

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)	
HomeRite Windows and Doors)	
)	
)	Docket No. MSBCA 2814
Under)	
St. Mary's College of Maryland)	
RFQ No. SMC-13-8138)	

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Sara Slaff
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER DOORY

This appeal is dismissed because the procurement officer properly considered Appellant's proposal and the decision to reject the proposal was appropriate.

Findings of Fact

1. St. Mary's College of Maryland ("College" or "SMCM") needed removal and replacement of windows in two residential buildings on the campus.
2. On March 20, 2012 the College issued an Invitation for Bid (IFB) No. 8133 which was for replacement windows and the IFB was posted on emarylandmarketplace.com in accordance with the College procurement requirements.
3. Six (6) amendments were issued for the IFB between April 4, 2012 and April 27, 2012. Amendment No. 001 converted the solicitation from an IFB to a Request for Proposal (RFP).

Amendment No. 002 was issued to correct the date for receipt of proposals. Amendment No. 003 was issued to postpone the proposal due date because of another Amendment to follow. Amendment No. 004 was issued setting a new proposal due date. Amendment No. 005 was issued to correct a typing error on the Solicitation, Offer and Award form. Amendment No. 006 was issued to answer contractor questions. All amendments were posted on emarylandmarketplace.com in accordance with College procurement requirements.

4. The RFP called for replacement windows, including 118 windows in Caroline Hall and 127 windows in Prince George Hall to be replaced during the summer in an expedited timeframe. (June 15 - August 3).
5. Seven (7) contractors submitted proposals. Three (3) proposals were deemed unacceptable. The evaluation considered all technical and financial proposals and as stated in the RFP's Solicitation, Conditions, Evaluation criteria, Paragraph 20, the technical evaluation criteria of the proposal are more important than the cost/price.
6. On May 14, 2012 notice of award letter went out to HomeRite and all other bidders informing them that W.M. Davis was recommended for award.
7. On May 17, 2012 HomeRite filed its protest of award.
8. On June 11, 2012 the College procurement officer responded by letter denying the protest.
9. On June 14, 2012 HomeRite filed an appeal to the Maryland State Board of Contract Appeals (MSBCA).

Decision

HomeRite submitted a bid on an RFP for replacement of 245 windows in two (2) residence halls at St. Mary's College of Maryland. Appellant argues that the procurement evaluation was "wrongly performed" and argues HomeRite could provide adequate

resources to perform the contract because HomeRite is a replacement window specialty contractor, unlike the awardee who is a general contractor. (Notice of Appeal letter)

The College issued an RFP which in the statement of work section stated, "The College will be replacing existing windows in our Caroline and Prince George residential halls this summer (June 15 - August 3). Caroline Hall has 118 windows and Prince George Hall has 127 windows to be replaced."

The RFP described the Evaluation Criteria in paragraph 20 of the Solicitation Conditions section which states, "The criteria are divided into technical and price categories. The Technical Evaluation Criteria, when combined are significantly more important than price."

The Technical Evaluation Criteria comprised two (2) factors, 1) Technical Approach and 2) Past Performance. The factors are considered equal in importance. The Technical Approach states,

Evaluation of the Technical Approach is intended to identify that offeror who has proposed a program which best meets the requirements of the solicitation and will fulfill the requirements of the contract. Proposals will be evaluated to determine the degree to which the offeror's Technical Approach offers enhanced value or lower risk to the College. Has proposed a Technical Approach that clearly demonstrates that functions and relationships are logically and clearly defined and that the contract schedule can be met.

Past Performance states,

Provides evidence that he/she has successful experience with current, or recently completed contract(s) within the last five (5) years for providing services of a similar nature to this solicitation. The Offeror will be evaluated on the extent of successful completion of similar services, taking into consideration the degree of client satisfaction. In addition, proposals will be

evaluated to determine whether, and the extent to which, the offeror has proposed an on-site staffing mix with satisfactory experience, including experience working on comparable projects and capability to perform work requirements, Higher rating/scores will be given to Offerors whose performance on similar services has exhibited the most success and client satisfaction. In investigating the Offerors' past performance, the College will consider information submitted by the Offeror and may consider information from other sources. Proposals and Past Performance Questionnaires received from customer references will be evaluated to determine whether, and the extent to which, the offeror has demonstrated a satisfactory record of conforming to contract requirements and to high standards of care provided; a satisfactory record of forecasting and controlling cost; a satisfactory record of completing contracts within budget; a satisfactory record of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, evidence of a business-like concern for the interest of the customer.

