

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF *

ENVIROTEST CORPORATION *

*

DOCKET NO. MSBCA 3272

UNDER MARYLAND *

MOTOR VEHICLE ADMINISTRATION *

RFP NO. V-HQ-24019-S *

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OPINION AND ORDER BY MEMBER KREIS

The Maryland State Board of Contract Appeals (“Board”) conducted a merits hearing in this Appeal on October 1, 2024.¹ After considering all witness testimony, the admitted exhibits, and arguments made by counsel, the Board denies the Appeal.

PROCEDURAL HISTORY AND FINDINGS OF FACT

On October 3, 2023, the Maryland Motor Vehicle Administration (“Respondent” or “MVA”) published Request for Proposals No. V-HQ-24019-S (“2023 RFP”) seeking a vendor to

¹ The record was left open to handle a discovery issue raised for the first time on the morning of the hearing. The record was officially closed on October 15th. No additional evidence was admitted.

manage and operate the State’s Vehicle Emissions Inspection Program (“VEIP”), which is designed to reduce air pollution. The resulting contract would replace the existing 2009 VEIP contract (“2009 Contract”) held by Envirotec Corp. (“Appellant” or “Envirotec”). Although the 2009 Contract expired more than four years ago, it has been extended four times with the approval of the Board of Public Works (“BPW”). The 2023 RFP is Respondent’s fourth attempt to reprocur the VEIP contract, and one of the reasons for the delay was Envirotec’s successful protests of a previous RFP.

The MVA held a pre-proposal conference on October 18, 2023, via Microsoft Teams and, since that date, has issued fourteen addenda to the 2023 RFP, only a few of which are relevant to this Appeal. On October 1, 2023, the MVA issued Addendum No. 1, consisting mainly of the Pre-Proposal Conference Minutes and Attendee Information.

On December 8, 2023, in Addendum No. 3, the procurement officer, Jessica Mettle, (“PO” or “Ms. Mettle”) published 92 questions submitted by potential offerors and Respondent’s answers to them (“Q&A”). In doing so, the MVA identified the entity that submitted each question, and the date on which each question was submitted. Addendum No. 3 disclosed that Envirotec submitted Questions 1-63 and 88-92, Parsons Transportation Group, Inc. submitted Questions 64-74, and OTAS, Inc. submitted Questions 75-87.

Envirotec’s Question No. 39 concerned variations in estimated quantities (“VEQ”). Q&A No. 39 stated:

QUESTION: If actual inspection quantities experienced once the contract is awarded do not materialize, or greatly exceed, the volume numbers in the Financial Proposal Form, will the State entertain an equitable adjustment to the contract.

ANSWER: The contractor should consider its pricing so that it need not submit a Request for Equitable Adjustment (REA) but may do so and MVA will evaluate the REA if received in accordance with COMAR 21.07.01.15 and 21.07.02.03.

OTAS, Inc.’s Question No. 75 concerned the number of employees currently working at each station. Q&A No. 75 stated:

QUESTION: Staffing: How many employees are currently working at each station?

ANSWER:

<u>Station Location²</u>	<u>Positions</u>
01 – Grasonville	5
02 – Hagerstown	6
03 – Frederick	9
04 – Westminster	6
05 – Erdman Ave.	14
06 – Edgewood St.	9
07 – Owings Mills	12
08 – Bel Air	10
09 – Columbia	10
11 – White Oak	16
12 – Derwood	12
13 – Glenarden	9
14 – Clinton	9
15 – Annapolis	11
16 – Glen Burnie	10
17 – Prince Frederick	6
18 – Waldorf	8
19 - Northeast	6
TOTAL STATION STAFFING	168

On January 4, 2024, Envirotest filed its First Pre-Proposal Protest, asserting that the MVA had impermissibly disclosed in Addendum No. 3 the identity of potential offerors who submitted questions concerning the 2023 RFP. It argued that such a disclosure provided potential offerors information about other potential offerors’ technical and financial approaches. Additionally, it protested that Q&A Answer No. 75 improperly disclosed Envirotest’s confidential and

² Even though there is a Station 19 in this table, it is undisputed that there are only 18 total stations. For an unknown reason not relevant to this Appeal, there is no Station 10.

proprietary information concerning its technical and pricing strategies, including the staffing plan, to its competitors.

