

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
SanDow Construction, Inc.	*	Docket Nos. MSBCA 3174, 3189
Under	*	
University of Maryland,	*	
College Park RFP No. 96352	*	
Appearance for Appellant	*	Scott A. Livingston, Esq.
	*	Barry L. Gogel, Esq.
	*	Rifkin, Weiner, Livingston, LLC
	*	Bethesda, Maryland
Appearance for Respondent	*	Melodie M. Mabanta, Esq.
	*	Mark D. Beaumont, Esq.
	*	Assistant Attorneys General
	*	Office of the Attorney General
	*	Contract Litigation Unit
	*	Baltimore, Maryland

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OPINION AND ORDER BY CHAIRMAN (BEAM) BRINKLEY

This matter came before the Board on November 17, 2021 for a hearing on two motions in the First Appeal, MSBCA No. 3174: (1) Respondent, University of Maryland College Park’s Second Motion to Dismiss or, in the Alternative, Motion for Summary Decision (“Second Motion”) filed on July 27, 2021, and (2) Appellant, Sandow Construction, Inc.’s (“Sandow”), Motion for Summary Decision (“Motion”) filed on July 1, 2021. After considering the two Motions, the Responses and Replies, if any, the Board heard argument from counsel on both Motions.¹ As to this Motion, the Board finds that there is no genuine issue of material fact and that Appellant is entitled to judgment as a matter of law.

¹ An Order and Opinion on Respondent’s Second Motion was issued on March 11, 2022.

UNDISPUTED FACTS

On July 1, 2020, Respondent issued a Request for Proposals No. 96352 for On-Call General Contracting Services for Small Projects (“RFP”).² Appellant, a certified Minority Business Enterprise (“MBE”), submitted its Proposal and was informed on or about February 11, 2021 that it did not satisfy the technical requirements of the RFP because its key personnel did not meet the five (5) year minimum experience requirements set forth in the RFP.³

Section 4, Evaluation Criteria, of the RFP requested information relating to the “Proposer’s Personnel.” Subsection (a) set forth the Minimum Requirements of the proposer’s “Key Personnel” and required offerors to complete a separate “Key Personnel Form” for one Project Coordinator, two Project Managers, and two Field Superintendents. For the Project Manager, the Minimum Requirements were set forth as follows:

Minimum Requirements:

High school graduation or GED equivalency required. **Minimum of five (5) years’ experience in scientific research, teaching facilities, occupied and/or educational setting, and general construction/renovation projects.** Considerable knowledge of construction materials, procedures, method and equipment. Knowledge of safety hazards and OSHA requirements. Ability to interpret contracts plans and specifications for subcontractors.

(emphasis added). Similarly, for the Field Superintendent, the Minimum Requirements were set forth as follows:

Minimum Requirements:

High school graduation or GED equivalency required. **Minimum of five (5) years’ experience in scientific research, teaching facilities, occupied/institutional settings, and general construction/renovation projects.** Considerable knowledge of construction materials, procedures, method and equipment. Knowledge of safety

² Pursuant to MD. CODE ANN., EDUC., §12-112(a), except as provided in §11-203 of the SF&P Article, the University System of Maryland is exempt from Division II of the SF&P Article (*i.e.*, the Procurement Law). As such, its procurement process is not subject to COMAR; instead, the University System of Maryland has adopted its own Policies and Procedures for regulating its procurements.

³ Despite being advised that its Proposal did not satisfy the technical requirements, Appellant’s Proposal was nevertheless ranked 11th out of the 24 proposals received. The RFP provides that Respondent “anticipates making multiple awards” to contractors, but the record is not clear as to how many proposals were approved for award.

hazards and OSHA requirements. Ability to interpret contracts plans and specifications for subcontractors.

(emphasis added). In addition to these Minimum Requirements, Proposers were instructed to provide the following information for all Key Personnel:

1. Educational background, including degrees/certifications received.
2. Work experience with the proposing firm, including duration of employment, with dates, and position(s) held;
3. Work experience with prior employers, including duration of employment, with dates, and position(s) held.
4. **Specific project experience which is similar to the work to be done under this contract** and the role this person played in each selected project. **A minimum of three (3) projects are to be listed for each person.** A brief description of the project should be given (if not provided elsewhere in the technical proposal) inclusive of type of work performed (i.e., renovation, new construction, additions, etc.), dollar volume of project, contract method (GM, GC, DB, etc.) job schedule.

(emphasis in original).

