

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of NUTRITION MANAGEMENT)
SERVICES COMPANY)
) Docket Nos. MSBCA 1810 &
) 1823
Under DHMH Services Solicitation)
No. DHMH - DCT 94-794)

July 25, 1994

Negotiated Contracts - Evaluation Criteria - Price proposals in a procurement by competitive sealed proposals must be evaluated pursuant to the evaluation criteria set forth in the RFP.

APPEARANCES FOR APPELLANT: Scott A. Livingston, Esq.
Donald A. Tobin, Esq.
Bastianelli, Brown & Touhey
Washington, D.C.

APPEARANCES FOR RESPONDENT: Sharon Krevor-Weisbaum
Dana A. Reed
Asst. Attorneys General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Susan K. Gauvey, Esq.
Venable, Baetjer & Howard
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant appeals two final decisions of the Department of Health & Mental Hygiene (DHMH) denying its bid protests relative to allegations of bias and procedural violations in award of a food services contract at the Carter Center arising out of the above captioned solicitation to a competitor. The appeals were consolidated for hearing.

Findings of Fact (MSBCA 1810) February 18, 1994 protest

1. The instant solicitation involving competitive negotiations was advertised on November 23, 1993 leading to responses from four vendors.¹

¹Sealed price and technical proposals were due to be submitted the same day. Only offerors with acceptable technical proposals would then have their sealed price proposals opened and evaluated. In order to have an offeror's price

2. On February 18, 1994 after being advised that it was not the successful offeror, Appellant filed a timely protest with the DHMH Procurement Officer alleging that the evaluators were biased against Appellant because of certain comments allegedly made to Appellant by two of the evaluators. Said protest was supplemented on March 11, 1994.
3. On April 6, 1994 the DHMH Procurement Officer issued a final procurement agency decision denying the protest which was received by Appellant, through its counsel, on April 8, 1994.
4. On April 20, 1994, Appellant filed an appeal of the Procurement Officer's April 6, 1994 decision with this Board.
5. At the hearing of the consolidated appeals on July 18, 1994, the above set forth events and dates were stipulated to by counsel for the Appellant and the Board dismissed Appellant's appeal in MSBCA 1810 as being untimely.

Decision (1810)

Appeal of a final procurement agency decision is required to be filed with this Board within 10 days of receipt of notice of such decision. COMAR 21.10.02.10A; Section 15-220, State Finance and Procurement Article. Such requirement is jurisdictional. If an appeal is not timely filed the Board has no jurisdiction to consider it. See W.R.M. Communications, MSBCA 1470, 3 MSBCA ¶220 (1989). Compgraph, Inc., MSBCA 1418, 3 MSBCA ¶199 (1988); Rolm Mid-Atlantic, 1 MSBCA 1161, 1 MSBCA ¶64 (1983). The appeal in MSBCA 1810 was not filed with this Board within 10 days of receipt of notice of the decision, and therefore, the Board had no jurisdiction to entertain the appeal. Accordingly, the Board granted DHMH's Motion to Dismiss.

Findings of Fact (MSBCA 1823) May 27, 1994 Protest

1. On May 27, 1994, after receipt on May 21, 1994 of redacted technical proposals of the other offerors and a redacted price proposal from the winning offeror, Appellant filed a second protest relative to the instant procurement. Upon denial of this protest Appellant timely filed an appeal which was docketed as MSBCA 1823 and consolidated for hearing with MSBCA 1810.
2. Appellant's May 27, 1994 protest contained 15 numbered paragraphs on items alleging, inter alia, evaluator bias,

proposal considered, the offeror needed to receive a score of 80 points on the evaluation of its technical proposal. Appellant's technical proposal did not receive 80 points upon evaluation, and Appellant was thus eliminated from competition.

procedural errors in the competitive method negotiations were conducted and failure of the winning offeror's price proposal to comply with the requirements of the RFP.

