

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE PISCATAWAY  
COMPANY, INC.

Under Contract DNR  
RFP To Operate Fort Washington  
Marina

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) Docket No. MSBCA 1644  
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August 12, 1992

Request for Proposals; Evaluation Criteria - Numerical rating systems are the preferred method but are not required.  
COMAR 21.05.03.03.

APPEARANCES FOR APPELLANT:

H. Michael Rankin, Esq.  
A. H. Michael Rankin, P.A.  
Upper Marlboro, MD

APPEARANCES FOR RESPONDENTS:

Stuart G. Buppert, II  
Assistant Attorney General  
Baltimore, MD

OPINION BY MR. MALONE

This is a timely appeal from a Department of Natural Resources (DNR) Procurement Officer's final decision denying Appellant's bid protest that there was no basis its proposal could fairly or lawfully be classified as "reasonably susceptible of being selected for award" and that the contractual relationship between DNR and the principal owner of the successful offeror (Coastal Properties Management, Inc.; Mitchell Nathanson) created a conflict of interest (bias) since he assisted DNR in the initial creation of the RFP. Appellant articulates its protest in fragmented form but all issues arise out of these two central points of protest. DNR asserts the bias protest was untimely.<sup>1</sup>

Findings of Fact

1. In April of 1987 DNR was interested in issuing an RFP for the management of the Ft. Washington Marina. DNR had acquired this property a year earlier and wanted to have a private entity operate the marina. They sought the advice of Mitchell

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<sup>1</sup>DNR originally asserted all grounds were untimely. However DNR later discovered a filing error and withdrew that defense to the protest except as to bias.

Nathanson and Associates, Inc. and received input for a possible RFP under the signature of its principal owner Mitchell R. Nathanson (Nathanson). An RFP was developed but never issued.

2. In June of 1990 new staff at DNR showed renewed interest in developing an RFP for the marina and received input from Pannell, Kerr and Foster, certified public accounts.
3. Early in 1990 the Appellant had (following settling a suit against the United States Department of the Interior, U.S. District Court of Maryland Civil No. N-88-660 on 10/19/89) acquired from its attorneys records which indicated Nathanson's early involvement in the RFP. Appellant questioned Nathanson's role during a hearing on January 8, 1992 before the Board of Public Works and was aware Nathanson was a principal with an offeror on this RFP.
4. The RFP in this appeal was issued in April 1991. The RFP required submission of a technical proposal and provided that the following factors would be evaluated in "descending order of importance";

- Marina operation experience
- Financial resources
- Plan for operation of the marina
- A development plan
- Plan for minority participation
- Oral presentation

5. A revenue proposal was also required with a guaranteed minimum annual payment to DNR of \$60,000.00 in addition to a percentage of gross revenues.
6. There was no numerical rating system for indicating the relative importance of either the technical proposal or the revenue (cost) proposal nor the numerical relative worth of any of the factors within the technical or cost proposal. Following an inquiry by Appellant an addendum #2 was issued which stated the Evaluation Committee would give "slightly" more importance to the revenue proposal than to the technical proposal. Appellant made no further inquiry as to the rating

system following addendum #2.<sup>2</sup>

7. In July 1991 DNR received five timely offers in response to the RFP. After receipt of the offers the Evaluation Committee had a meeting to determine the relative importance of each category (factor) of the Technical and Revenue sections of the RFP using a numerical system. While the RFP drafters envisioned the use of a numerical system to indicate the relative weight of each evaluation factor no decision as to the weight was made until after the offers were received but prior to their opening.
8. The Evaluation Committee having determined the method of rating opened the Technical Proposals and the three evaluators rated each factor by hand written notation. Following this the evaluators then opened and evaluated the Revenue section of the proposal. The Committee then had the offerors appear for an oral presentation and questioning. At this meeting Appellant was asked several questions as to its experience in marina operation as well as other areas. DNR did not advise Appellant at this meeting that due to the experience section of its proposal its offer was not reasonably susceptible of award. Appellant submitted additional material as did other offerors.
9. By letter dated October 7, 1991 Appellant was advised DNR had found their offer was "not reasonably susceptible of being selected for award," and that it had a right to a debriefing under COMAR 21.05.03.06.
10. Appellant timely protested and requested a debriefing. On January 31, 1991 a debriefing took place. However, DNR did not provide any documentation to support their conclusion other than the materials of Appellant itself. Appellant had

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<sup>2</sup> The Board notes that any deficiency as to the rating system method would be apparent in this case prior to the date set for proposal opening. This RFP came before the Board previously as MSBCA 1595 on pre-proposal opening issues and was dismissed on 9/25/91 since the appeal was untimely.

