

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
Zillion Technologies, Inc.**

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**Under Maryland DGS Solicitation
CATS+ TORFP F50B00045**

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Docket No. MSBCA 3210

Appearance for Appellant

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Appearance for Respondent

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OPINION AND ORDER BY MEMBER CHO

This bid protest appeal came before the Board for a merits hearing on September 21, 2022. The question in this Appeal is: how much information must the State provide an unsuccessful offeror at a debriefing to be compliant with COMAR 21.05.03.06B(1)(c)? After considering witness testimony, the admitted exhibits, and arguments by counsel, the Board denies the Appeal.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

Zillion Technologies, Inc. (“Appellant” or “Zillion”) is a provider of IT staffing services.

On July 2, 2020, the Department of General Services (“Respondent” or “DGS”) issued a Task Order Request for Proposals under Solicitation No. F50B00045 (“TORFP”). The purpose of

the TORFP was to “provide a streamlined procurement process to support the need for agile delivery services,” and was intended to create a “pool of qualified, agile resources who can be engaged, on an as needed basis, to support the State” in its IT development efforts. This was to be accomplished by using qualified firms “that specialize in recruiting and retaining information technology personnel that work in the State government agencies.” TORFP § 3.1. Respondent intended to award the TORFP to up to ten (10) Master Contractors. *Id.*

The TORFP required the submission of a technical proposal and financial proposal in separate volumes, which were to be evaluated independently of each other. The five (5) criteria for evaluating a technical proposal, in descending order of importance, were:

- A. Evidence that the Offeror has sufficient technical experience in providing the required agile consulting services in the TORFP Scope of Work.
- B. The strength of the Offeror’s Staffing Management Plan and the ability for the Master Contractor to meet future Work Order needs.
- C. The Offeror’s Statement of Capability evidencing that the Offeror possesses the ability to recruit and retain highly qualified, agile resources who can be engaged to support State agencies in planning and implementation of IT system development efforts.
- D. The strength of the Offeror’s Communication Plan.
- E. References.

TORFP § 5.2 (TO Proposal Evaluation Criteria). In the event there were more than twenty (20) proposals, the PO could elect to use a down-select process whereby all proposals received would be evaluated on the first two technical criteria, § 5.2A and § 5.2B, and ranked. *Id.* § 5.3A. Only the top twenty (20) technical proposals would be eligible to continue in the selection process. The twenty proposals would then be subject to a full evaluation based on all five technical criteria and ranked from highest to lowest. *Id.* § 5.3B.

Only the financial proposals submitted by the technically qualified offerors would be opened, then ranked from lowest to highest price. TORFP §§ 5.3C, 5.3D. The TORFP required that the Procurement Officer “make a determination recommending award ... to the ten (10) responsible Offerors who have the TO Proposals determined to be the most advantageous to the State, considering price and the evaluation criteria,” and stated that in making such a selection, “technical merit has greater weight than financial.” *Id.* § 5.3E.

Zillion was among some 98 offerors that timely submitted proposals in response to the TORFP. The Procurement Officer (“PO”) exercised the down-select process set out in TORFP § 5.3.A and, following the initial evaluation under §§ 5.2.A and 5.2.B, Zillion’s technical proposal was ranked in the top 20 and continued in the competition. Later in the evaluation process, after an unrelated bid protest was sustained, a 21st offeror was added to the down-selected proposals.

The Evaluation Committee (“EC”) and the PO conducted a full evaluation of the top 21 down-selected technical proposals using the evaluation criteria in §§ 5.2.A through 5.2.E. Zillion’s technical proposal was ranked #21.

By letter dated November 23, 2021, Respondent issued a request for Best and Final Offers (“BAFO”). Zillion timely submitted its BAFO. Its financial proposal ranked third. Zillion’s final ranking was 20th overall.

On January 14, 2022, the PO notified Appellant in an email that it had not been selected for award. Appellant immediately requested a debriefing, which was conducted by video conference on January 20, 2022. Ms. Pam Malech, the PO, and Ms. April Weimer, Associate Director of Procurement, IT & Professional Services for the Office of State Procurement, attended on behalf of Respondent. Individuals who attended on behalf of Zillion were Mr. Anthony M. Irudhayanathan, CEO; Mr. Kevin Chang, Vice President; and Mr. R.K. Pinelli, Vice President.

During the debriefing, the PO read from a “Virtual Debriefing Outline” that had been prepared in advance. Ms. Malech read to Appellant’s representatives the verbatim language of COMAR 21.05.03.06B and explained the criteria and procedures she and the EC used in conducting the evaluation. She also discussed how proposals were ranked. With respect to Zillion’s proposal specifically, the PO provided feedback on the strengths and weaknesses under each evaluation criterion, exactly as written on page 3 of the Debriefing Outline:

Zillion

RFP § 5.2.A. Evidence that the Offeror has sufficient technical experience in providing the required agile consulting services in the TORFP Scope of Work.

Strengths:

- None.