Under Contract Award section, paragraph 21.3 the RFP states,

The College intends to evaluate proposals and award a contract without discussions with offeror. Therefore, the offeror's initial proposal should contain the offeror's best terms from a price and technical standpoint. The College reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary.

The College evaluated the seven (7) proposals submitted. Three (3) proposals were considered unacceptable. The College was quite concerned about the work being completed in a timely manner because of the short timeframe. Upon the completion of the evaluation process, the College procurement officer recommended for award W.M. Davis (Davis).

In the technical criteria approach, Davis received an outstanding rank for work force, an outstanding rank for milestone schedule and a pass for manufacturer guarantee. In the past performance criteria Davis received an excellent ranking. In the total technical rating Davis ranked outstanding. In the price proposal Davis was the lowest bidder of the four (4) proposals considered acceptable. In the overall ranking Davis was number one (1) and the ranking footnotes state, "W.M. Davis had complete package, proper perceived staffing and excellent references. The Davis proposal included ten (10) employees on-site to complete work by deadline date.

By comparison, HomeRite's technical ranking was acceptable for work force and ranked acceptable for milestone schedule, however in manufacturer guarantee HomeRite failed. In past performance HomeRite got an acceptable ranking. In the price ranking HomeRite received an N/A which in the footnote reference stated, N/A means price proposal was not considered as technical proposal was unacceptable. The overall ranking footnotes for HomeRite stated, "lacked proper submittal documentation to meet criteria for ranking." HomeRite's proposal included three (3) employees and the proposal also stated if needed they could add more staff, even though the RFP requested the best final terms from the contractor. Further, in the technical factor section the degree the offeror's approach offers enhanced value or lower risk for the College was to be considered. Because of the uncertainty created by HomeRite's staffing statement, the procurement officer evaluated that statement and decided that the College saw value to having more workers on-site to minimize risk of untimely job completion.

A procurement officer has a great deal of discretion, especially in competitive negotiations. This Board has ruled that "... competitive negotiation process is used when an award cannot be based solely on price. It involves an evaluation of

technical factors as well as price in order to determine which proposal is most advantageous to the State. The evaluation of technical factors requires the exercise of discretion and judgment which is necessarily subjective." B. Paul Blaine Association Inc., MSBCA 1123, 1 MSBCA ¶58 (1983). The Board has recognized and held that, "Procurement officials may award a contract to a higher priced, technically superior proposal if it is determined that the higher priced, technically superior proposal is also the proposal most advantageous to the State". Delmarva Community Services, Inc., MSBCA 2302, 5 MSBCA ¶523 (2002), see also, United Technologies Corp and Bell Helicopter, Textron, Inc., MSBCA 1403 and 1407, 3 MSBCA ¶201 (1989), Information Control System Corporation, MSBCA 1198, 1 MSBCA ¶81 (1984).

Appellant has the burden of proving that the award of the contract is contrary to law or regulation or otherwise unreasonable, arbitrary capricious or an abuse of discretion. Delmarva, op. cit. "Mere disagreement with the judgment of the evaluators assigned to the evaluation panel for the procurement is insufficient to show that the evaluation of proposals is unreasonable." AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987). "Appellant may disagree with the evaluators' recommendation but that alone does not meet the burden necessary." Hunt Reporting Company, MSBCA 2783 (2012). The Board does not second guess procurement officers. The Board has consistently held, that it will not supplant its judgment for that of the agency. See, Hensel Phelps Construction, MSBCA 1167, 1 MSBCA ¶68 (1984), Eisner Communications, Inc., MSBCA 2438, 2443 and 2445, 6 MSBCA ¶560 (2005), ACS State Healthcare, LLC, MSBCA 2474, 6 MSBCA ¶564 (2005).

The appeal is denied because the procurement officer's action was not arbitrary, capricious, unreasonable or in violation of law.

Wherefore it is Ordered this _____ day of October, 2012
that the above-captioned appeal is DENIED.

Dated:

Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
Chairman

Dana Lee Dembrow
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 2680, appeal of HomeRite Windows and Doors under St. Mary's College of Maryland RFQ No. SMC-13-8138.

Dated:

Michael L. Carnahan
Deputy Clerk