On March 1, 2021, Appellant filed a protest (“Protest”) with the procurement officer (“PO”) alleging that Respondent “ignored clear indications of [Appellant’s] key personnel experience, and applied undisclosed criteria to the evaluation of [Appellant’s] proposal.” On April 22, 2021, Respondent issued its Final Decision denying the Protest, and Appellant filed this Appeal (*i.e.*, MSBCA No. 3174) on April 30, 2021.

In its Final Decision, Respondent stated that “SanDow’s Proposal did not show the minimum experience required for Project Manager and Field Superintendent.” Respondent acknowledged that “Mr. Auslander’s Key Personnel Form indicated over 35 years of construction experience, and Mr. Kaschak’s Key Personnel Form indicated over 29 years of experience.” Respondent ultimately concluded that

SanDow's proposal showed that Alan Auslaender **had three years' experience as a Project Manager**, and other non-Project Manager experience. For Jerry Kaschak, SanDow showed **only three years' experience as a Superintendent**. The information provided by SanDow in its proposal did not meet the minimum requirements set forth in the RFP.

(emphasis added).⁴

On June 16, 2021, the Board held a hearing on Respondent's Motion to Dismiss, or in the Alternative, Motion for Summary Decision ("First Motion"). At this hearing, Respondent's counsel was questioned regarding "what minimum qualifications did [Respondent] find the project manager and superintendent didn't have?" Respondent's counsel responded that "[t]hey didn't have five years of experience as project manager or five years of experience as a field superintendent." When asked "[w]here in the RFP does it require a project manager to have five years experience as a project manager," Respondent's counsel was unable to point to any specific language in the RFP that sets forth this criteria, other than to state that "I think that's what that language says, and if there was some confusion about that, then a question should have been asked about that."

Toward the end of the hearing, Appellant's counsel orally moved for summary decision in its favor. The Chairman responded that although oral motions for summary decision are allowed under COMAR 21.10.05.06B(1), the Board was nevertheless requesting that he submit his dispositive motion in writing so that Respondent would have a full and fair opportunity to respond. Respondent's First Motion was denied on June 16, 2021.

On July 1, 2021, Appellant filed, in writing, the oral Motion for Summary Decision it had made at the June 16, 2021 hearing. The next day, Appellant filed a Motion to Shorten Time for

⁴ Appellant asserted several bases for its Protest, and Respondent addressed each of these in its Final Decision Letter. However, at the hearing on Respondent's first Motion to Dismiss, or in the Alternative, for Summary Decision, Respondent's counsel conceded that Appellant's alleged failure to satisfy the minimum requirements was the sole basis of Respondent's determination to reject Appellant's Proposal.

Respondent to respond. On July 6, 2021, Respondent filed a Response opposing the Motion to Shorten Time. On July 7, 2021, Appellant filed a Reply, and the Board then issued an Order requiring Respondent to file its response to Appellant's Motion for Summary Decision "on or before July 12, 2021." To date, Respondent has not filed a written Response to the Motion.

On November 17, 2021, the Board held a hearing on Respondent's Second Motion and Appellant's Motion. Even though Respondent had not filed a written Response opposing the Motion, the Board nevertheless allowed Respondent's counsel to argue in opposition thereto. In arguing that the Motion should be denied, Respondent's counsel simply re-asserted her objection based on the Board's lack of jurisdiction, asserted that there was a dispute of material fact regarding SanDow's key personnel experience, and asserted that Appellant had requested relief that the Board was unable to grant.

DECISION

In Appellant's Motion, Appellant argued that it was entitled to judgment as a matter of law because there was no genuine dispute of material fact that Respondent applied evaluation factors and minimum qualifications that were not expressly stated in the RFP. Appellant asserts that the RFP did not expressly state or require that the proposed Project Manager have five years of experience working as a Project Manager, or that the proposed Field Superintendents have five years of experience working as Superintendents. According to Appellant, Respondent's conclusion, that the "information provided by [Appellant] in its proposal did not meet the minimum requirements set forth in the RFP," was based on her misapplication of minimum requirements that were not actually set forth in the RFP.

We agree. We do not find any language in the RFP that expressly requires that a Project Manager must have a minimum of five years of experience as a project manager. Likewise, we

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 Order in MSBCA Nos. 3174 & 3189, the Consolidated Appeals of SanDow Construction, Inc., University of Maryland, College Park RFP No. 96352.

Date: March 11, 2022

/s/
Ruth W. Foy
Deputy Clerk