On January 24, 2024, Envirotest filed its Second Pre-Proposal Protest, asserting improprieties in the 2023 RFP, including its lack of a Variations in Estimated Quantities Clause (“VEQ Clause”). In reference to the Answer to Question No. 39, Envirotest argued: “COMAR 21.07.02.03 applies only to construction contracts,” and MVA’s answer to Question No. 39 should be rescinded, while incorporating a reasonable variation in estimated quantities clause into the 2023 RFP. *See* Second Pre-Proposal Protest at 6.

On May 3, 2024, the MVA issued Addendum No. 13, including a revised RFP document. Among other things, Addendum No. 13, for the first time contained a VEQ Clause that stated:

Variations in Estimated Quantities

Unless specifically indicated otherwise in the State’s solicitation or other controlling documents related to the Scope of Work, any sample amounts provided are estimates only and the Department does not guarantee a minimum or maximum number of units or usage in the performance of this Contract.

Where the quantity of a pay item in this Contract is an estimated quantity and where the actual quantity of such pay item varies more than 25 percent above or below the estimated quantity stated in this Contract, an equitable adjustment in the Contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 125 percent or below 75 percent of the estimated quantity.

On May 7, 2023, the PO issued two separate final decision letters addressing each of Envirotest’s two protests. The PO denied the First Pre-Proposal Protest (“Final Decision #1”) in its entirety. With respect to the Second Pre-Proposal Protest, the PO denied in part, and sustained in part (“Final Decision #2), sustaining that portion of the protest relating to the lack of a VEQ Clause. The PO noted that the MVA took corrective action in issuing Addendum No. 13 and the Amended RFP that included a VEQ Clause, which is what Envirotest requested.

On May 16, 2024, Envirotest appealed both final decisions. As to Final Decision #2, it argued that MVA “took insufficient corrective action” when it added a VEQ Clause substantially like the one contained in COMAR 21.07.02.03.

The Board denied the parties’ cross motions for summary decision after a hearing on August 7, 2024. At the merits hearing on October 1, 2024, Appellant restated the appeal issues as follows:

1. Improper disclosure of Q&A Submitters.
2. Improper disclosure of staffing plan.
3. Improper VEQ Clause for Construction Contracts.
4. Improper VEQ for ambiguous “pay items.”

Each party called one witness at the hearing. The Appellant called Darrin Greene (“Greene”), Vice President of Opus Inspection, the parent company of Envirotest.³ The Respondent called the PO.⁴

STANDARD OF REVIEW

In appeals concerning bid protests, an appellant must show by a preponderance of the evidence that a procurement officer’s actions were biased, arbitrary, capricious, unreasonable, or in violation of law. Absent this showing, a procurement officer’s decision will not be overturned. *See Montgomery Park, LLC v. Maryland Dep’t of General Servs.*, MSBCA No. 3133 (2020) at 36 – 27, *rev’d on other grounds, Montgomery Park, LLC v. Maryland Dep’t. of Gen. Servs.*, 254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023); *Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6.

³ Although legally separate entities, for purposes of this opinion, both Opus Inspection and Envirotest will be referred to as Envirotest.

⁴ On October 4, 2024, Appellant filed a 5-page document with Exhibits that it characterized as a Line Providing October 3, 2024 MDOL (Maryland Department of Labor) Determination. The Appellant claims a recent ruling from the MDOL specifically contradicts Appellant’s Exhibit 4 (a document provided to Appellant by Respondent during discovery) and all testimony and argument regarding it at the hearing. The Board need not address this “Line” as it is not relying on Exhibit 4 or any of the testimony or argument related to it in this Opinion.

DECISION

The MVA Did Not Improperly Disclose Q&A Submitters.

Envirotest argued that the MVA deviated from Maryland Department of Transportation (“MDOT”) policy when it disclosed the identity of potential offerors that submitted questions to the MVA concerning the 2023 RFP. It alleged that the MVA violated COMAR 21.06.01.02C because the disclosure “afforded potential offerors competitive advantages by providing insight into strategies being considered by specific competitors,” thus tainting this solicitation and discouraging potential offerors from asking questions in the future. *See* First Pre-Proposal Protest at 5.

