

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of JPMorgan)
Electronic Financial Services,)
Inc.)
) Docket No. MSBCA 2577
Under Department of Human)
Resources Solicitation No.)
OTHS/EBT-06-02S)

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OPINION BY BOARD MEMBER DEMBROW

This appeal challenges the award of a \$15 million contract for the design and implementation of a new web-based electronic benefits transfer (EBT) system for the Department of Human Resources (DHR) by ACS State and Local Solutions, Inc. (ACS). Appellant JPMorgan Financial Services, Inc. (JPMorgan) currently administers DHR's EBT system and was the low bidder in response to this solicitation to convert DHR's payment of public assistance and food stamp benefits to achieve internet compatibility, but JPMorgan was ranked second, inferior to ACS,

in DHR's technical evaluation, as a result of which the contract was awarded to ACS. In this bid protest, JPMorgan complains that the bid of ACS was nonresponsive to DHR's solicitation criteria in that the project manager proposed by ACS failed to obtain the requisite professional certification mandated by the terms of the solicitation. ACS also complains that DHR failed to conduct discussions with JPMorgan in a fair and impartial manner equivalent to DHR's discussions with ACS.

For the reasons set forth herein, this appeal is DENIED.

Findings of Fact

1. On April 17, 2006, DHR issued its Solicitation No. OTHS/EBT-6-002S, a Request for Proposals (RFP) intended to identify a private vendor with whom to contract for the performance of certain technical services required by DHR to convert its EBT system to an internet web-based design implementation.
2. JPMorgan is a private vendor currently contracted with DHR to operate its existing EBT system, which provides payment of public assistance and food stamp benefits to well over 100,000 Maryland recipients.
3. The subject RFP stated as follows:

"3.6 Project Manager

Contractor shall designate an EBT Project Manager who will be responsible for carrying out the tasks in this RFP. The Contractors' proposed Project Manager is subject to DHR's approval. The Project Manager shall start work on the project on the effective date of the contract and continue until DHR's written acceptance of the successful conversion of the current EBT system to the new EBT system.

Following a successful conversion, the Contractor may designate a different Project Manager responsible for the EBT contract. The Project Manager must maintain regular and frequent contact with DHR's EBT Director and designated staff. His or her appointment and continuing service is subject to DHR approval. A replacement may be required for

any legitimate performance reason at DHR's option, and the replacement is also subject to DHR approval." (Appellant's Exhibit 1, Tab B, page 53 of 65.)

4. The RFP here at issue further established three (3) labor categories for personnel engaged on the job, providing in part as follows with respect to the position of Project Manager:

"3.8 DESCRIPTIONS FOR LABOR CATEGORIES

Staffing shall consist of, at a minimum, the following labor categories:

Project Manager

Education: A Bachelor's Degree from an accredited college or university with a major in Computer Science, Information Systems, Engineering, Business, or other related scientific or technical discipline. A Master's Degree is preferred. A Master's Degree in one of the above disciplines equals one year specialized and two years general experience.

General Experience: Must have ten (10) years of PME experience, including at least five (5) years of software management experience.

Specialized Experience: At last five (5) years of direct supervision of software development, integration maintenance projects experience." (Appellant's Exhibit 1, Tab B, Pages 53-54 of 65.)

5. Among other elements set forth in the solicitation as DHR's "Criteria for Technical Evaluation," Sec. 5.5(D) of the RFP stated as follows:

"Personnel.

- Qualification of Personnel with experience that is similar to the requirements identified in this solicitation.
- Experience in working with projects of similar size and scope." (Appellant's Exhibit 1 at Tab B, Page 63 of 65.)

6. The initially issued RFP established no licensure or certification requirements for any of its labor categories.

7. On May 18, 2006, DHR issued Amendment No. 1 to the subject solicitation, which stated as follows:

"This amendment is being issued to amend and clarify certain information in the above-named RFP. All information contained herein is binding on all Offerors who respond to this RFP..

Revise, Section 3.8 Description for Labor Categories

Education: Project Management Professional (PMP) Certification plus a Bachelor's Degree from an accredited college or university with a major in Computer Science, Information Systems, Engineering, Business, or other related scientific or technical discipline. A Master's Degree is preferred. A Master's Degree in one of the above disciplines equals one year specialized and two years general experience.

General Experience: Must have ten (10) years of project management experience, including at least five (5) years of software management experience.