3. There are no specific allegations of evaluator bias made in the May 27, 1994 protest. However, certain of the allegations in the protest suggest the existence of evaluator bias as the reason for the complained of activity (failure to achieve an 80 point score on the technical evaluation). As indicated above, the Board lacks jurisdiction to consider the allegations of evaluator bias set forth in the original appeal (MSBCA 1810) of the denial of Appellant's protest of such bias because the appeal was not timely filed. The inference or suggestion of evaluator bias set forth in the May 27, 1994 protest is directly related to the allegations of evaluator bias set forth in the appeal in MSBCA 1810. In the May 27, 1994 protest, Appellant asserts that it did not receive 80 points because of the alleged remarks of two evaluators said to constitute the evaluator bias complained of in its earlier protest in February, 1994. No new acts or actions of an evaluator alleged to constitute bias are set forth. Accordingly, the Board concludes that it lacks jurisdiction to consider the inferences set forth in the May 27, 1994 protest that Appellant did not receive an 80 point score on its technical evaluation due to evaluator bias. Therefore, the appeal on such grounds was dismissed at the hearing.
4. Appellant's May 27, 1994 protest asserted that the procurement was procedurally flawed because the evaluators received material from other offerors during evaluation of technical proposals and considered such materials in evaluating and scoring these proposals but failed to consider materials

similarly requested and supplied by Appellant during these negotiations or discussions.

5. The material allegedly supplied by Appellant during the negotiations or discussions referred to in paragraph 4 above consisted of the following as set forth in the Procurement Officer's final decision of April 6, 1994 on the Appellant's February 18, 1994 bias protest:

"Among the reasons for this low score was Nutrition Management's failure to comply with the RFP by not providing the following information in its proposal:

1. - sample menus including portion sizes;
2. - a sample sanitation schedule;
3. - policies which serve as evidence of the Policy and Procedures Manual of the Vendor;
4. - proposed staffing;
5. - salary structure for both professional and non-professional staff;
6. - Management Benefit Summary;
7. - all references.

The Procurement Officer's decision then went on to deny that such material was requested and received in connection with negotiations or discussions for the instant procurement.

Although Nutrition Management supplied the Department with this information after their oral presentation, this information could not be included in the evaluation since it was submitted well beyond the due date for proposals. Under Competitive Sealed Proposals offerors are permitted to clarify, portions of their proposals. However, offerors may not rewrite their proposals after the proposal due date by submitting material that was omitted from the original submission. Although the Department did accept supplemental material from Nutrition Management, it only did so in order to provide feedback that would be useful if .

Nutrition intended to submit a proposal in

response to the other RFP's for dietary services that were upcoming."

6. Appellant received the April 6, 1994 Procurement Officer's final decision on April 8, 1994. Accordingly, on April 8, 1994, Appellant was aware that DHMH did not consider that it had been conducting negotiations or discussions with Appellant relative to the evaluation and acceptability (achievement of at least 80 points) of Appellant's technical proposal. Therefore, Appellant was required to protest its elimination from competition and challenge the alleged procedural defect that negotiations were not engaged in with Appellant as they were with other offerors within seven days of April 8, 1994 since protests are required to be filed within seven days after the basis for protest is known or should have been known. COMAR 21.10.02.03B. See, for example, Communication Management Systems, Inc., MSBCA 1625, 3 MSBCA ¶296 (1992). The filing of a protest on May 27, 1994 on this issue of flawed process was, therefore, late and the Board dismissed the appeal on such issue for lack of jurisdiction. *id.*
7. The remaining issue set forth in Appellant's protest of May 27, 1994 concerns allegations that evaluation of price proposals deviated from the criteria expressed in the RFP because the winning offeror (Linton's Food Management Services) submitted its price proposal in a manner that did not conform to the requirements of the RFP but was nevertheless accepted and evaluated. Specifically, Appellant alleges that:

"(4) It would appear that DHMH evaluated proposals based upon net bid prices (i.e., gross bid price less cafeteria sales credit). The RFP failed to advise offerors on this point and provided no details regarding the amount of cash sales to be expected. This lack of information creates ambiguity since one offeror could compute the percentage breakdown of costs required by Section 5 of the RFP using gross total costs while another might use net total costs. Further, the costs submitted cannot be compared by DHMH without

knowledge of the cash sales credit used in formulation of total costs."

