

of Dr. Bruce Regan, a psychiatrist and acting Superintendent of Spring Grove Hospital Center, Barbara Smith Hamer, a nurse and Assistant Director of the DIMH for Quality Assurance, Robert Jacobs, Chief Executive Officer of Crownsville Hospital Center, Dr. Denise Holland, a psychiatrist and Clinical Director at Crownsville Hospital Center, Dr. Phyllis Greenwald, a psychiatrist and acting Clinical Director at Spring Grove Hospital Center, and two advisory persons, the procurement officer and Dr. David Hesel, a psychiatrist and Associate Clinical Director at Spring Grove Hospital Center.

5. The Evaluation Committee determined that Ardleigh did not meet certain mandatory requirements and that its technical proposal was not acceptable.

6. The Evaluation Committee recommended GBMC Agency to the procurement officer for award of the contract. Best and final offers were not requested by the procurement officer.

7. During the week of April 6, 1987, GBMC Agency, Ardleigh and Appellant were notified by telephone of the selection of GBMC Agency.

8. On April 8, 1987, Appellant submitted a written bid protest to the procurement officer objecting to the award without solicitation of best and final offers. In relevant part the protest stated:

As you know, we have been informally informed that although our proposal to continue to provide medical services at Spring Grove Hospital Center was technically superior, the State intends to award the contract to another firm which submitted a lower price.

We wish to formally contest any contract award unless the State provides our firm (and any other qualifying bidders) an opportunity to negotiate a best and final offer. This is clearly in the best interest both of the State and the patients at Spring Grove and is clearly addressed in the RFP.

If price is the only significant issue, we believe it is incumbent both upon the State of Maryland and our firm to determine if we can renegotiate a price that will permit the State to retain the services of the more technically qualified bidder and maintain the continuity of medical care which we have been providing to the patients at Spring Grove for the past five years.

9. On April 20, 1987, the procurement officer issued a written decision denying Appellant's bid protest on the following grounds:

I am in receipt of your letter of April 8, 1987 in which you state that you "wish to formally contest any contract award unless the State provide your firm (and any other qualifying bidders) an opportunity to negotiate a best and final offer." For the following reasons, I conclude that your protest is without merit.

State Procurement Regulations, COMAR Title 21.05.03.03C(4) states in pertinent part:

Best and final offers. When in the best interest of the State, the procurement officer shall establish a common date and time for submission of best and final offers. . . .

Neither the evaluation committee, nor I as the Procurement Officer, saw or now see any need for further discussions or a request for best and final offer[s]. This decision is based on the fact that the technical proposals considered acceptable addressed the Request for Proposal in detail and with clarity. The Financial Proposals were considered competitive; and the low bid was viewed as being very realistic in terms of today's health care costs. To call for a best and final offer under the circumstances creates the potential for bids that are unrealistically low, which could jeopardize the quality of the medical services to be rendered. This situation would not be in the [S]tate's best interest.

While each of the acceptable technical proposals had scores that were close and highly rated, I would like to make clear that the selected offeror had not only the lowest financial proposal, but he also had the highest rated technical proposal.

10. Appellant timely appealed the procurement officer's decision to this Board on May 1, 1987. In pertinent part the appeal stated:

1. We object to the fact that in the attached letter from Henry Good, dated April 20, 1987, that the State concluded that obtaining best and final offers could result in bids which would be unrealistically low and could jeopardize the quality of medical services to be rendered. Although both Tekmatix and Greater Baltimore Medical Center are competitive, neither firm has ever proposed a project in which the quality of medical care would be compromised. Certainly in the "best and final offers" process, the best offerers [sic] would be required to demonstrate that any modifications to their initial offers would not, in fact, jeopardize the quality of medical services. In fact, several hospitals are willing to join our firm allowing us to be more price competitive and enhance the services we already provide.