made numerous requests for the documents of DNR which would explain the basis of their decision. DNR refused to provide those documents under the theory they were privileged. Appellant never received the evaluators score-sheets for Appellant's offer nor any other documents necessary to fully understand the decision of DNR.<sup>3</sup> The Appellant did receive typed summaries of the evaluators ratings by letter of March 6, 1992. The final decision was issued on April 7, 1992 and an appeal to this Board was filed April 28, 1992.<sup>4</sup>

11. At the hearing DNR informed Appellant that the original evaluators scores had been lost. There was no evidence offered at the hearing of the scores given by the evaluators for any given category only the summary of preliminary scores of October 1, 1991 were provided to the Board. While DNR could not give the actual scores for each category it did offer testimony of the general recollection of one evaluator, Mr. Bruce Gilmore. Mr. Gilmore recalled that Appellant's offer was not reasonably susceptible of award since in the experience category Appellant had lost so many points it was mathematically impossible for Appellant to win. Appellant was never advised of the number of points it received in the experience category. As noted above, Appellant had complained about the relative weight to be accorded the technical and financial proposals. However, Appellant did not protest as to

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<sup>3</sup> COMAR 21.05.03.06 limits material available to offerors at a debriefing. However, offerors own scores on each criteria should have been made available.

<sup>4</sup> DNR did not raise the issue of the timeliness of the appeal only the timeliness as to the protest. Appeals must be filed within 10 days of receipt of the Procurement Officer's final decision. No "green card" receipt was offered in the Agency Report to state with exactness when Appellant received the final decision. In its absence and the absence of any allegation of timeliness for the appeal under COMAR 21.10.02.10 the Board accepts the appeal as timely.

the rating system for the evaluation factors within the technical and revenue sections of the RFP. Appellant's witness, Juliette P. Coyle, at the hearing stated Appellant was satisfied with the rating system as to individual evaluation factors as described in the RFP (i.e. "in descending order of importance").

12. Appellant's failure to provide a management team with actual marina operation experience resulted in the finding "not reasonably susceptible of award". The record reflects that George M. Staples whom Appellant proposed to operate the marina, while highly experienced in many fields never operated a marina. Leslie Goodier, of the proposed management team, well known in dredging, pollution and oil spills disciplines never operated a marina. Malcolm E. Arnold, of the proposed management team, has extensive experience in accounting and management. However, he has never operated a marina. Only Juliette P. Coyle had actual hands on marina operation experience. However, she would not hold or exercise a senior management or administrative position according to the proposal of Appellant. This RFP was directed toward finding a marina operator and experience was listed as the most important criteria of the Technical section.

#### Decision

##### A. Timeliness

DNR asserts that the bias issue of Appellant is untimely filed as a protest to the Procurement Officer under COMAR 21.10.02.03 B. We agree. DNR received Appellant's protest February 7, 1992. Appellant knew from other litigation and discovery years before that DNR had requested Mr. Nathanson to give input into the development of the RFP. Appellant also knew that Mr. Nathanson was a principal in the successful offeror on this RFP as of the hearing before the Board of Public Works on January 8, 1992. The record is clear that Appellant had actual knowledge sufficient to protest the bias claim as of January 8, 1992 but did not protest until February

7, 1992. Appellant waited and the protest was received on the bias issue more than 7 days after the basis for protest was known or should have been known. The appeal is therefore dismissed as untimely as to the bias issue.

B. Reasonably Susceptible of Award

Appellant timely protested the classification of its offer as "not reasonably susceptible of being selected for award," under COMAR 21.05.03.03, and a debriefing was held pursuant to COMAR 21.05.03.06. The record supports the findings of the Procurement Officer. The RFP contained a method of indication of the relative importance of each factor. A number method of rating proposals was contemplated by the issuing agency and used by the evaluators, but it was not disclosed to the offerors. However, the Appellant did not protest the method of evaluation as to any vagueness in describing the relative importance of the factors "in descending order of importance". The number system to grade the offers was determined after all offers were received but prior to opening of proposals and was uniformly applied to all offerors. No offeror knew that a low score on experience would make it very difficult to win the award.

While having the number scoring system in the RFP would have made the process more understandable, the system was uniformly applied. Numerical rating systems may be used in RFP's but are not required. COMAR 21.05.03.03.<sup>5</sup> However, where used they should be

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<sup>5</sup> COMAR 21.05.03.03 provides in relevant Part:

.03 Evaluation of Proposals, Negotiations and Award.