8. Appellant did not file a pre-proposal opening protest or otherwise seek clarification of the intent of the RFP concerning whether net bid prices (gross price less projected revenue from cafeteria sales) or gross total costs without consideration of a credit for cafeteria sales was what would be evaluated.
9. The Appellant testified that it believed that a proper interpretation of the RFP² was that it required an offeror to list its gross prices and that proper evaluation of price should only consider an offeror's gross price.
10. The Procurement Officer requested best and final offers from the offerors whose price proposals were opened and received a best and final offer from Linton's which confirmed its price as contained in its sealed price proposal of a net bid price (bid price less projected revenue) of \$1,200,551.
11. Appellant argues that DHMH cannot award a contract to Linton's based upon Linton's net bid price. The RFP at Part X, Paragraph C, P. 51 explains the Basis for Award as follows:

*The qualified offeror with the lowest [cost] financial proposal price will be recommended as the successful offeror, subject to the provisions of COMAR 21.05.03.03 A.*³

The RFP required offerors to submit a separate financial proposal. The total contract cost for all three years was to be submitted on Form B-4 provided with the RFP. As explained in the Minutes of the pre-Proposal Conference, offerors were required to include in their financial proposal all of the costs of providing the Carter Center food services.

² References to the RFP include the addenda thereto as set forth in the asterisked material included in the pre-proposal conference minutes.

³ The word "cost" was added by addendum.

Form B-4 is entitled "TOTAL CONTRACT COST" and has only one column which requires offerors to insert four dollar amounts: the first, second and third year contract costs, as well as a total bid for the contract -- which is the total of the three contract years costs.

Linton's, however, modified the form and created two columns: (1) Bid Price and (2) Net Bid Price (less projected revenue). The figure under Linton's Net Bid Price, \$1,200,551, we assume to be Linton's project costs less cafeteria revenues. In any event, we find DHMH's \$1,200,551 contract award figure is a net price (projected costs less projected revenues from cafeteria sales). The RFP as amended by addendum says that award should be based upon the lowest cost financial proposal price. (RFP Part X, Paragraph C). This does not preclude a net price as being the lowest cost. In the Pre-Proposal Conference minutes at pp. 4-5 there appears the following language:

As requested at the pre-proposal conference, the winning bid for the previous three year contract from 11/1/90 - 10/31/93 is as listed below. This contract is currently on a three month extension 11/1/93 - 1/31/94) for a cost of \$117,034.8

The respective annual bid prices are as follows:

	<u>Bid Price</u>	<u>Net Bid (Less Projected Revenue (1))</u>
First Year	\$ 495,333	\$ 440,891
Second Year	527,233	467,347
Third Year	<u>559,645</u>	<u>496,166</u>
Total	\$1,582,211	\$1,404,404

(1) Note: These were projected figures provided on a form drawn - up by the vendor which won the 1990 bid. This form and the net bid costs indicated was not required then and is not required now.

Hence, the "bid price" column contains the prices from form B-4 which were used for purposes of award in 1990. This is a period to indicate the end of a sentence. This 1990 form B-4 is comparable to the

current form B-4 which will also be used to make an award determination form the current bid.

In addition, the actual employee cafeteria sales for the 1993 fiscal year are:

<u>PERIOD COVERED BY SERVICES</u>	<u>CAFETERIA SALES</u>
4 weeks ended 7/25/92	\$3,717.16
4 weeks ended 8/22/92	\$4,024.39
5 weeks ended 9/26/92	\$5,318.47
4 weeks ended 10/24/92	\$5,209.21
4 weeks ended 11/21/92	\$4,651.24
5 weeks ended 12/26/92	\$7,068.29
4 weeks ended 1/23/93	\$3,954.67
4 weeks ended 2/20/93	\$5,327.28
5 weeks ended 3/27/93	\$6,309.54
4 weeks ended 4/24/93	\$4,675.44
4 weeks ended 5/22/93	\$4,596.01
6 weeks ended 6/26/93	\$5,032.23

This language does not, as asserted by Appellant, specifically prohibit offerors from submitting or the Procurement Officer from considering "Net of Cafeteria Sales" bids. Nor does the language on pp. 3-4 of the Pre-Proposal Conference minutes⁴

⁴ This language was as follows:

There have been numerous questions concerning how the monies from the employee cafeteria are to be reported.

