

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of)	
)	
THE SEXUAL ASSAULT AND)	
DOMESTIC VIOLENCE CENTER,)	
ET AL. ¹)	MSBCA No. 1858
)	
Under Solicitation No.)	
CSA/BS-07/95-01-S)	

February 2, 1995

Bid Protest - Timeliness - A protest must be filed within seven days after the basis for the protest is known or should have been known.

APPEARANCE FOR APPELLANT:	Kathleen A. Behan Arnold and Porter Washington, D.C.
APPEARANCE FOR RESPONDENT:	Sherry L. Kendall Assistant Attorney General Baltimore, MD

Memorandum Decision By Chairman Harrison and Member Steel

Findings of Fact

1. On March 29, 1994, the Women's Program, a part of the Community Services Administration, Department of Human Resources (DHR) issued a request for Proposals (RFP) requesting competitive sealed proposals for providing shelter and supportive services to battered spouse and children.

¹Appellants herein are in fact eight individual offerors represented by counsel for the Maryland Network Against Domestic Violence (Network), an umbrella organization of which each offeror is a member. These offerors, in addition to the captioned offeror, are, Family Crisis Center of Prince Georges' County; Heartly House (Frederick County); YWCA Domestic Violence Counseling and Shelter Program (Anne Arundel County); Mid-Shore Council on Family Violence (Kent, Caroline, Dorchester, Queen Anne and Talbot Counties); Center for Abused Persons (Charles County); Sexual Assault/Spouse Abuse Resource Center, Inc. (Harford County); and Abused Persons Program (Calvert County). The Abused Persons Program of Calvert County is a unit of the Health Department of Calvert County, and as such as a "State Agency". State Finance and Procurement Article 11-203(a)(2)(i) exempts from the application of the General Procurement Law procurements between units of State Government.

2. The RFP is in support of the Battered Spouse Program which is a mandatory program to provide services statewide to victims of Domestic Violence and their Children.²
3. The contracts being solicited were for five year terms commencing July 1, 1994.
4. A pre-proposal conference was held on April 5, 1994, at which questions were taken from offerors, with additional questions being accepted in writing through April 7, 1994. Summaries of all questions and answers were delivered to all persons who had received the RFP prior to the due date for receipt of proposals.
5. The closing date for receipt of proposals was April 19, 1994. Nineteen proposals were received. The proposal of Sexual Assault/Spouse Abuse Resource Center, Inc. of Harford County was determined to be not reasonably susceptible of being selected for an award.³
6. The remaining 18 proposals were deemed to be reasonably susceptible of being selected for award. Pursuant to the technical and financial criteria set forth in the RFP, each proposal was scored and was given a ranking in relation to the others.
7. The 18 offerors together had requested in their responses to the RFP a total request for funding in the amount of \$2,184,841.00. However, the total amount allocated to the Battered Spouse Program budget for FY 1995 was only \$1,715,666.00 of which total \$1,590,668.00 was immediately available for disbursement to the 18 successful offerors.⁴
8. Following the initial evaluation of the proposals and the determination that a funding shortfall of \$594,173.00 existed (as set out in Finding of fact NO. 7 above), the WSP determined that specific allocation of funds would be made to each offeror following consideration of several factors,

²Effective October 1, 1994, the Battered Spouse statute was amended to extend shelter services to unmarried parents and families. Chapter 728 of the laws of Maryland, 1994.

³This Harford County subsequently received an award under a new domestic violence solicitation issued in order to provide coverage of services in Harford County. This second solicitation might have the practical effect of making moot this particular appeal with regard to Harford County.

⁴The 124,998.00 difference between \$1,590,668.00 and \$1,715,666.00 apparently represents funds necessary for State agency administration costs as well as representing discretionary funds to be used for program operations by offerors.

including perceived duplication of services, population, support from local jurisdictions, innovation and coordination, the offerors' position in the ranking, in addition to evaluation factors clearly referenced in the RFP. Further reductions were made based on the merit and strength of the proposals as to the evaluation factors weighted in the RFP.

9. On May 5 and 6, 1994, the offeror agencies were giving between 24 and 48 hours to accept their allocated reduction. The offerors were instructed that should they accept the reduction, they were to resubmit the pertinent pages of the RFP (apparently the Budget Form Justification and Detail) to reflect the reduction in the offeror's request for funding, without, however, adjusting the unit cost reported, but by amending the number of clients served as necessary to achieve the designated reduced level of funding request. All of the offerors made such adjustments to their responses to the request for proposals.

10. On behalf of the individual Appellants, inquiry was made by the Network concerning the level of reductions received by the individual members, and the rationale therefor. As a result of these inquiries, on May 17, 1994 Counsel for the Network wrote to Respondent seeking information concerning the new funding allocations:

[i]n order that the Network can determine whether or not the allocations properly were made, and thus whether or not further action to challenge the allocations is warranted. . . .

11. Counsel for the Network received from Respondent by letter dated May 23, 1994 a response to his May 17, 1994 inquiry. In that letter, Respondent stated:

Had the Department determined to provide funding to all vendors at the level of their request, five qualifying vendors would have been totally unfunded. It therefore became incumbent on the Department to make reductions in all requests. These reductions were based on perceived duplication of services, population, support from local jurisdictions, innovation and coordination, the offeror's positions in the ranking, in addition to evaluation factors clearly referenced in the RFP. Further reductions were made based on the merit and strength of the proposals as to the evaluation factors weighted in the RFP.

