BEFORE THE MARYLANDSTATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Diamond Drugs, Inc., d/b/a Diamond Pharmacy Services	*	**Docket No. MSBCA 3093**
UNDER DPSCS SOLICITATION No. Q0016025	*	
	*	

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OPINION BY MEMBER STEWART

The Board denies this appeal on the grounds that procuring agency met its burden of asserting a sufficient and reasonable cause for each of the requirements in the solicitation challenged by the Appellant, and that Appellant failed to meet its burden of proving that the challenged requirements were unreasonable, arbitrary or unlawful.

FINDINGS OF FACT

On June 22, 2017, Respondent, Maryland Department of Public Safety and Correctional Services ("DPSCS") issued Request For Proposals ("RFP") Solicitation No. Q0016025 for qualified offers to provide pharmacy services, including pharmaceuticals and supplies, packaging, delivery, staff, and equipment, to facilities operated by Respondent throughout the State. The anticipated duration of the Contract is five (5) years beginning on or about July 1, 2018, through June 30, 2023, and DPSCS, at its sole discretion, may extend it for one (1) renewal option of two (2) years.

The original opening date for proposals was August 22, 2017, but was amended numerous times to the present opening date of January 31, 2019. There have been 28 amendments to the RFP to date, and Respondent has issued 289 answers to questions posed by potential offerors. On July 25, 2017 the Respondent held a pre-proposal conference and

then published a summary, attendee list, and conference agenda on eMaryland Marketplace[1] and the Maryland Department of Budget and Management ("DBM")[2] website.

On April 11, 2018, Appellant, Diamond Drugs, Inc., doing business as Diamond Pharmacy Services ("Diamond"), filed a protest with the Procurement Officer ("PO") challenging five of the requirements or specifications contained in the RFP as being unduly restrictive and asserting that each of the specifications was designed to, or has the effect of, favoring the incumbent provider of pharmacy services to the Respondent, namely Correct RX Pharmacy, Inc. ("Correct RX").[3]

On June 25, 2018, the PO issued a Final Agency Decision denying Appellant's protest in part, and sustaining its protest in part. Appellant filed an appeal to the Board on July 3, 2018. Respondent filed its Agency Report on July 27, 2018, and Appellant did not file any Comments in response. On December 11, 2018, counsel for the Interested Party, Correct RX, filed an entry of appearance. Hearing on the merits was held on January 4, 2019. The Appellant and Respondent informed the Board that they had agreed to a stipulated statement of facts which Appellant's counsel read into the record. No witnesses were called by any party, and the Board heard legal argument from Appellant and Respondent. Counsel for the Interested Party did not present any argument.

Appellant withdrew multiple allegations concerning the requirement of the RFP it

[1] eMaryland Marketplace is the State's online procurement system that provides vendors with access to State procurement information including notice of bid and contracting opportunities and bid information while also allowing vendors to submit bids electronically and obtain bid results online.

[2] Although DPSCS is the procuring agency, DBM is assisting it in the procurement and a DBM procurement analyst is serving as the PO.

[3] Correct RX has provided correctional pharmacy services to Respondent since June 2, 2005, and an extension to its current contract to allow the Board to consider this appeal was approved by the Board of Public Works on September 5, 2018.

challenged in its protest at the hearing on the merits. The facts relevant to Appellant's remaining allegations in its protest which were presented to and ruled on by the PO are as follows:

Contract Program Manager Requirements

The first allegation remaining from Appellant's protest concerns the RFP's requirements for the position of Contract Program Manager ("CPM") as set forth in Sections 1.2.17 and 3.2.17.5 of the RFP as amended. The Appellant in its protest alleges that Respondent amended the requirements of the CPM position in an unduly restrictive manner by mandating for the CPM: a requirement that the CPM be based in Maryland and be devoted full-time to the Contract; an educational requirement; and an experience requirement - that the CPM have correctional pharmaceutical experience with multiple sites or populations over 10,000 inmates and three years' experience in contract management.