The detailed explanation for this is as follows:

On Pages 57, 61, and 65, Item I - Food Expenses, the line for Employees' Cafeteria Food is to contain the projection for raw food expenses for food that is projected to be sold in the employee cafeteria. This must be a positive number. No attempt should be made on these pages or for the bid in general to project any other cost related to the employee cafeteria or to project any revenues from the employee cafeteria.

However, after the contract is awarded, the successful vendor will have to complete a Monthly Summary of Expenses (form C-1). Section VI, Credits on page 72 of from C-1

prohibit such a bid. This language does not preclude an offeror from submitting a net price as its bid price and therefore, does not cast doubt on the reasonableness of the Procurement Officer's determination of the meaning of the RFP evaluation criteria.⁵

Decision (1823)

The sole issue not disposed of by motion in MSBCA 1823 is that of the propriety of the evaluation of Linton's price proposal.⁶

Price proposals in a procurement by competitive sealed proposals pursuant to COMAR 21.05.03 must be evaluated pursuant to the evaluation criteria set forth in the RFP. See Fujitsu Business Communication Systems, MSBCA 1779, 4 MSBCA ____ (1994). Herein the Board has found that the RFP permitted an offeror to submit a net price as its bid price. Therefore, the Procurement Officer was permitted to accept Appellant's net price as its bid price. As a

specifically requires the listing of cafeteria (and special functions and other revenues.

These are then aggregated to yield a "Total Credits" amount for each month which in turn is subtracted from the Gross Department Expenses total, to yield a "Net Department Expense" total for each month.

⁵ The Board recognizes that Pre-Proposal or Pre-Bid Conference minutes are not binding on offerors or bidders unless stated to be an addendum or addenda to the RFP or IFB. However, the parties herein point to the material set forth in the Pre-Proposal Conference minutes as supporting their respective positions and thus the Board has addressed these arguments.

⁶ Appellant was not in the competitive range because it did not achieve the required 80 points on the evaluation of its technical proposal. Accordingly, there is a question of Appellant's standing to challenge an alleged defect in Linton's price proposal because Appellant is not eligible for award. Appellant attempts to avoid the standing issue through its assertion that it would have structured its technical proposal differently had it known that the RFP did not require an offeror to submit a gross price rather than a net price as its bid price.

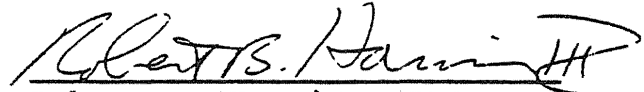
result of a price BAFO Linton's confirmed that its bid price was the net price set forth in its sealed price proposal. Therefore, the Procurement Officer's evaluation or determination that Appellant's net price dollar figure of \$1,200,551 was its bid price and was the "lowest cost financial proposal price" was not inconsistent with the RFP evaluation criteria as set forth in Part X, Paragraph C at p. 51.

Accordingly, the appeal is denied.

It is therefore, ORDERED this 25th day of July, 1994 that the appeal in MSBCA 1810 is dismissed and the appeal in MSBCA 1823 is denied.

Dated:

July 25, 1994


Robert B. Harrison III
Chairman

I concur:



Candida S. Steel
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 1810 & 1823, appeal of Nutrition Management Services Co. under DHMH Services Solicitation No. DHMH - DCT-94-794.

Dated: *July 25, 1994*

Mary F. Priscilla

Mary F. Priscilla
Recorder