Weaknesses:

- Experience provided does not support experience they say they have.
 - Looks like they provided resources but did not do specific project work
-

RFP § 5.2.B. The strength of the Offeror’s Staffing Management Plan and the ability for the Master Contractor to meet future Work Order needs.

Strengths:

- Has talent network.

Weaknesses:

- None
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RFP § 5.2.C. The Offeror’s Statement of Capability evidencing that the Offeror possesses the ability to recruit and retain highly qualified, agile resources who can be engaged to support State agencies in planning and implementation of IT system development efforts.

Strengths:

- Retention rate 90%.

Weaknesses:

- Hard to find response to assess their capability.
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RFP § 5.2.D. The strength of the Offeror’s Communication Plan.

Strengths:

- Offered escalation levels and SLA.

Weaknesses:

- No real plan or substance.
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RFP § 5.2.E. References.

Strengths:

- None.

Weaknesses:

- None.

Joint Hearing Exhibit (“JE”) 11 at 3.

After Ms. Malech finished reading from the Debriefing Outline, Appellant requested that she provide more detail concerning the weaknesses in its Technical Proposal. Ms. Malech responded that no further information was available and, in any event, that COMAR did not allow her to share any other information during the debriefing.

On January 25, 2022, Zillion filed its Protest with the PO. Specifically, Appellant protested “the determination that [its] technical proposal and oral interview failed to demonstrate that [Appellant] should be included among the ten offerors to whom award is to be made” under the TORFP. Further, Appellant asserted that it was “entitled to sufficient information to identify the nature of [its] perceived weakness,” and Respondent’s failure to provide additional detailed feedback during the debriefing led Appellant to conclude that its “ranking outside of the top [ten] offerors was either arbitrary or capricious.”

The PO issued her Final Decision in a letter dated January 26, 2022, denying Appellant’s Protest. Ms. Malech again quoted COMAR 21.05.03.06B(1) & (2), reiterating that the “additional information Zillion is requesting is not required and is not available.” Moreover, she found the

nature of Zillion’s Protest to be “a mere disagreement with the judgment of the evaluators,” which is not a proper ground for a protest. She noted that “the lack of understanding on the part of Zillion does not determine whether something is arbitrary or capricious.”

Zillion appealed the PO’s denial of the Protest to this Board on February 3, 2022. On February 16, 2022, the Board of Public Works approved the award of the contracts under the TORFP to the top ten (10) offerors.

STANDARD OF REVIEW

A procurement officer’s decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See Montgomery Park, LLC v. Maryland Dep’t of Gen. Servs.*, 254 Md. App. 73 (2022), *cert. granted*, 479 Md. 64 (2022); *Hunt Reporting*, MSBCA No. 2783 (2012).

DECISION

As a threshold matter, we must address Respondent’s defense of standing. Zillion has not shown that its competitive position was affected by Respondent’s actions in such a way as to qualify it as an “aggrieved” party and, therefore, the Board finds that Appellant does not have standing to pursue this Appeal.

We recently clarified the requirements for standing in bid protests. *See MGT Consulting Group, LLC*, MSBCA No. 3148 (2020); *Qlarant Integrity Solutions, Inc.*, MSBCA Nos. 3157, 3158, 3163 & 3169 (2021). To have standing, a party must show that it either “may be aggrieved” or “is aggrieved” by some action taken by the State in connection with “the solicitation or the award of a contract.” COMAR 21.10.02.01B(1), 21.10.02.01B(3). Whether a party is “aggrieved” – that is, whether the party’s competitive position has been affected negatively by some action of

a State agency – is a question of fact which, when disputed, requires a hearing on the merits. *MGT Consulting*, at 9; *Qlarant*, at 6-7.

In this Appeal, we previously denied Respondent’s Motion to Dismiss or, in the Alternative, for Summary Decision for lack of standing. *See* Order dated May 4, 2022. While acknowledging that the Appeal “stems from ... a lack of full and required disclosure by the procurement officer” during the debriefing, Appellant asserted that it was Respondent’s “failure to provide a detailed explanation as to why its experience did not result in a higher ranking” that compelled its conclusion that the evaluation must have been conducted in an arbitrary or capricious manner. In other words, Appellant argued that it was not given enough information at the debriefing to be able to determine whether it was properly ranked #21, rather than in the top 10. Appellant believed that discovery “would provide the answers that the procurement officer refused or failed to provide.” Opposition to Respondent’s Motion to Dismiss or For Summary Decision, at 7. The case proceeded through discovery to allow Appellant the opportunity to fully develop the record and demonstrate how it qualifies as an aggrieved party with standing to pursue this Appeal.

The Board finds the record devoid of any evidence supporting Appellant’s standing. At the merits hearing, Zillion did not offer any evidence to challenge its ranking or the evaluation process. The only evidence offered related solely to whether the amount of information provided to Appellant during the debriefing was adequate. No testimony or documentary evidence showed that Respondent conducted the procurement improperly, or that the evaluation criteria were not applied correctly to Zillion’s proposal. Appellant did not seek to disqualify other offerors or compare its proposal to others.