2. Our firm has provided medical care at Spring Grove over the past 5 years and is now joined together with the State in the current "malpractice insurance crisis." We are not certain what the malpractice buy-out will be in July. The State, however, must realize that if our firm cannot cover the cost of the buy-out premium as a result of contract termination, the State and our firm will assume liability for malpractice under the contract. Alternatively, if we submit a competitive final offer, we will avoid the malpractice buy-out costs and, hopefully resolve the problem on a long term basis by having the insurance assumed through a participating private hospital.¹

3. We have provided quality medical care at Spring Grove for five years. Clearly interrupting the continuity of care by switching contractors and staff would not be in the best interest of the State or the Spring Grove patients.

4. It is in the State's interest to give special consideration to small business, particularly those who have demonstrated they can compete successfully and deliver quality services. The cost of purchasing buy-out coverage may determine the viability of our firm and ability to continue to provide services under contracts we now have with the State at other State hospitals.

The above issues were not properly addressed, or considered by the Department of Mental Health when they decided not to accept best and final offers. It is clear that accepting and terminating medical service contracts, is much more complex than contracts for other services and best and final offers are required to provide the State every opportunity to evaluate all factors involved. As a result, other Divisions within the State which contract for medical services (e.g., Division of Corrections), as part of the normal bidding process, always consider best and final offers.

For the reasons outlined above, the others we can present at a hearing of our appeal, we are appealing the State's decision not to accept best and final offers on the Spring Grove Somatic (Medical) services contract. (Underscoring added).

11. On May 5, 1987, DIIMH requested the Board of Public Works to approve the contract award to GBMC Agency.

12. On May 27, 1987, the Board of Public Works approved award of the contract to GBMC Agency with an effective date of July 1, 1987.

13. Also on May 27, 1987, the Appellant, pursuant to this Board's Protective Order of May 26, 1987, was permitted to review the GBMC Agency proposal.

¹At the hearing of the appeal, Appellant withdrew its appeal on grounds associated with the medical malpractice insurance buy-out.

14. By letter dated June 1, 1987 and received by this Board on June 2, 1987, Appellant raised the following issues regarding this procurement:

The Board should also be advised that inspection of the GBMC proposal has brought to Tekmatix's attention additional grounds for challenge which we intend to raise at the June 16th hearing. We contend that the GBMC proposal was not responsive to the RFP, because it failed to include the required references and failed to allege satisfaction of the "basic requirement" that the bidder have two years prior experience in providing a "comprehensive health care delivery system." We also contend that GBMC was not a responsible bidder because it lacked the required experience and because the persons identified in its proposal as staff were not available to GBMC.

We note that, had the Board of Public Works not proceeded to award the contract, we could present these newly discovered grounds to the procurement officer for reconsideration of his recommendation. Unfortunately, that option was lost and the procurement officer's hands tied by the award.

Counsel for GBMC Agency and DHMII were copied on this letter.

The issues set forth in the June 1, 1987 correspondence to the Board were not at that time brought before the procurement officer for decision.

15. By letter to the procurement officer dated June 17, 1987, Appellant protested award to GBMC Agency on the basis of several grounds that allegedly became known to Appellant for the first time at the Board's hearing of the appeal which was conducted on June 16 and 17, 1987. All grounds of protest set forth therein essentially involve allegations that GBMC Agency is not a responsible bidder, except one which asserts that the Evaluation Committee improperly had access to the financial proposals during the technical evaluation phase.

16. On the eve of hearing, DHMII and GBMC Agency filed motions to dismiss for lack of jurisdiction over the issues raised in Appellant's letter to the Board of June 1, 1987. The essence of these motions to dismiss is that the procurement officer had not been presented these issues for determination, and therefore the Board lacks jurisdiction to hear and decide these issues which require an agency decision in the first instance. The motions also asserted that the issues may not be considered because they are untimely. The Board reserved ruling on the motions pending completion of the evidentiary hearing.