The PO testified that she was not aware of any laws or regulations that prevented identifying the entity asking the questions. Further, she pointed out that no entity that submitted questions concerning the 2023 RFP requested that its identity remain confidential. The MVA is also not aware of any long-standing MDOT policy against disclosing the identity of potential offerors. In fact, the Pre-Bid Conference Minutes and Teams Sign-In sheet contained in Addendum No. 1 identified the names of all entities attending, as well as whether they were a prime contractor, subcontractor or Minority Business Enterprise. *See* Respondent’s Exhibit # 2.

The PO testified that the reason she disclosed the names in the Q&A was to keep track of the many questions that were submitted and avoid not responding to all of them inadvertently. She indicated that on a prior procurement questions were missed.

In the words of Iain Pears, an English art historian, novelist and journalist: “The simple fact that something has not been done is no proof that it cannot be done.” While there is no evidence that it had ever been done before, Envirotest failed to prove the existence of any statute, regulation or MDOT policy that prohibits the MVA from identifying the names of the question

submitters prior to the submission of proposals. Neither COMAR 21.06.01.02C nor Md. Ann. Code, State Finance & Procurement (“SF&P”) § 13-210(d)(2) applies here, as those provisions only prohibit the disclosure of the name of a person who had **submitted** a proposal. Here the Q&A was published prior to proposal submission.

Although we appreciate Envirotest’s concerns, we do not find the PO’s reasons for disclosing names in this particular solicitation were arbitrary, capricious, or unreasonable. Nor do we find any bias, since the MVA disclosed all submitters, not just Envirotest. This Board “will not disregard or reverse a determination that was made within the allowable range of discretion reserved to the appropriate agency’s decisional authority.” *L-1 Secure Credentialing, Inc.*, MSBCA No. 2793 at 28 (2012).

The MVA Did Not Improperly Disclose Envirotest’s Staffing Plan.

Envirotest argues that the MVA’s Answer to Question No. 75, which asked how many employees are currently working at each of the stations, revealed confidential commercial information by identifying Envirotest’s current total staffing positions at each site because Envirotest’s current staffing provided other potential offerors insight into one of the most important components of the 2023 RFP, “Offeror’s Approach and Methodology.”

Mr. Greene, who has been with Envirotest for only about one and half years but has been working in the VEIP field for over 25 years, testified that the most important part of a VEIP proposal is the staffing plan, including the number of employees and types of employees. He testified that 70% of pricing is based on the staffing plan.

He testified that the MVA knew Envirotest considered this information confidential. On May 18, 2023, shortly after he joined Envirotest, the PO requested that Envirotest review recent regulatory changes to the VEIP program and provide feedback on their impact on the incumbent

2009 Contract. In the back and forth leading up the modification of the 2009 Contract, Mr. Greene notified the PO that “[d]iscovery of our costs could be used by a competitor to their advantage. Please let us know if you will be able to accommodate our request for the information marked as confidential to remain confidential.” *See* Appellant’s Exhibit #2. The MVA responded that it “completely agrees to not releasing proprietary or confidential information.” *Id.* When Envirotec finally submitted the modification, it submitted two versions of the modified staffing plan and the management fee adjustment, one redacted and one not. The cover email again notified the PO that the information in Attachments C and D was confidential commercial and financial information. *See* Appellant’s Exhibit #3.

However, Mr. Greene acknowledged that in 2021 during COVID, the MVA started requiring Envirotec to submit monthly staffing reports that contained information substantially similar to that contained in what he submitted to the PO as “confidential” in connection with the modification of the 2009 Contract. An excerpt of a table from the January 2023 Staffing Report was admitted as Appellant’s Exhibit #1 and the complete January 2023 Staffing Report was admitted as Respondent’s Exhibit #1. Mr. Greene admitted that the January 2023 Staffing Report was not marked confidential, and that submission of the monthly reports predated his time at Envirotec.

MVA’s Answer to Question No. 75 was identical to (and seemed to be a cut and paste of) Column A (Station # & Name) and Column I (Total Head Count) from Respondent’s Exhibit #1. Mr. Greene testified it was also substantially similar to the information in Appellant’s Exhibit #3 in that 12 of 18 stations, staffing numbers were the same or a variance of one. The total staffing variation was only 5-6%. He believed that other potential offerors could reverse engineer

Envirotest's staffing plan and, consequently, its pricing, just from knowing the total number of staff at each location.