Appellant in its protest essentially alleged that the Respondent amended the RFP after receiving questions from the incumbent Correct RX, and then tailored the requirements of the CPM position to mirror qualifications of Correct RX's program manager on its current contract with Respondent.

In support of its position, Appellant cites Questions and Responses #1, released on October 13, 2017, specifically Questions and Answers Nos. 16 and 17:

> 16. (Section 3.2.17.5) The current Program Manager has a Master's degree and over 12 years of experience as a Program Manager working in corrections. Is it the Department's intent to require a similar level of credentials to ensure that each Offeror is submitting comparable qualifications to fulfill this key management role?
>
> RESPONSE: The Program Manager shall have, at a minimum, a master's degree in health administration or other health fields, or an MBA. It is

preferred that this individual have correctional pharmacy management experience with multiple sites. See Amendment 5, Item 5.

17. (Section 3.2.17.5) Is it the Department's intent that the Contractor's Program Manager provide services full time 40 hour a week to the Department?

RESPONSE: Yes. See Amendment 5, Item 6.

Appellant states that it has participated in the RFP process in every jurisdiction in the country, and goes on to allege that it is rare for a department of corrections to require a contract administrator to live in the jurisdiction and devote full-time to the administration of the Contract. Appellant further alleged that the Respondent could not name one single job duty or responsibility that could not be performed outside of Maryland other than on-site visits.

Before setting forth the PO's response to the Appellant's allegations contained in its protest, the Board notes the history of the evolution of the position of CPM in the RFP and its amendments as it pertains to the allegations raised in Appellant's protest. The RFP in Section 1.2.17 defines the CPM position:

> Contractor's Program Manager - Representative appointed by the Contractor **who works from an office located in Maryland** and is responsible for the daily management and administrative functions of the Contract from the Contractor's perspective at the various facility locations. (Emphasis added).

Section 1.2.17 was never amended. Section 3.2.17.5 was amended multiple times. Before being amended, Section 3.2.17.5 read as follows:

> A. The Contractor shall have a Contractor's Program Manager, which shall be other than one of the On-site Clinical Pharm.D.s.
>
> B. The Contractor's Program Manager shall be the Contractor's main point-of-contact for any contract matters raised by the DPSCS Contract Monitor.

> C. Although it is expected that the Contractor's Program Manager will be located Off-site, upon request, the Department will consider providing space Onsite for the Contractor's Program Manager, either primarily or part-time.

Amendment No. 5, dated October 13, 2017, to the RFP amended Section 3.2.15.5 to require an educational requirement for the CPM position, along with a requirement that the CPM be based in and work full-time in Maryland:

> D. The Program Manager shall have, at a minimum, a master's degree in health administration or other health fields, or an MBA. It is preferred that this individual have correctional pharmacy management experience with multiple sites.
> E. The Program Manager shall be based in the State of Maryland and work full-time in the State.

The educational requirement was changed via Amendment No. 13, dated January 16, 2018, to require only a bachelor's degree with a preference for a master's degree:

> D. The Program Manager shall have, at a minimum, ~~a master's degree in health administration or other health fields, or an MBA.~~ bachelor's degree in any health-related field or in healthcare management. However, a master's degree in any health-related filed or in healthcare management is preferred. It is preferred that this individual have correctional pharmacy management experience with multiple sites.

Amendment No. 13 also added a requirement that the CPM have three (3) years' pharmacy management experience:

> F. The Program Manager shall have at least three (3) years of experience in pharmacy management that is documented with one or more references. Experience with correctional pharmacy management at multiple sites is preferred.

Amendment No. 19, dated March 6, 2018, mandated that the CPM work exclusively on the Contract awarded as a result of the RFP:

> E. The Program Manager shall be based in the State of Maryland and work full-time in the State. The Program Manager's time shall be dedicated exclusively to the DPSCS Pharmacy Services Contract.