17. Much of the testimony at the hearing centered around the assertion by Appellant that GBMC Agency would not be able to perform as of the contract effective date, July 1, 1987, as a result of alleged inability to obtain qualified physicians and medical malpractice insurance. GBMC Agency maintained that it would be able to perform under the contract's terms beginning on July 1, 1987. (Compare June 16 Tr. 7-30, June 17 Tr. 197-200, 205-222 with June 16 Tr. 103-106, June 17 Tr. 225-231).

18. Board certification or board eligibility of physicians was not required by the RFP. The RFP (Section E, p. 18), however, provides that the offerors could provide that all somatic health care services required in the RFP be provided by physicians who were either board certified or board eligible in their specialties, and that use of board certified physicians could result in a higher score on the technical evaluation. At the time of the hearing on June 16 and 17, 1987, one board certified full time primary care physician, two board eligible full time primary care physicians and one Board eligible part-time primary care physician listed in the GBMC Agency proposal were not available to perform the contract. None of the physicians GBMC Agency proposed at the hearing to replace the physicians listed in its proposal were board certified. Insurance requirements for those physicians GBMC Agency listed in its proposal had not been completely satisfied at the time of the hearing.

19. The RFP requires the successful contractor to provide a "comprehensive medical care delivery system" (see, e.g., RFP pp. 9, 22, 25, Agency Report, Tab 6) and to have experience for at least two years within the past five years in the provision of such a system. Additionally, the RFP requires references demonstrating current successful operations in the provision of a comprehensive medical care program.

20. GBMC Agency is a subsidiary of Maryland Health Corp., Inc. which has other subsidiaries including Greater Baltimore Medical Center, Inc. a 359 bed, full service, acute care facility (i.e. a hospital). Appellant's president, Mr. Mitchell Diamond, a person of considerable knowledge in the health care field, characterized GBMC Agency as a hospital. (June 16 Tr. 111, 112-129). The record as a whole supports the characterization that the actual provider under the GBMC Agency proposal is a hospital. (June 17 Tr. 197-198).

21. Appellant is a medical management consulting firm whose services are essentially those associated with an HMO (Health Maintenance Organization). Mr. Diamond testified that a hospital is not a comprehensive medical care delivery system within the contemplation of the RFP. (June 16 Tr. 111-115). In Mr. Diamond's opinion a comprehensive medical care delivery system is one which achieves cost effectiveness (i.e. providing a complete range of somatic health services at the lowest cost) by placing the focus of health care on minimizing the need for and length of stay at a hospital. Thus, while Appellant's proposal costs for such services to the State may be higher than a hospital's proposal costs, according to Mr. Diamond, the real cost to the State will eventually be much higher where the provider is a hospital than it would be if an HMO such as the Appellant is the provider. This is so, according to Mr. Diamond, because the natural orientation of a hospital team of physicians is toward the hospital, and there will therefore be a tendency for the hospital provider to refer more patients to the hospital more frequently and for longer periods than necessary. Because hospital care costs are paid for by third party insurance to the extent it is available and thereafter by the State of Maryland, the total cost to the State will be higher under a hospital providers proposal, despite the initial lower proposal cost, because of the additional dollars the State must ultimately pay for in-hospital services. (June 16 Tr. 111-129).

22. Under the terms of the RFP, every person on the Evaluation Committee individually evaluated each technical proposal by assigning a score to each of three subfactors: operational plan, personnel qualifications, and demonstrated experience. The individual scores were totaled and then averaged in each category. A combined total of all three subfactors and a total average for each offeror was determined. Proposals receiving a total average score of 80 points or more were considered for financial review. Appellant's total average score was 92.35 and GBMC Agency's total average score was 93.79. Appellant proposed a total three year contract price of \$3,218,124. GBMC Agency proposed a total three year contract price of \$2,878,473.

23. Mr. Diamond testified that it was unreasonable for an evaluator to rank the GBMC Agency technical proposal as high as it was ranked in any of the three subfactors. (June 16 Tr. 108-114). In contrast Dr. Regan, a knowledgeable person respecting the services sought by the RFP, testified that the respective technical evaluations of GBMC Agency and Appellant were appropriate. (June 17 Tr. 187-201).

