

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of WILLIAM M. SCHLOSSER )  
COMPANY, INC. )  
Under Morgan State University )  
Project No. DCM 97024 )

Docket No. MSBCA 2104

January 21, 1999

Competitive Negotiation - Debriefing - Timeliness - Under COMAR 21.05.03.06A debriefings shall be held at the earliest feasible time after the procurement officer makes a final determination recommending the award. Grounds for protest may be revealed by such debriefing and may be considered if a timely protest is filed following the debriefing.

APPEARANCE FOR APPELLANT:

Michael J. Cohen, Esq.  
Hyattsville, MD

APPEARANCE FOR RESPONDENT:

Jennifer L. Forrence  
Assistant Attorney General  
Baltimore, MD

MEMORANDUM DECISION

Appellant appeals the denial of its protest concerning Morgan State University's (Morgan) decision to eliminate it from Phase One of the RFP, without providing a debriefing before contract award.

Findings of Fact

1. On September 8, 1998 Morgan issued a three phase Request for Proposals (RFP) for construction of the New Fine Arts Building.
2. Phase One of the RFP called for technical proposals. Technical proposals were due on October 13, 1998.
3. The maximum score possible on the evaluation of technical proposals was 80 points. A score of at least 60 points was necessary for offerors to be considered qualified and reasonably susceptible of being selected for award. The RFP provided that offerors who did not score at least 60 points would be duly notified.
4. Phase Two of the RFP was an interview, the maximum score for which was 20 points. The RFP specified that after Phase Two, only those offerors with combined scores from Phases One and Two of at least 75 points would be invited to participate in Phase Three.

5. Once offerors reached Phase Three, the RFP specified that they would be referred to as "proposers." Phase Three involved a financial proposal, negotiation, and award. Phase Three financial proposals were due on December 15, 1998, with negotiation and award to follow. However, as of the date of this Board's decision herein, the Board has not been advised that a final determination recommending award has been made.
6. Appellant submitted a phase One technical proposal which was evaluated and on October 23, 1998, Appellant was notified in writing that its technical proposal scored less than 60 points and that it therefore would not be invited to participate in Phase Two.
7. The October 23<sup>rd</sup> letter specifically advised that when contract award is based on something other than price alone, debriefing is to be provided at the earliest feasible time after contract award has occurred,<sup>1</sup> and Appellant was told that it would be notified when award occurred, so that it could request a debriefing.
8. By letter dated October 27, 1998, Appellant requested a debriefing.
9. On October 28, 1998, a telephone call from an official of Appellant was returned by procurement personnel at Morgan. During this call Appellant again asked for a debriefing and was told that it could not be provided until after contract award, per the COMAR regulations. A copy of COMAR 21.05.03.06<sup>2</sup> was sent to Appellant via facsimile transmission. A follow-up letter from the Procurement Officer reiterated the same message to Appellant and enclosed another copy of the same COMAR regulation.
10. By letter dated October 30, 1998, Appellant protested its elimination from competition on Phase Two of the solicitation. On November 2, 1998, Morgan procurement officials again returned a telephone call from an official of Appellant. During this conversation Appellant again asked for a debriefing, and was again told that he would have to await contract award.
11. On November 9, 1998, Morgan issued its final decision, denying Appellant's protest. The Procurement Officer's decision, was based on the language of the RFP that only those offerors' with 60 or more points after Phase One would move on to subsequent phases, and that under COMAR's competitive sealed proposal procedures, debriefing cannot take place until after an award. This appeal followed. Neither party requested a hearing and the appeal is thus based on the written record.

### Decision

In its protest letter, Appellant stated that it protested "its elimination from competition on Phase Two of the procurement for the project" because it "met or exceeded all of the requirements of the solicitation." Appellant further asserted in its protest that once it is apprised of the grounds for the disqualification, it will specifically address such ground. Finally Appellant asked that it be advised immediately of the grounds for its elimination from competition or, in the alternative, that it be permitted to participate in Phase Two of the procurement.

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<sup>1</sup> The regulation governing debriefings at this time provided that a debriefing is to be provided at the earliest feasible time after the procurement officer makes a final determination recommending the award of the contract.

<sup>2</sup> As noted in footnote 3 below, it is possible that the Agency sent Appellant an out of date regulation. If so, it does not affect this Board's decision herein.