The PO testified that the Answer to Question No. 75 came from two columns in the January 2023 Staffing Report. She did not believe the information was confidential. She considered the information in the Answer generic and just enough to allow subcontractors, including MBEs like the asker of Question No. 75, to prepare and submit proposals to prime contractors. She explained also that these were actual numbers from the existing 2009 Contract and not proposed numbers for the 2023 RFP, noting that the answer did not divulge details, such as position titles or the number of hours worked by each person, that would be necessary to reverse engineer a staffing plan or pricing. Finally, she believed that the information in the answer could be readily ascertained by any member of the public by visiting the individual stations and performing a head count.

The Board finds the information provided in response to Question No. 75 does not disclose Envirotest's staffing plan and is not otherwise confidential or proprietary.⁵ A staffing or work plan is much more than just the names and numbers of the stations and the total number of people working at each station. The 2023 RFP § 5.3.2(E)(3) defines a work plan to include "specific methodology, techniques, and number of staff." Envirotest's reverse engineering argument falls flat because potential offerors were not provided important details like the number of hours worked, positions held, pay rates, vacation and other benefits, and profit margins. The published information did not contain any methodologies or techniques, but only the raw number of staff currently at each site.

⁵ Because the Board finds the limited and generic information disclosed is not confidential and not a staffing or work plan, it need not address whether Envirotest's assertion of privilege to cost information provided in a 2023 Modification of the 2009 Contract can be retroactively applied to similar information that Envirotest provided to the MVA in monthly Staffing Reports starting around 2021, with no assertion of privilege or confidentiality.

Moreover, providing potential offerors the current staffing on the 2009 Contract does not necessarily reveal staffing that will be required to win the 2023 RFP. There are important differences between the 2009 Contract and the 2023 RFP.

The PO's Answer to Question No. 75 provided the minimum responsive information to allow potential prime contractors and subcontractors to prepare meaningful proposals, and we see no undue advantage given to them or Envirotest. The Board finds the PO's decision was not arbitrary, capricious, unreasonable, or unlawful.

The Board Lacks Jurisdiction to Address Whether the VEQ Clause was Improper or Ambiguous.

It is undisputed that when Envirotest filed its Second Pre-Proposal Protest on January 24, 2024, the 2023 RFP did not contain a VEQ Clause. What did exist was Q&A No. 39 in Addendum No. 3. Envirotest had asked whether the State would entertain an equitable adjustment, and the PO responded that any such request would be evaluated in accordance with COMAR 21.07.01.15 and 21.07.02.03.

Envirotest subsequently filed its Second Pre-Proposal Protest arguing that COMAR 21.07.02.03 applied only to construction contracts and that it only allowed for an equitable adjustment when a pay item varied more than 25% above or below the estimated quantity. Envirotest asserted that COMAR 21.07.02.03 was inappropriate for a service contract, such as the 2023 RFP, because it increased the risk for potential offerors which would need to be built into their pricing strategy and, by extension, increase the ultimate cost to the State. Envirotest specifically requested that the MVA rescind its Answer to Question No. 39 and incorporate a reasonable VEQ Clause into the 2023 RFP.

On May 3, 2024, MVA issued Addendum No. 13 to the 2023 RFP, removing Q&A No. 39 and adding a new VEQ Clause substantially like the one contained in COMAR 21.07.02.03. On

May 7, 2024, the PO issued Final Decision #2, sustaining the portion of the Second Pre-Proposal Protest regarding the lack of a reasonable VEQ Clause, stating that, essentially, MVA had done what Envirotest requested.

Envirotest never filed a new protest challenging the propriety of the actual VEQ Clause added to the 2023 RFP. Instead, on May 16, 2023, it filed the Appeal to the Board arguing, among other things, that the MVA's corrective action was an improper response to Envirotest's Second Pre-Proposal Protest.