Should you require clarification of the information provided in this amendment, please contact me via email at mdeshiel@dhr.state.md.us or telephone at (410) 767-7044 as soon as possible." (Emphasis in original.) (Appellant's Exhibit 1, Tab A.)

8. DHR's RFP here at issue did not set forth any personnel licensure or certification requirements in its "Criteria for Technical Evaluation," but only by the foregoing Amendment to its mandatory "Descriptions for Labor Categories."
10. Ordinarily, criteria for evaluation set forth factors to be considered during an agency's appraisal of responsibility of a vendor, rather than responsiveness of a bid.
11. DHR could have elected to draft its RFP to set forth licensure or certification requirements in either or both of its mandatory minimum submission requirements and/or its criteria for evaluation of offers.
12. The Code of Maryland Regulations (COMAR) 21.05.03.03(A)

- required DHR to evaluate competing offers in accordance with the evaluation factors set forth in the RFP.
13. On June 16, 2006 proposals were submitted to DHR by two (2) competing offerors, namely, appellant JPMorgan and interested party ACS.
 14. Both proposals were deemed by the procurement officer for DHR to be responsive to the RFP.
 15. The proposal submitted to DHR by ACS identified Ricky Aviles (Aviles) as its proposed Project Manager, an individual said to have 12 years of EBT experience, ACS stating in the first descriptive box in the list of qualifications next to DHR's requirement, "Project Management Professional (PMP) Certification" that Aviles was "[i]n the process of achieving PMP certification." (Appellant's Exhibit 1 at Tab C, page 9.0-13.)
 16. On July 28, 2006, DHR's Procurement Officer requested from both JPMorgan and ACS various clarifications to their proposals, including with respect to ACS, the qualifications of Aviles, who was designated by ACS as its proposed Project Manager.
 17. On August 2, 2006, ACS responded to DHR's request for clarification advising that Aviles was enrolled in PMP class and was expected to be PMP certified prior to contract start.
 18. On August 21, 2006, DHR's Procurement Officer requested further clarifications from ACS, including an update on the status of Aviles' PMP certification.
 19. On August 24, 2006, ACS advised DHR that it expected Aviles to have secured PMP certification by November 1, 2006.
 20. On September 14, 2006, DHR entertained oral presentations by both offerors.
 21. Of the two (2) competing offerors, ACS was ranked by DHR's Evaluation Committee technically first, ahead of JPMorgan.
 22. One of the dominant factors accounting for the Evaluation

Committee's preference for ACS over JPMorgan was the excellent impression made by the ACS team led by Aviles, in contrast to the comparatively weak presentation made by JPMorgan representatives.

23. On October 3, 2006, both offerors submitted best and final offers (BAFOs) to DHR.
24. With a price of \$14,072,801, JPMorgan submitted the low bid, compared to ACS' price of \$15,155,579, for a price difference of a little over one million dollars between the two (2) BAFOs.
25. On November 10, 2006, ACS notified DHR that Aviles' PMP class was rescheduled for late November and it therefore expected Aviles not to have PMP certification until December 15, 2006, still prior to contract start date.
26. DHR's Evaluation Committee recommended award of the contract to ACS, stating in its Technical Evaluation Summary, that "ACS' technical proposal was determined to be the best-qualified technical proposal and was ranked #1. The offeror's technical proposal met all of the qualifications of the RFP." (Appellant's Exhibit 1, Tab D, page 3 of 9.)
27. DHR's Technical Evaluation also referenced as a strength of the ACS proposal in "Understanding the Problem" that "Project Manager and key staff [had] experience in EBT conversion operations support & training" and as a further strength of the ACS proposal in "Personnel" was set forth the following:

- "• The proposed personnel displayed teamwork
 - Project Manager and each team member were very knowledgeable of their area of expertise
 - Well prepared for the oral presentation
 - During the oral presentation, team provided a quick response to technical questions concerning their proposed system" (Appellants Exhibit 1, Tab D, page 4 of 9.)

28. DHR's Technical Evaluation also noted the following:

"Deficiency: ACS was asked to clarify the qualifications for proposed Project Manager, Ricky Aviles. ACS was further notified as follows: Please advise of expected date of PMP certification for proposed Project Manager, Ricky Aviles. Further, advise me, in writing when certification takes place.