Decision

We will grant the motions to dismiss filed by DHMH and GBMC Agency respecting the allegations of nonresponsibility (i.e. that GBMC Agency is not a responsible offeror) set forth for the first time in Appellant's letter to the Board of June 1, 1987.²

Maryland's procurement law and regulations³ expressly require bid protests raising contract formation issues to be filed initially with the agency procurement officer. Section 17-201, Division II, State Finance and Procurement Article, COMAR 21.10.02.09A. The Board's jurisdiction later may be invoked by an appeal taken from a written decision of the agency procurement officer concerning the bid protest.⁴ Sections 17-201(e), 17-202(c), and 17-201(f), Division II, State Finance and Procurement Article. The issue for resolution raised

²The procurement officer presumably determined prior to award as required by COMAR 21.06.01.01 that Appellant was a responsible offeror. The allegation that GBMC Agency did not provide the required references, we find to be clearly a responsibility issue.

³The law and regulations we refer to in connection with the motions to dismiss are those effective prior to July 1, 1987 and under which this procurement was undertaken.

⁴Further, §17-201(e) subjects the decision of the procurement officer to review by the agency head unless otherwise provided by regulation. Thus, by the time a procurement question arises under §17-201(e), it has been presented initially to the procurement officer and decided — or not decided — by that individual, and also reviewed by the agency head or his or her designate.

by the motions to dismiss thus concerns whether the Board is constrained to consider only those issues previously presented to the procurement officer. In this regard we have previously noted:

Generally, where a special statutory remedy is provided, that remedy is usually deemed exclusive and a litigant may not by-pass the administrative body or official authorized to hear and decide its claim. Soley v. State Commission on Human Relations, 277 Md. 521, 356 A.2d 254, 257 (1976); DuBois v. City of College Park, 280 Md. 525, 375 A.2d 1098, 1104 (1977). This rule is not absolute, however, and a number of well recognized exceptions have been established. Compare Soley v. State Commission on Human Relations, supra at 356 A.2d 258; Harbor Island Marina, Inc. v. Board of County Commissioners of Calvert County, Md., 407 A.2d 738, 741 (1979); Appeal of Evergreen Engineering, Inc., IBCA 994, 78-2 BCA 13226 (1978); Appeal of Pilcher, Livingston & Wallace, Inc., ASBCA 13391, 70-1 BCA 8331 (1970); Appeal of Bendix Field Engineering Corp., ASBCA 10124, 66-2 BCA 5959 (1966). These exceptions each have resulted from the exercise of judicial and administrative discretion under particular circumstances where the ends of justice have required the reviewing board or court to act immediately. Compare Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 721 (1941); American Electric Contracting Corporation v. U.S., 579 F.2d 602, 217 Ct.Cl. 338, 354 (1978). We likewise conclude that principles of fundamental fairness preclude a strict construction of Maryland's procurement law and regulations so as to require that, in all cases, the procurement officer decide issues before this Board may take jurisdiction.

CTC Machine & Supply Corporation, MSBCA 1049, 1 MICPEL ¶15 at pp. 6-7 (1982).

However, in the instant appeal we decline to exercise our inherent jurisdiction and interpose our judgment regarding allegations that GBMC Agency is not a responsible offeror. We have said:

Under Maryland law, the determination of a bidder's responsibility is the duty of the procurement officer who is vested with a wide degree of discretion and business judgment in making that determination. Lamco Corporation, supra, at pp. 6-7; Louise T. Keelty, Esq., MSBCA 1195 (September 26, 1984); Board of Education of Carroll Co. v. Allender, 206 Md. 466, 112 A.2d 455 (1954); see also Keco Industries, Inc. v. United States, 203 Ct.Cl. 566, 576, 492 F.2d 1200 (1974). The rationale for granting procurement officers such leeway has been addressed 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 judgment. Such judgment 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. * * *"

43 Comp. Gen. 228, 230 (1963).

Accordingly, a procurement officer's determination of responsibility will not be disturbed unless it is unreasonable. See: Allied Contractors, Inc., MSBCA 1191 (August 16, 1984).