Amendment No. 21, dated March 28, 2018, added Respondent's expectation of the CPM position in great detail:

> G. DPSCS expects the Contractor's Program Manager to be actively involved on a daily basis with the provision of Pharmacy Services, including being physically present for all meetings called by DPSCS, to include but is not limited to; e.g. Wardens MAC Meetings, patient care concerns meetings, death reviews, EHR meetings related to bi-directional medication orders; and medication audit processes. The Contractor's Program Manager and Clinical Liaison are expected to provide a high-contact, high-touch service on a continuous basis, and to engage with the Other Healthcare Contractors throughout the regular course of business of contract performance. DPSCS also expects the Contractor's Program Manager to be available by phone 24/7/365 for emergencies, as well as on-site as needed for daily operational issues regarding site facilities statewide, internal auditing contract issues, and any after-hours crisis or additional facility requests regarding problems. The Contractor's Program Manager shall also designate/identify personnel to contact in times of short term absence, vacation, or sick leave. If the timeframe shall be greater than two (2) weeks, the Contractor's Program Manager must also provide a list of personnel contact names in the priority order of contact.

Finally, Amendment No. 27, dated June 21, 2018, issued after Appellant's protest, but before the issuance of the Final Agency Decision of the PO, deleted Paragraph C of Section 3.2.17.5, and revised Paragraphs D, E and F. Paragraph D was revised as follows:

> D. The Program Manager shall have, at a minimum, a bachelor's degree ~~in any health-related field~~ (preferably in healthcare management). However, a master's degree in any health-related filed or in healthcare management is also preferred. It is preferred that this individual have correctional pharmacy management experience with multiple sites/correctional populations of 10,000 or greater inmates.

Paragraph E was amended to stress the importance of the CPM's in-person attendance at meetings connected with the Contract :

> The Program Manager shall be based in the State of Maryland and work full-time in the State. The Program Manager's time shall be dedicated exclusively to the DPSCS Pharmacy Services Contract. The Contractor's Program Manager shall be accessible to participate in any in-person meeting, as required under the contract, at the direction of the DPSCS CMO. In-person accessibility of the Contractor's Program Manager is critical to

> the success of this contract. The interactions of the Contractor's Program Manager extends [sic] to the Other Healthcare Contractors, as well as attendence [sic] at all facility regional Medical Advisory Council (MAC) meetings.

Paragraph F was amended to require three (3) years' contract management experience instead of pharmacy management:

> F. The Contractor's Program Manager shall have at least three (3) years of experience in contract management (preferably pharmacy management) that is documented with one or more references. Experience with correctional pharmacy management at multiple sites with populations of 10,000 or greater inmates is preferred [.]

The PO sustained Appellant's protest in that it acknowledged that the Respondent did not fully describe the duties and responsibilities of the position of CPM to make apparent the reasonable requirements of the work location and full-time nature of the position. Respondent therefore issued Amendment No. 5 (requiring the CPM to be based and work full-time in Maryland), Amendment No. 19 (requiring the CPM to be devoted exclusively to the Contract), Amendment No. 21 (laying out in detail the expectations of the position of CPM), and Amendment No. 27 (requiring the in-person accessibility of the CPM for meetings connected to the Contract).

The PO denied Appellant's grounds concerning the educational and experience requirements of the CPM position by stating that Appellant misinterpreted those requirements, noting that at the time of Appellant's protest that Respondent had amended the education requirement via Amendment No. 13 (from a master's degree to a bachelor's in any health-related field or healthcare management), and via Amendment No. 27 (from a bachelor's degree in any health-care related field or healthcare management to a bachelor's degree). Moreover, the PO concluded that the experience requirement of Amendment No. 13 (that the CPM have at least three (3) years' experience in pharmacy management) had

been amended via Amendment No. 27 (to three (3) years' experience in contract management).

Clinical Pharmacists Requirement

The second allegation remaining from Appellant's protest concerns the RFP's requirements regarding five (5) Clinical Doctors of Pharmacy ("Pharm.D.s".) called for in Sections 3.2.17.1 – 3.2.17.4 be full-time and onsite in Maryland. Appellant alleges, based on its experience as the largest correctional pharmacy service provider in the country, that the requirement to hire and place pharmacists at a client's facility is "nearly unheard-of."