A. Evaluation. The evaluation shall be based on the valuation factors set forth in the request for proposals and developed from both the work statement and price. Technical proposals and price proposals shall be evaluated independently of each other. Numerical rating systems may be used but are not required. Factors not specified in the request for proposals may not be considered. Initial evaluations may be conducted and recommendation for award made by an evaluation committee. Final evaluations, including evaluation of the recommendation

included in the RFP so the relative importance of each factor is known. COMAR 21.05.03.02 A.(2).<sup>6</sup> DNR has described one system of rating (i.e. descending order of importance) in the RFP but actually used a numerical system. This caused confusion to the Appellant. Appellant knew experience would be given the most relative importance. The decision to find Appellant "not reasonably susceptible of award" was a mathematical determination based on the scoring method which was not disclosed in the RFP. While this caused some acrimony during the process the facts finally were revealed at the hearing before this Board.

Appellant was advised by a summary of the evaluation process of the number of points allowable for each criteria. The actual scores are lost. However, the summary of preliminary scores of October 1, 1991 together with the DNR evaluator's testimony supports a finding that due to lack of experience<sup>7</sup> of marina operation in Appellant's offer the offer was not reasonably susceptible of award. A numerical system of rating the relative importance of evaluation criteria clearly is the preferred method. A system without a given value in the RFP leaves the door open for protests. However, even with a numerical rating system (i.e. 1-10 Points) judgement is still applied by evaluators in reaching a conclusion. The advantage of a numerical system is clarity and

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of the evaluation committee, if any, shall be performed by the procurement officer and the agency head or designee.

<sup>6</sup> .02 Solicitation of Proposals.

A. Content of the Request for Proposals. The request for proposals shall include:

(2) The evaluation factors and an indication of the relative importance of each evaluation factor, including price.

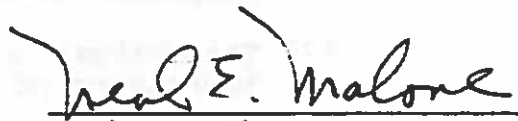
<sup>7</sup> As noted in the findings of Fact Appellant's offer listed personnel with extensive experience in other fields but no actual experience in the operation of a marina. Ms. Juliette P. Coyle, Appellant's president had run this marina before but was not going to participate in "hands on" running of the marina.

uniformity. Each offeror and evaluator prior to opening proposals knows what the objective measure is for each criteria. The subjective effect of each evaluators score is set against pre-determined guidelines. While numerical rating systems in the RFP are preferred they are not required. While the RFP was vague, all offerors knew experience was the most important factor.

DNR in applying the strictest interpretation of the debriefing regulation created an atmosphere of secrecy. The Appellant sought information concerning its offer so it could judge if a protest was warranted. This information was withheld. Appellant began to speculate as to the reason the information was withheld. The speculation took the form of allegations that the rating of offers was being unfairly applied. DNR's basis for concluding Appellant's offer was not reasonably susceptible of award was the result of the mathematical application of its rating system. The system was in place and defined prior to opening of proposals. While the vagueness and equivocation in the structuring of the rating system is troubling; it took final form prior to the opening of proposals and meets the minimum requirements for a RFP. The evaluation, while vague, does support the agency findings of "not reasonably susceptible of award" since lack of experience reasonably and materially affects the ultimate purpose of the RFP to find a marina operator. The more subjective the evaluation method is the greater the potential for manipulation of the process. However, the facts here do not support a finding of manipulation. The criteria were uniformly and fairly applied.

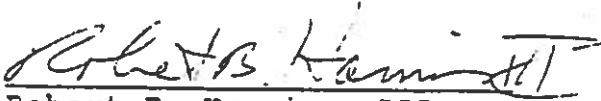
Wherefore the appeal is denied.

Dated: 8/12/92

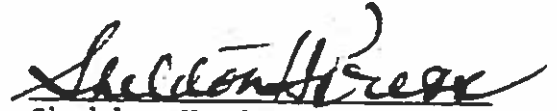
  
Neal E. Malone  
Board Member



I concur:



Robert B. Harrison III  
Chairman



Sheldon H. Press  
Board Member

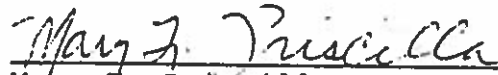
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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1644, appeal of Piscataway Company, Inc. under DNR RFP to Operate Fort Washington Marina.

Dated:



Mary F. Priscilla  
Recorder

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I hereby certify that the foregoing is a true and correct copy of the original as shown to me by the person who presented it for certification.

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