous to the State. In accepting the evaluation committee's recommendation, the Procurement Officer concluded that the recommendation was based on a reasonable assessment of the two proposals in light of the requirements set forth in the RFP.

A Procurement Officer may accept recommendations from an evaluation committee based on the committee's evaluation. The evaluation committee and Procurement Officer deemed the experience and operating plan of the Interested Party to be on a par with the experience and operating plan offered by Appellant. The Interested Party is a subcontractor to Appel-

¹ The ground of failure to designate confidential information was not pursued at the hearing of the appeal which consisted solely of argument of counsel. According to counsel for Respondent, the Interested Party did submit a copy of its proposal in which confidential portions were identified as required by the RFP at the time it submitted its proposal, but such PIA copy became detached. Later on March 2, 2000, the Interested Party submitted a revised PIA copy of its proposal which was filed with the Agency Report herein submitted pursuant to COMAR 21.10.07.03C. Had the matter been pursued at the hearing and assuming it had first been raised below, a precondition to this Board's jurisdiction (see *infra*), we would find that failure to file a proposal that identifies, as required by the RFP, those portions of the proposal that are deemed by the offeror to be confidential for purposes of Maryland's Public Information Act (PIA) does not require that the proposal be rejected as non-responsive. Rather, failure to designate which portions of the proposal that an offeror deems confidential may leave the proposal subject to public inspection under the PIA and in proceedings involving a protest at the agency level and appeal before this Board.

lant under the current Contract to audit hospital inpatient claims. As indicated in its technical proposal, the Interested Party is also currently successfully performing audits of hospital outpatient claims for the Medicaid Program. The Interested Party's technical proposal contains documentation from which one familiar with the Program could conclude that the Interested Party's staff is qualified and experienced enough to successfully perform the requirements of the inpatient hospital audit Contract. The Interested Party also submitted a slightly better cost proposal.

Appellant has not demonstrated on this record in light of the recommendation of a qualified evaluation panel, the documentation set forth in the Interested Party's technical proposal and the Program's current satisfactory experience with the Interested Party that the Procurement Officer acted unreasonably in recommending that the Contract be awarded to the Interested Party.

Appellant specifically questions the evaluation of the economic benefit to the State of the Interested Party's offer and the evaluation of the ability of the Interested Party to perform the Contract services. An economic evaluation criteria, as permitted by COMAR 21.05.03.03A(3) and consistent with §§14-302 and 14-303 of the State Finance and Procurement Article, is set forth in the RFP as are three other criteria with various subcriteria focusing on the ability of an offeror to perform. These criteria and related subcriteria are in descending order of importance. The four criteria are titled Plan of Operation, Experience of Offeror and Qualifications of Personnel, Statement of the Problem, and Economic Benefits to the State of Maryland. Least important is the economic benefit to the State criteria. Appellant has performed a side-by-side analysis of its technical proposal with that of the Interested Party based on the above criteria and concluded that the determination of the evaluation Committee and Procurement Officer that the technical proposals were essentially equal is arbitrary. We find, however, that the technical proposal submitted by the Interested Party could reasonably be evaluated as essentially equal with the proposal submitted by Appellant.

Accordingly, Appellant has failed to meet its burden. The Board has repeatedly held that it will not overturn a Procurement Officer's decision to award a contract in a competitive negotiation unless it is shown to be unreasonable, arbitrary, or in violation of the procurement statutes or regulations. While Appellant has alleged that the Procurement Officer's decision is unreasonable in light of Appellant's alleged superior qualifications and Appellant's alleged view of the lack of ability of the Interested Party, Appellant has not proven such allegations. Under the Board's precedent, Appellant's appeal must be rejected.

As observed by the Board in Mid-Atlantic Vision Services, Inc., MSBCA 1368, 2 MSBCA ¶173(1988) at p. 24, citing Health Management Systems, Comp. Gen. Dec. B-200775, 81-1 CPD ¶255(1981):

The determination of the needs of the . . . [State] and the method of accommodating such needs is primarily the responsibility of the procuring agency which therefore is responsible for the overall determination of the relative desirability of proposals.

Therefore, the "Board does not second guess an evaluation of a proposal, but merely concerns itself with whether a reasonable basis exists for the conclusions and results reached or de-

terminated.” Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 at p. 5. Citing Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA ¶94(1985), Transit Casualty Co., MSBCA 1260, 2 MSBCA ¶119(1985). See also AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158(1987) at p. 12, where the Board stated:

Since procuring officials enjoy a reasonable range of discretion in evaluating proposals and in determining which offeror or proposal is to be accepted for award, their determinations are entitled to great weight. In this regard, our function is not to evaluate proposals in order to determine which should have been selected for award as the most advantageous proposal, but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of Maryland procurement law. Accordingly, we will not disturb an agency’s determinations regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations.

Accord Maryland New Directions, Inc., MSBCA 1367, 2 MSBCA ¶179(1988); Information Control Systems Corporation, MSBCA 1198, 1 MSBCA ¶81(1984); Beilers Crop Service, MSBCA 1066, 1 MSBCA ¶25(1982).

Appellant’s appeal invites the Board to reevaluate the proposals and declare the agency evaluation to be arbitrary. There is evidence in the record from which this Board could determine that there is a reasonable basis for the recommendations of the evaluators and the Procurement Officer’s decision to propose award of the Contract to the Interested Party. This evidence has not been rebutted. Accordingly, the Procurement Officer’s agency final decision will not be disturbed and Appellant’s appeal on the above ground is denied.

Finally, in an argument raised for the first time on appeal, Appellant contends that the Interested Party’s proposal is not responsive to the RFP’s requirements concerning Minority Business Enterprise (MBE) participation. Appellant asserts that the Interested Party is required to use MBEs to perform 20% of the work under the Contract and the Interested Party in its technical proposal declined to subcontract this percentage of the work to other MBEs.²

COMAR 21.11.03.10A (3)(a) provides that “A certified MBE prime contractor shall accomplish an amount of work not less than the MBE subcontract goal with its own work force, certified MBE subcontractors, or both.” The parties agree that the Interested Party is a Maryland certified MBE prime contractor. Under this regulation, therefore, the Interested Party need not use any MBE subcontractors to accomplish the MBE participation goal. If it performs the work itself, 100% of the work will have been performed by an MBE. While not legally required, the Interested Party, nevertheless, proposed in its technical proposal to seek qualified MBE subcon-

² This argument (ground of protest) has not been considered by the Procurement Officer and thus the Board lacks jurisdiction to consider it. See Hess Fence & Supply Company, Inc., MSBCA 2061, 5 MSBCA ¶438(1998) and cases cited at p. 2. However, it is clear from the record that the Procurement Officer would have denied such ground of protest and we will briefly comment on our view of its merits.

tractors in performing an unspecified percentage of certain work under the Contract, accomplishing the bulk of the Contract work with its own work force. The Interested Party's proposal meets the requirements of COMAR 21.11.03.10A(3)(a) and is responsive to the RFP.

Accordingly, the appeal on such grounds is denied for lack of jurisdiction and would also be denied on its merits.

Therefore, the appeal is denied. Wherefore, it is Ordered this 5th day of June, 2000 that the appeal is denied.

Dated: June 5, 2000

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

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 2171, appeal of SHPS, Inc. Cost Management Systems under Dept. of Health & Mental Hygiene Contract No. DHMH DOC-01-6276.

Dated: June 5, 2000

Mary F. Priscilla
Recorder