The Board has previously held that it does not have jurisdiction to hear and decide an appeal when the PO has sustained the protest and provided the Appellant with all the relief requested. *See Lorenz, Inc.*, MSBCA No. 3172 at 3 (2021), *aff'd. In the Matter of Lorenz, Inc.*, Baltimore Co. Cir. Ct. Case No. C-03-CV-21-2607 (2022). "There is nothing left for the Board to consider." *Id.*

This case is similar to *Lorenz* in that, although the protest was sustained by the PO, Appellant remains unhappy with the result of the corrective action. Envirotest's Second Pre-Proposal Protest requested the retraction of Q&A No. 39 and the addition of a reasonable VEQ Clause to the 2023 RFP. The MVA did exactly that with Addendum No. 13. However, Envirotest's issue on Appeal is not that the MVA wrongfully denied its Second Pre-Proposal Protest. Rather, its complaint is that it does not agree with the corrective action taken by the MVA, i.e., the reasonableness of the VEQ Clause inserted into the 2023 RFP, as confirmed by Appellant's counsel during the following exchange at the hearing:

CHAIRMAN CHO: That is the basis of your appeal is that they sustained your protest, but they didn't do it the way that you would have done it.

MR. MILLER: That's right. They did it in an improper manner. They created another problem or actually the same problem.

10/1/2024 Hearing Transcript at 194 (10-15).

The Board is not convinced by Envirotest's argument that its disagreement with the PO's corrective action really means that the PO did not sustain the protest. We hold that the Board lacks jurisdiction to consider the propriety and/or ambiguity of the VEQ Clause as added via Addendum No. 13 due to Envirotest's failure to file a protest.⁶

Notwithstanding our conclusion, were we to consider the merits of the issues concerning the VEQ Clause, we are hard-pressed to find any evidence supporting Envirotest's assertions. COMAR 21.07.02.03 is a mandatory provision for all construction contracts, but there is nothing that limits its application only to construction contracts. Similarly, COMAR 21.07.01.15 requires all contracts that contain estimated quantity items to have a VEQ Clause, but does not handicap in any way the State's ability to use whatever language or terms it sees fit to include in a VEQ Clause.

The PO testified that the MVA did not want to put a VEQ Clause in the 2023 RFP. She said that the MVA was trying to get the best cost and that, with moving away from a monthly management fee to a per test fee, it was confident in its test volume estimates. Questions from potential offerors indicated, however, that they felt strongly that a VEQ Clause should be included, and ultimately the Second Pre-Proposal Protest requested one be added. In the interest of moving forward with the procurement after years of delay, the PO and her team decided that adding a VEQ Clause of 25%, consistent with COMAR 21.07.02.03 was a better alternative to arbitrarily assigning a random percentage.

⁶ At the hearing Envirotest also contended this was an "improper VEQ for ambiguous pay items." It stated it was unclear what time period (daily, weekly, monthly, yearly, or other) would be used to determine whether the 25% overage or underage was met. This issue was never raised in the Second Pre-Proposal Protest, never addressed in Final Decision #2, no questions were asked after the VEQ Clause was officially added by Addendum #13, and it was never separately protested. As this issue is clearly beyond our jurisdiction, we will not be addressing its merits.

Mr. Greene testified that the +/- 25% margin in COMAR 21.07.02.03 was too much risk for Envirotec to assume. He indicated that due to training requirements and federal restrictions, it cannot react quickly enough to increase or decrease staffing to absorb the 25% swings. When pressed, he indicated that 10% was acceptable, and further indicated he had not seen anything higher than 15%. He concluded that if you go higher, offerors must increase their price to the State.

Based on testimony at the hearing, it appears that the MVA assessed the amount of risk it was willing to assume under the contract as well as its potential impact on offerors' prices and set the VEQ accordingly. Where there was a reasonable basis for its decision, it is not this Board's job to second guess the Agency's judgment.

ORDER

Based on the foregoing, it is this 24th day of October, 2024 hereby:

ORDERED the Appellant's Appeal is DENIED.

/s/
Lawrence F. Kreis, Jr., Member

I concur:

/s/
Sonia Cho, Chairman

/s/
Michael L. Carnahan, Jr., 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 Opinion and Order in MSBCA No. 3272, Appeal of Envirotest Corporation, under Maryland Motor Vehicle Administration RFP No. V-HQ-24019-S.

Date: October 24, 2024

_____/s/
Ruth W. Foy
Clerk