12. The Board of Public Works approved award of contracts to the offerors at the reduced funding levels on June 29, 1994, and each offeror executed a contract with the Respondent for FY 1995.
13. In late May 1994, several Appellants discovered by talking with each other, and confirmed by telephone inquiries to members from Maryland Network, that eight of the offerors were given reductions which equalled exactly their prior year allocations minus \$8,000.
14. By letter dated September 21, 1994, Counsel for the Network again wrote the Respondent concerning the funding allocation. Mr. Bartel, Executive Director of the Community Services Administration, replied on October 6, 1994 in material part as follows:

As previously indicated in my correspondence to you, the award to each vendor was based on a number of variables. These included duplication of services by multiple offerors, population, support from local jurisdictions,

innovation and coordination, and the offeror's position in the ranking, as well as the degree of compliance with the evaluation factors clearly referenced in the RFP. Final allocations were based on the State's desire to provide access to these services statewide, as indicated in the applicable regulations, at COMAR 07.06.04.01.

15. On Appellants' behalf, the Network filed a protest on October 25, 1994.
16. On November 9, 1994, the procurement officer issued her decision denying the protest on grounds that the protest was untimely, that the Network could not collectively represent the Appellants, and that the Appellants had already signed contracts and had been performing on the contracts since July 1, 1994, thus waiving any right to protest.
17. Appellants timely appealed to this Board on November 18, 1994.
18. On January 24, 1995, DHR filed a motion to dismiss the above-captioned appeal, on grounds that the protest was not timely filed.

Decision

The Board shall grant DHR's motion to dismiss on grounds that the protest was not timely filed. COMAR 21.10.02.03 states:⁵

⁵The parties have argued that the requirement that a protest be filed within 7 days of the date a person knows or reasonably should have known of the grounds of its protest is the controlling principle to be applied in this appeal. There may be some question whether in this negotiated procurement the determination to reduce funding as communicated to the offerors constitutes an amendment to the Requests For Proposals requiring that a protest be filed prior to the due date for response to such amendment under COMAR 21.10.02.03A.

One of the offerors (Family Crisis Center of Prince Georges' County) included a letter with its amended budget submission in which it stated: "while we accept your offer, we are officially appealing your decision and request either restoration of lost dollars from the Battered Spouse funds, or allocation of the difference from other funding such as the funds for the generally homeless." This letter, we find, does not constitute a formal protest because it was not specifically designated as a protest

.03 Time for Filing.

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in §A or §B means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest received by the procurement officer after the time limits prescribed in §A or §B may not be considered.

The Board finds that the information conveyed in the Respondent's letter of May 23, 1994 constitutes reasonable notice of how the various reduced funding allocations communicated to the offerors were determined. Appellant argues that it was not until the letter of Oct 6, 1994 that sufficient information was conveyed to put a reasonable person on notice of how the funding allocations were established. However, a comparison of the substance of the information conveyed by the two letters leads to the conclusion that no new substantive information was conveyed by the October 6,

directed to the Procurement Officer as required, or otherwise comply with COMAR 21.10.02.03 and .04. See Micrographic Specialties, Inc., MSBCA 1331, 2 MSBCA ¶149 (1987).

We also note that had a timely protest been filed by one of the offerors, jurisdiction would not have been conferred for the Board to consider appeals by other constituent members of the Network who did not timely protest the funding allocations.

1994 letter than that contained in the May 23, 1994 letter. The information conveyed by the May 23 letter would clearly have placed an offeror on notice that the DHR was asserting that it had based its allocation decision only on the factors set out therein, factors which were repeated in the October 6, letter. Appellants also argue that it was not until receipt of the October 6, 1994 letter that a question arose concerning whether funding allocations were based on criteria not set forth in the RFP.

However, as a result of information received in late May or early June, the Network and some of the Network's members were also aware that funding reductions apparently were virtually identical to their previous year's funding minus \$8,000. At the hearing of the appeal, it was the position of counsel for the Appellant Network that this \$8,000 similarity was proof that in fact DHR's funding allocations were not based on the factors set forth in the RFP, but on some other unexpressed factor, such as prior years' funding.

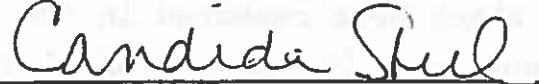
Accordingly, the Board finds that the Appellant Network knew or should have known that DHR may have been basing funding allocations on some unexpressed criteria not set forth in the RFP at some time in late May or early June of 1994. Therefore, its protest on such grounds filed in October 1994 was not timely under COMAR 21.10.02.03 above. See Transitional Technologies, Inc., MSBCA 1527, 3 MSBCA ¶256 (1990). Compare Guide Program of Montgomery County, Inc., MSBCA 1482, 3 MSBCA ¶242 (1990). See also, Hitek Community Control Corporation, MSBCA 1535, 3 MSBCA ¶248 (1990).⁶

⁶This Board has found no MSBCA cases which deal with the timeliness of a protest relative to a situation in which award of the contract is actually to be made to the protestor. The following cases deal with situations where the protestor was not to be awarded the contract, but nevertheless are illustrative of the requirement that protests be timely filed.

Wherefore it is this 8th day of February 1995, ORDERED that the appeal is dismissed with prejudice.

Dated: February 8, 1995


Robert B. Harrison III
Chairman


Candida S. Steel
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 1858, appeal of The Sexual Assault and Domestic Violence Center, et al., under Solicitation No. CSA/BS-07/95-01-S.

Dated: 2/8/95



Mary F. Priscilla
Recorder

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