Section 3.2.17.1 sets out the requirement for the five (5) full-time Pharm.D.s onsite:

> The Contractor shall provide five (5) full-time equivalent (FTE) Clinical Pharm.D.s, licensed by the Maryland Board of Pharmacy, during the term of the Contract.
>
> A. The Contractor Clinical Pharm.D.s shall be On-site 40 hours per week at various DPSCS facilities, as directed by the DPSCS CM or CMO.
>
> B. Each Clinical Pharm.D. will primarily be covering a specific region or specified facilities within a region, consulting with Clinicians and patients as needed regarding the best pharmacy intervention available, the most cost-effective treatment (providing education on generic, clinically equivalent, and less costly medications), assisting with difficult-to-manage medical and 32 mental health cases, performing rounds in the infirmaries within the facilities, and assisting with disease management. Contractor Clinical Pharm.D.s will also be required to chair and participate in the P&T meetings in their respective region(s).
>
> C. Although primarily assigned to perform services within a designated region or specified facilities within a region, as appropriate Clinical Pharm.D.s may consult with Clinicians from other facilities or perform any other activity typically performed by another Contractor Clinical Pharm.D.

Section 3.2.17.2[4] sets forth the locations where the five (5) Clinical Pharm.D.s shall be located – one (1) at the Baltimore Complex, one (1) at the Western Region, one (1) at the Jessup Region, and one (1) at the Jessup Region Hub. Section 3.2.17.3 set forth the expectation that all Clinical Pharm.D.s would attend the quarterly Statewide Pharmacy and Therapeutics ("P&T") Committee Meetings, and Section 3.2.17.4 mandated an updated on-call Clinical Pharm.D. list be maintained by the contractor.

The PO concluded the Respondent had properly determined the need for on-site Clinical Pharm.D.s as part of its multivendor model of inmate health services. The PO further concluded that Clinical Pharm.D.s are needed to conduct care conferences with the inmate-patient present, and to interact on a daily basis with the medical and mental health contractor staff.

Clinical Liaison Requirement

The third allegation remaining from Appellant's protest concerns the RFP's requirements for one of the required Clinical Pharm.D.s to serve as a Clinical Liaison ("CL") to the Chief Medical Officer, the Respondent's employee physician who has final clinical authority over the Contract, and co-chair the Respondent's quarterly P&T Committee Meetings. Appellant protests the requirement as amended which requires the CL to work full-time in Maryland. Appellant contended that the Respondent tailored this requirement after receiving numerous questions from the incumbent contractor. Appellant further contended in its protest that requiring a full-time hire for the position of CL "is not only rare across the United States, but is unprecedented."

Section 1.29 of the RFP originally defined the position of CL as:

[4] Amendment No. 27 clarified that one (1) Clinical Pharm. D. would service a given service region, and the duties and expectations of the Clinical Pharm. D. serving at the Jessup Region were further defined.

> Clinical Liaison – The Contractor shall designate one Clinical Doctor of Pharmacy (Pharm.D.) to act as the Clinical Liaison to the CMO and who will be the designated co-chairperson for the Department's quarterly Statewide Pharmacy & Therapeutics Committee (P&T Committee) meetings.

Amendment No. 3, dated July 17, 2017, added requirements that the CL was obligated to respond to requests by the Respondent's CMO, attend other meetings as required, facilitate problem solving regarding medical utilization as requested with the directors of other statewide vendors of medical and mental health, and respond to the questions and concerns of the Respondent's Chief Nursing Officer.

Amendment No. 21 added the requirement in Section 3.2.17.10 that the CL work full-time in Maryland:

> The Clinical Liaison shall be based in the State of Maryland and work full-time in the State. The Clinical Liaison's time shall be dedicated exclusively to the DPSCS Pharmacy Services Contract.