Peninsula General Hospital Medical Center, MSBCA 1248, 1 MICPEL ¶109 at p. 3 (1985). Compare Construction Management Associates, Inc., MSBCA 1238, 1 MICPEL ¶108 (1985).

Here, DIIMH is uniquely qualified to determine an offeror's qualifications to provide somatic services to the patient populations at the Spring Grove and Crownsville Hospital Centers. It must bear the brunt of any adverse consequences if the procured services are inadequately or poorly performed. This Board is not well equipped to make such judgments concerning these services and we believe to attempt to do so would be prejudicial to the State. We will of course review, if need be and at the appropriate time, issues properly raised concerning whether DIIMH acted contrary to Maryland procurement law and regulation or in an unreasonable manner in awarding a contract to the qualified offeror it determined sub-mitted the most advantageous proposal.

We next examine the contention set forth in Appellant's June 1 correspondence that GBMC Agency lacks two years prior experience as a provider of a comprehensive medical care delivery system. This contention was improperly characterized by Appellant as being a responsiveness issue.⁵ It is an issue involving offeror responsibility over which we have said we will not exercise original jurisdiction in this instance. However, while not articulated clearly until the hearing of the appeal, this contention arguably relates to the question of the denial of Appellant's protest regarding the determination not to conduct best and final offers which is properly before this Board. This is so because of Appellant's contention that a hospital can not be a provider of a "comprehensive medical care delivery system," and its suggestion that DHMH modified its RFP to permit hospitals to compete without conducting negotiations with Appellant followed by best and final offers to permit it to restructure its proposal from an HMO to a hospital type provider with alleged consequent reduction in cost through its best and final offer. However, our consideration of this issue on its merits leads to its denial.

The evidence of record satisfies us that a hospital was contemplated as an appropriate provider of service within the disputed RFP terminology "comprehensive medical care delivery system." There was no convincing evidence provided to indicate that hospitals were to be excluded. Persons in the business of providing somatic medical services to mental patients would have understood that a hospital was eligible to provide such services without need to re-define or clarify the specifications regarding the type of provider being sought. Since the RFP clearly did not exclude hospitals from providing the services requested, there was no need to conduct discussions with Appellant on the grounds that RFP criteria respecting the type of provider sought had been relaxed or altered.

We turn now to Appellant's appeal of the denial of its protest that the procurement officer failed to require best and final offers concerning price. In procurement by competitive negotiation, Maryland procurement law, with certain exceptions, requires that the State conduct discussions prior to award with all offerors whose proposals are acceptable or capable of being made acceptable absent notice in the RFP that an award may be made without discussions.⁶ Section 13-203(a)(5), Division II, State Finance and Procurement Article, COMAR 21.05.03.02A(3); Johnson Controls, Inc., MSBCA 1155, 1 MICPEL ¶60 (1983); Information Control Systems Corporation, MSBCA 1198, 1 MICPEL ¶81 at p. 8 (1984).

Here, however, the RFP gave notice that award might be made without discussions. RFP Part I Section G. p. 6. See COMAR 21.05.03.02A(3). In this regard, the RFP stated that "negotiations may be held with responsible offerors if there is a need" and "[w]hen in the best interests of the State, the procurement officer shall establish a common date and time for the submission of best and final offers."

In the context of this specific procurement, Section 13-203(a)(5) supra and COMAR 21.05.03.02A(3)(c) allow a procurement officer to dispense with negotiations only where in addition to notification in the RFP it also:

(c) . . . can be demonstrated clearly from the existence of adequate competition or accurate prior cost experience with the particular supply, service, or construction item, that acceptance of an initial offer without negotiation would result in a fair and reasonable price.