Although Appellant argued that it was “aggrieved” by receiving a deficient debriefing, it did not elicit any testimony or produce other evidence of some information it was not provided – but should have been provided – at the debriefing that would show that Zillion had a reasonable possibility of receiving an award or, at a minimum, had an adverse effect on Zillion’s competitive position in this procurement. Even assuming *arguendo* that Respondent violated COMAR in the way it conducted the debriefing in this case, Appellant offered no evidence to show how its right to an award was affected by the violation. In short, this Appeal became a case of “mere disagreement” with Respondent’s evaluation.

Further, it bears repeating that the relief Zillion seeks is one that this Board cannot provide. Appellant requests a new and improved debriefing, which it believes may provide another opportunity to identify some impropriety in the evaluation and/or selection process, and thus the basis for a second protest. However, our authority is limited to determining whether a violation of procurement law has occurred and does not extend to determining what remedy, if any, is warranted. *See Client Network Services, LLC*, MSBCA No. 3168 (2022) at 14. Even if this Board were to sustain the Protest based on a determination that the PO failed to comply with the debriefing requirement in COMAR, we cannot compel Respondent to provide a second debriefing.

Here, there is no dispute that a debriefing was requested and promptly given. The burning question is: how much information is the State required to provide under COMAR 21.05.03.06B(1)(c), which states that a debriefing shall “provide information on areas in which the unsuccessful offeror’s technical proposal was deemed weak or deficient”?

Appellant contends that the “generic and perfunctory statements” Respondent made at the debriefing were “too vague to comport with” COMAR, rendering it “effectively not a debriefing at all.” *See* Sept. 21, 2022 Hr’g Tr. (“Hr’g Tr.”) at 11:23-12:1; 12:22-25. Mr. Chang testified that

the ambiguity of the feedback provided by the PO left him “gobsmacked” because he “did not know what to do with [it].” *Id.* at 49:11-50:5. He testified that the PO’s cursory explanation of the weaknesses in Zillion’s proposal was not enough to help Zillion improve its future proposals in any meaningful way.

The reason for Appellant’s confusion and, perhaps, frustration, is readily apparent. Being told that “[e]xperience provided does not support experience they say they have... [l]ooks like they provided resources but did not do specific project work... [h]ard to find response to assess their capability... [and] [n]o real plan or substance,” without a more detailed explanation, does little to assist Zillion in understanding the ways in which its proposal fell short, or how it might prepare a better proposal. However, Ms. Malech testified that, based both on the language of COMAR and her on-the-job training as a procurement officer, she provided all necessary and required information, and it was Zillion’s responsibility to review and identify the deficiencies in its own proposal in light of the information provided at the debriefing. *See Hr’g Tr.* at 106:17-109:25.

The Board is bound to uphold the regulation as written. COMAR 21.05.03.06B(1)(c) is silent with respect to the quality or quantity of “information” to be provided on the weaknesses of an unsuccessful offeror’s technical proposal, and it is beyond this Board’s mandate to prescribe the appropriate level or degree required. Although Zillion may be dissatisfied with the cursory information provided, we cannot say that Respondent violated COMAR as promulgated. We conclude that Respondent complied with the letter of the law.

We do, however, share Appellant’s sentiment and agree that the debriefing provided in this instance “did not meet with the purpose of a debriefing.” Although the PO testified that she believes that the primary purpose of a debriefing is to support the agency’s decision, she

nevertheless acknowledged that it was also “to provide vendors with some feedback on why they were not selected.” *See* Hr’g Tr. at 110:7-15. She also conceded that, although the regulation did not require more detail, it also did not necessarily prohibit or limit her from sharing more detailed feedback, if available. *Id.*

We recognize the inherent tension in what a procurement officer can versus should share in debriefings, and there are practical considerations as to why it may be sometimes difficult to do more than what was done here. For instance, Ms. Malech explained that the summaries of strengths and weaknesses in technical proposals are prepared immediately after completing the technical evaluation but before opening the financial proposals because of concerns that seeing the financial proposals may “taint” her opinion and compromise the overall evaluation. *See* Hr’g Tr. at 107:9-16. Another factor may be the sheer number of debriefings that must be conducted in some cases where, as here, close to 100 proposals were submitted and only 10 offerors selected; thus, at least theoretically, the PO may have been preparing for up to 90 debriefings.

Nonetheless, we would strongly encourage procurement officers, to the extent possible, to make available more detailed and meaningful feedback than the bare minimum (especially when asked) to assist unsuccessful offerors in understanding the reasons for their non-selection, so that they can improve for future procurements. We believe such a cooperative approach is in keeping with both the letter and spirit of the debriefing requirement as well as the Procurement Law in general (*see* SF&P § 11-201(a)), and ultimately would better serve the State of Maryland by promoting broader competition and attracting higher quality proposals to the State’s benefit.

For the reasons stated above, the Board denies the Appeal.

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.

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I hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3210, Appeal of Zillion Technologies, Inc. under Maryland DGS Solicitation CATS+ TORFP F50B00045.

Date: October 6, 2022

/s/
Ruth W. Foy
Clerk