Amendment No. 27 mandated that the CL participate at in-person meetings at the direction of the CMO, and stated that in-person accessibility of the CL was critical to the success of the Contract:

> The Clinical Liaison shall be based in the State of Maryland and work full-time in the State. The Clinical Liaison's time shall be dedicated exclusively to the DPSCS Pharmacy Services Contract. The Clinical Liaison shall be accessible to participate in any in-person meeting, as required under the contract, at the direction of the DPSCS CMO. In-person accessibility of the Contractor's Clinical Liaison is critical to the success of this contract.

The PO concluded that the requirement of a CL reflects the agency needs and does not unduly restrict competition, and that Respondent was issuing Amendment No. 27 to further clarify the role of the CL.

Minority Business Enterprise ("MBE")

The final allegation remaining from Appellant's protest concerns the RFP being amended to exclude the cost of goods from pharmaceutical wholesalers towards the overall MBE participation goal, and limited the services that would be counted towards the MBE participation goal to delivery, staffing, and other services related to the distribution of pharmaceuticals and medical supplies under the Contract. Appellant contended in its protest that eliminating an entire class of MBE participants, namely wholesalers of pharmaceuticals, contravened the Respondent's own RFP and Maryland MBE rules. Appellant further alleged that it had trouble obtaining quotes from registered MBE delivery and transportation subcontractors because they feared losing business with the incumbent contractor. Appellant also cited the fact that Respondent allowed the incumbent under the current contract to include janitorial services in its count towards the MBE participation goal, which clearly favors the incumbent.

Section 1.33.1 of the RFP as amended by Amendment No. 17, states:

> An overall MBE subcontractor participation goal of 7% of the total value of the Annual Management Fee portion only (aggregate of the Annual Management Fee paid on entire contract as set forth in Attachment F), including all option years, if any, has been established for this procurement.

Section 3.6.1.1 defines that the Annual Management Fee covering all pharmacy services excludes the cost of drugs:

> As described in the Financial Proposal Form (Attachment F), payments to the Contractor shall be based on the Actual Acquisition Cost (AAC) for Brand drugs minus the Fixed Discount for Brand drugs and the Actual Acquisition Cost (AAC) for Generic drugs minus the Fixed Discount for Generic drugs, plus a fixed Annual Management Fee for each respective Contract Year.

The PO concluded that the RFP did not preclude a pharmacy wholesaler form performing work comprising the Annual Management Fee, and that numerous MBE-certified subcontractors for transportation and delivery services are listed in the Maryland Department of Transportation Directory other than MBE subcontractors servicing the current pharmacy contract. The Respondent's Agency Report states that it is the Respondent's longstanding policy to exclude the pass through costs of pharmaceuticals and pharmaceutical supplies to obtain the lowest cost for these items without restricting or incentivizing the use of any particular wholesaler.

STANDARD OF REVIEW FOR BID PROTESTS

To prevail on an appeal of the denial of a bid protest, an appellant must show that the agency's action was biased or that the action was arbitrary, capricious, unreasonable, or in violation of law. *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Cmty Servs., Inc.*, MSBCA 2302 at 8, 5 MSBCA ¶ 523 at 5 (2002)).

DECISION

Appellant contends that the RFP requirements: that the CPM be based in Maryland and be devoted full-time to the Contract; that the CPM have at least a bachelor's degree; that the five (5) Pharm.D.s required to staff the Contract work full-time and onsite in Maryland; that the CL work full-time in Maryland; and that wholesalers of pharmaceutical and pharmaceutical supplies who are subcontractors under the Contract do not count towards the MBE participation goals set forth in the RFP, are unduly restrictive and favor the incumbent under the current pharmacy services contract in violation of State Finance & Procurement (SF&P) Article §13-205(a)(1), which mandates that a unit "shall draft specifications to encourage maximum practicable competition without modifying the

requirements of the State...", and COMAR 21.04.01.04 which provides that "[t]he procurement officer or his designee shall be responsible for reviewing the specifications for content, clarity, and completeness and to insure that the specification is nonrestrictive."