The procurement regulations, promulgated by the Board of Public Works, provide certain rules for procurement competitions. These regulations are promulgated pursuant to §12-101 of the State Finance and Procurement Article. COMAR 21.05.03.06A anticipates that unsuccessful offerors will be interested in learning why their proposal was not successful and thus provides for debriefing:

When a contract is to be awarded on some basis other than price alone, unsuccessful offerors shall be debriefed upon their written request submitted to the procurement officer within a reasonable time. Debriefings shall be provided at the earliest feasible time after the procurement officer makes a final determination recommending the award of the contract pursuant to Regulation .03F of this chapter. The debriefing shall be conducted by a procurement officer familiar with the rationale for the selection decision and contract award.<sup>3</sup>

The RFP here anticipated a contract to be awarded on a basis other than price alone, and so this regulation clearly would apply. In keeping with this regulation, in its October 23<sup>rd</sup> letter, Morgan offered to let Appellant know when the contract was awarded so it could request a debriefing. When the Procurement Officer's final determination recommending award is announced it is anticipated that Morgan will provide the requested debriefing to Appellant. To conduct such debriefing prior to the final determination recommending the award would violate the provisions of COMAR 21.05.03.06A that debriefing be provided at the earliest feasible time after the Procurement Officer makes a final determination re-commending the award of the contract. Appellant recognizes the existence of the regulation but asks that this Board declare the regulation invalid on grounds that a debriefing might avoid a protest if no grounds for protest were revealed as a result of the debriefing. The Board of Contract Appeals declines to find that this regulation is invalid. Nothing in the General Procurement Law requires that a debriefing be conducted prior to recommendation of award in a procurement by competitive sealed proposals.

Appellant asks in the alternative to be allowed to participate in Phase Two of the competition. The RFP contained the requirement that a score of at least 60 points was necessary before an offeror would be allowed to participate in Phase Two. Appellant did not protest this requirement before its proposal was due and cannot now complain about this requirement. COMAR 21.10.02.03A&C. Appellant did not achieve a score of 60 points and was thus eliminated from competition. There is no basis presented by this record to waive this requirement of the RFP that an offeror achieve a point score of 60 in the Phase One evaluation in order to proceed to Phase Two.

Appellant bears the burden to demonstrate that it should have received the required 60 points in the Phase One evaluation. This Board recognizes that without a debriefing Appellant may not be able to specifically address any deficiencies in the State's evaluation process and thus may not be able to meet this burden based on the information available to it.

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<sup>3</sup> The Agency Report states that the time for debriefing is as of contract award. The COMAR provision in effect for this procurement (Supplement 17, January 26, 1998) fixes the time for debriefing as after a final determination recommending award. This error is not material to the decision herein.

Nevertheless, Appellant's protest asks for relief that COMAR and the RFP do not allow, i.e. to be debriefed before final determination recommending award, in violation of COMAR, or be allowed to continue despite its failure to achieve the requisite 60 points in Phase One. Accordingly, Appellant's appeal to this Board must be denied. However, Appellant will be enabled to file a further protest based on information made available to it during the promised debriefing and may further appeal to this Board should any such subsequent protest be denied. See Guide Program of Montgomery County, Inc., MSBCA 1482, 3 MSBCA ¶242 (1990) at p. 7. See also United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989) at pp. 14-16.

Therefore, it is Ordered this 21<sup>st</sup> day of January, 1999 that the Appellant's appeal on grounds that it is entitled to a pre-award notification debriefing or participation in Phase Two is denied.

Dated: January 21, 1999

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Robert B. Harrison III  
Chairman

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Candida S. Steel  
Board Member

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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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2104, appeal of William M. Schlosser Company, Inc. under Morgan State University Project No. DCM 97024.

Dated: January 21, 1999

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Mary F. Priscilla  
Recorder

Complaint

Case No. 100-100000-000

The undersigned, the Applicant, hereby complains that the Respondent, the Administrator of the Department of Health Services, has violated the provisions of the Administrative Procedure Act, Chapter 350, RCW, by failing to issue a decision on the Applicant's request for a hearing on the Respondent's proposed rule.

The Applicant requests that the Respondent be ordered to issue a decision on the Applicant's request for a hearing on the Respondent's proposed rule.

The Applicant further requests that the Respondent be ordered to issue a decision on the Applicant's request for a hearing on the Respondent's proposed rule.

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 Name of Applicant  
 Address

Date of Filing