In this regard the Board has held that it is necessary to evaluate technical factors along with price to determine which proposal is most advantageous to the State. See B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MICPEL ¶58 at p. 10 (1983); Transit Casualty Company, supra at p. 55. Thus in order to dispense with discussions in a negotiated procurement, the procurement officer must not only find that adequate price competition exists, he must also find that the firm to whom award is proposed on the basis of initial proposals has a technically acceptable proposal determined to be the offer most advantageous to the State. It is required of course that the technical proposals make clear what is proposed so that the procurement officer can make an informed judgment on whether the interests of the State are served by award without discussion.

⁵See Louise T. Keelty, Esq., MSBCA 1195, 1 MICPEL ¶85 (1984). Responsiveness is not ordinarily an issue in a negotiated procurement.

⁶The law we allude to and discuss below is that which was effective prior to July 1, 1987 and under which this procurement was undertaken.

Appellant's protest does not challenge the clarity of the GBMC Agency proposal, but arguably, it challenges the bone fides of the technical evaluation of its proposal vis-a-vis GBMC Agency. Recognizing that this procurement is one involving technical judgment as to the quality of medical services our review is constrained by the principle that in technical matters there must be competent evidence adduced by the party attacking the technical evaluation that an evaluator's rating of proposals was arbitrary. See Transit Casualty Company, supra at pp. 54-56. This can be a particularly heavy burden where, as here, the evaluators are professionals in the field that is the subject of the evaluations. While the testimony of Mr. Diamond clearly raises questions about the relative scores assigned to the technical proposals, it does not establish that the slightly higher score received by GBMC Agency in the technical evaluation reflects arbitrary evaluation by the Evaluation Committee, particularly given the testimony of Doctor Regan that the evaluations were appropriate. Respecting the competitiveness of the financial proposals, we note that the procurement officer had before him the financial proposals of GBMC Agency and Appellant for comparison. He also was aware of Appellant's costs as the incumbent provider of the services over the previous five years.

The articulated reason given by the procurement officer in his final decision denying Appellant's protest that best and final offers should have been conducted was:

Neither the evaluation committee, nor I as the Procurement Officer, saw or now see any need for further discussions or a request for best and final offer. This decision is based on the fact that the technical proposals considered acceptable addressed the Request for Proposal in detail and with clarity. The Financial Proposals were considered competitive; and the low bid was viewed as being very realistic in terms of today's health care costs. To call for a best and final offer under the circumstances creates the potential for bids that are unrealistically low, which could jeopardize the quality of the medical services to be rendered. This situation would not be in the state's best interest.

This articulation reflects that the procurement officer reasonably determined both that the GBMC Agency technical proposal was acceptable and that adequate price competition existed such that acceptance of GBMC Agency's offer without negotiation would result in a fair and reasonable price and the most advantageous offer to the State for the services sought. The reasonableness of this determination was not successfully challenged at the hearing.

In summary, Appellant has failed to demonstrate that the technical evaluation was arbitrary, or that GBMC Agency's price was not fair and reasonable and its offer not the most advantageous to the State. Appellant thus has not shown that the determination to dispense with best and final offers was unreasonable. See Beilers Crop Service, MSBCA 1066, 1 MICPEL 425 (1982); Baltimore Motor Coach Company, MSBCA 1216, 1 MICPEL 494 (1985).

Accordingly, the appeal is denied.

CONCURRING OPINION BY MR. KETCHEN

While I concur in the Board's opinion, a comment is warranted. Negotiated procurements provide a vehicle through discussions to explore in depth what an offeror proposes to provide within the RFP's parameters and the cost of the services offered. Any deficiencies in the proposal or difficulties regarding an offeror's capability to perform that may exist beyond the written offer are potentially discoverable as a result of such discussions. Had discussions been conducted in this procurement any uncertainties or deficiencies regarding GBMC Agency's proposal similar to those raised by Appellant during the hearing, and that GBMC Agency to an extent acknowledged, could have been discussed and potentially clarified in determining the best offer. See generally: Sperry Corp., B-220521, January 13, 1986, 86-1 CDP 428, at 6.