The Board most recently addressed the standard for reviewing a procuring agency's drafting of specifications and requirements in *Master Security Company, LLC,* MSBCA No. 3062 (2018) at 6 - 7 (footnote omitted):

> SF&P §13-205(a)(1) and COMAR 21.04.01.04 provide that specifications in a solicitation should be drafted to encourage maximum practicable competition without modifying the requirements of the State. *Balfour Beatty Constr. v. Dept. of Gen'l Servs.*, 220 Md. App. 334 at 362 (2014); State Finance & Procurement Article §13-205(a)(1); and COMAR 21.04.01.04. In drafting specifications, a state agency is in a unique position to determine those specifications that most accurately reflect the minimum needs of the State. *Id.* at 362 – 363 (citing *Lottery Enterprises, Inc.*, MSBCA No. 1680, 4 MSBCA ¶314 at 7 (1992); *Admiral Services., Inc.*, MSBCA No. 1341, 2 MSBCA ¶159, at 2 (1987)). State agencies are, therefore, afforded great discretion in determining their own needs. *Id.* at 363. When reviewing a procuring agency's specifications, the Board will defer to the technical judgment of the procuring agency unless it is clearly erroneous. *Id.* (citing *Siems Rental & Sales Co., Inc.*, MSBCA 1609, 3 MSBCA ¶288 at 4–5 (1991); *Adden Furniture, Inc.*, MSBCA 1219, 1 MSBCA ¶93 at 4 (1982)).
>
> In order to defend its specifications, the State must simply assert reasonable cause for a restrictive bid or proposal requirement. *Balfour Beatty Constr.*, MSBCA 2803 at 5 (2012)(citing *Xerox Corp.*, MSBCA No. 1111, 1 MSBCA ¶48 (1983)). The more restrictive a specification may be, the greater the justification that the State may be fairly required to assert. *Id.* at 5-6. Once the State satisfies this showing, the protestor has a "considerable burden" to prove by a preponderance of the evidence that the restriction is unreasonable. *Id.* at 5 (citing *Xerox Corp., supra; The Trane Co.*, MSBCA No. 1264, 2 MSBCA ¶118 (1985)).

Appellant, at the hearing on the merits, argued that the Respondent must meet its minimal *prima facie* burden by showing some reasonable facts upon which it bases its opinion that the protested specifications meet the procuring agency's needs citing *Balfour* and its discussion of *Siems.* However, the Board notes that the Court

of Special Appeals explicitly rejected the strict "verifiable facts" standard proposed by the Appellant in *Balfour*:

> Appellants attempt to rely on *Siems Rental & Sales Co., Inc.* to assert that DGS is required to come forward with evidence in the form of "verifiable facts" indicating that the PLA specification is necessary to meet the State's needs and advance the government's legitimate interest. While *Siems* does provide that "in the face of protest, *some reasonable facts* upon which the opinion that the specifications meet the State's minimum needs must be shown," neither the MSBCA nor the Maryland Courts have utilized the strict verifiable facts standard as proposed by the Appellants. *Siems Rental & Sales Co., Inc.*, at 4 (emphasis added). Rather, where the State has met its minimal *prima facie* burden, the burden shifts to the Appellants to prove by a preponderance of the evidence that the restriction is unreasonable. *Xerox Corp., supra*, at 6; *Alco Power*, B207252.2, 82–2 Comp. Gen. Proc. Dec. ¶ 433 (1982). *Balfour* at 368.

Nonetheless, the Board finds the Respondent has met its *prima facie* burden in drafting the RFP specifications and requirements that the challenged specifications and requirements meet its minimum needs. The Board finds that the Respondent has asserted reasonable cause for each of the challenged specifications and requirements based on the PO's Final Agency Decision and the uncontested facts set forth in the Respondent's Agency Report. The Board further finds that Respondent has a legitimate interest in securing the safety, health and welfare of its inmate population[5] by close oversight of its pharmacy contractor and contractor staff, and in ensuring that the contractor under the multimillion dollar contract resulting from this procurement delivers its services at the lowest cost to taxpayers.

The requirements challenged by Appellant that the CPM, the Pharm.D.s and the CL work full-time in Maryland are an acknowledgement that given the responsibilities of the positions, that the Respondent wanted to ensure that the individuals filling these positions

[5]DPSCS reported an average daily population for FY 2018 of 21,632 individuals in custody. Dpscs.maryland.gov. (2019). *DPSCS-Annual Reports and Other Publications*. [online] Available at: http://dpscs.maryland.gov/publicinfo/publications/statistics.shtml [Accessed 11 Jan. 2019].

and discharging the duties as set forth in the RFP would be responsive and accountable to the Respondent, and the best way to ensure that was for those individuals to be in-person and on the ground for 40 hours a week.

It is reasonable to require the CPM, the individual who is to be the "point person" to the State for the entire Contract, to be based and work full-time in Maryland and to have at least a bachelor's degree and three years of experience in contract management. The record before the Board shows that the education and experience requirement was relaxed by Respondent via amendment upon questioning by potential offerors.

The requirement that the Clinical Pharm.D.s physically work within Maryland is reasonable given that they are required to be on-site, in space provided for by the Respondent, within each of the Department's five (5) service delivery areas per Section 3.2.17.2 of the RFP, and need to be available to consult with the Respondent's other healthcare contractors, and to meet with inmate patients.

The requirement that the CL must also work full-time in Maryland is reasonable given that, in addition to its other duties, the CL is also one of the on-site Pharm.D.s and is expected to supervise the Clinical Pharm.D.s.

The requirement to exclude the cost of goods from pharmaceutical wholesalers towards the overall MBE participation goal is reasonable in that it is the Respondent's longstanding policy to exclude the pass through costs of pharmaceuticals and pharmaceutical supplies to obtain the lowest cost for these items without restricting or incentivizing the use of any particular wholesaler.

Since the Board finds that Respondent has met its burden of asserting reasonable cause for the specifications and requirement of the RFP protested by Appellant, the

Appellant must prove by preponderance of the evidence that the specifications and requirements were unreasonable. The Board finds that Appellant has failed to meet its burden.

The Appellant offered no Comments to the Agency Report and the uncontested facts contained therein. The Appellant offered no witnesses at the hearing on the merits. The only facts in evidence provided by Appellant to the Board were by way of a stipulated statement of facts that provided no facts relevant in any way to the question as to whether the specifications and requirements protested by Appellant were unreasonable and unduly restrictive. Appellant merely presented arguments on how the Respondent *could have* drafted the specifications or requirements more to *its* liking. Appellant, in its protest, tells Respondent to supplant the requirements it has drafted for the positions of CPM, Clinical Pharm.D.s and CL in favor of contractor-defined requirements via supplanting the Respondent's draft of the requirements with language that contractor "supply sufficient staff and management to be able to fulfill the obligations under this RFP and the Agency's Manual of Policies and Procedures."

Appellant also presented no evidence that the Respondent drafted the challenged specifications and requirements to favor the incumbent contractor. The Board is not persuaded with Appellant's *post hoc ergo propter hoc* argument - the mere fact that the incumbent contractor asked the Respondent questions before changes were made to the specifications and requirements is not evidence that the changes were made in response to those questions. The only evidence presented to the Board of a change to the specifications and requirements of the RFP at issue is that the Respondent issued an amendment to the RFP after filing of a protest by Appellant.

Accordingly, Appellant's appeal is denied.

ORDER

For the foregoing reasons, the above-captioned appeal is DENIED.

SO ORDERED this 30th day of January, 2019.

/s/
Michael J. Stewart Jr., Esq., Member

I Concur:

/s/
Bethamy N. Beam, Esq., Chairman

/s/
Ann Marie Doory, Esq., 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 contested cases.

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 ten 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 No. 3093, Appeal of Diamond Drugs, Inc., d/b/a Diamond Pharmacy Services under Maryland Department of Public Safety and Correctional Services Solicitation No. Q0016025.

Dated: January 30, 2019

/s/
Ruth W. Foy, Deputy Clerk