Cure: ACS provided the following response: Mr. Aviles, who holds a Bachelor's degree in Business, is currently enrolled in the Project Management Professional (PMP) Certification program and will have his certification prior to contract start. Further ACS responded that Mr. Aviles is scheduled to complete the PMP Examination Boot Camp class by the end of September. This class is designed to prepare experienced project managers for the PMP certification exam. Mr. Aviles is planning to take the PMP certification examination during October and should be certified by November 1, 2006. Once Mr. Aviles has successfully passed the PMP exam, the State will be notified in writing." (Appellant's Exhibit 1, Tab D, page 5 of 9.)

29. On November 17, 2006, DHR Secretary Christopher J. McCabe approved DHR's Evaluation Committee's recommendation for award of the contract to ACS.
30. On November 20, 2006, DHR notified both offerors that ACS had been selected for contract award.
31. On December 9, 2006, DHR debriefed JPMorgan.
32. On March 12, 2007, DHR requested verification of Aviles' PMP certification.
33. On March 15, 2007, DHR requested ACS to submit its performance bond, hiring agreement and signed contract.
34. On March 30, 2007 DHR requested another update on Aviles' PMP certification.
35. On April 9, 2007, DHR again requested an update on Aviles' PMP certification.

36. On April 10, 2007, ACS proposed to substitute another person as Project Manager in place of Aviles.
37. The reason that ACS proposed an alternative person to serve as Project Manager was that Aviles had narrowly failed to pass the PMP certification examination and the terms of the RFP as well as the contract offered by DHR required the Project Manager to be PMP certified.
38. ACS proposed to keep Aviles working on the DHR job as one of the ACS personnel, notwithstanding ACS' designation of a newly added PMP-certified staff member to serve as Project Manager for the ACS team.
39. ACS' initial designation of Aviles as its proposed Project Manager was made in good faith.
40. On April 18, 2007, the Board of Public Works (BPW) approved the contract award to ACS.
41. On April 19, 2007, the contract was executed by DHR.
42. After the contract was approved by BPW and executed by DHR, it first became public and therefore available to JPMorgan on April 23, 2007.
43. On April 30, 2007, JPMorgan filed its protest before the Maryland State Board of Contract Appeals (Board).
44. On May 1, 2007, ACS began performance of DHR's EBT system conversion work under the terms of the contract, ongoing work that has been and is still being performed in coordination with JPMorgan as the current contract vendor to DHR in the management of its EBT system.
45. Full conversion of DHR's EBT system to a web-based design is expected to be completed in February 2008, thereby accomplishing the first phase of the work solicited by the RFP and contract award that is the subject of this appeal.

Decision

Of seminal concern to the Board's evaluation of this appeal is an issue raised *sua sponte* due to the unusual posture of the

timeliness of filing. Specifically, JPMorgan did not become aware of the failure of ACS' designated Project Manager to hold the requisite PMP certification mandated by DHR's RFP until after the award of the contract to ACS on April 23, 2007. This appeal was promptly noted seven (7) days later, but the appeal was thus by necessity not lodged until after approval of the contract by the Board of Public Works (BPW). At the present time ACS has been on the job for more than six (6) months. Federal authority in this regard is replete with examples of the ability and duty of the Comptroller General of the United States to evaluate contracts after they are finalized and approved. Maryland State precedent, however, is much more limited in this regard, as may be the actual authority of the Board, which is derived from state statute as follows:

"The Appeals board shall have jurisdiction to hear and decide all appeals arising from the final action of a unit...on a protest relating to the formation of a procurement contract." *State Finance and Procurement Article §15-211, Maryland Annotated Code.*

Of course, the foregoing fundamental statutory authority of the Board is considerably embellished by regulation, including COMAR 21.10.07.01 *et seq.*, but there is no statute or regulation in Maryland pertaining to the power of the Board to reverse or revise final BPW action and it is well recognized that the authority of the Board is quite limited with regard to affecting agency action prior to agency submission of a proposed contract for approval by BPW. It has long been established, for example, that the Board is not empowered to compel a State agency to act in a particular manner by awarding a contract to an interested party or appellant. Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶ 10 (Jan. 20, 1982). Because this jurisdictional issue is not raised by either of the parties to the instant dispute, the question of the extent to which the Board may have or lack authority to modify an approved and executed contract subsequent

to BPW final action will remain an issue for which the Board reserves judgment to another day, but for present purposes the Board simply notes that it is fully cognizant of the potentially perilous path that could be followed if the instant appeal were to be sustained on a contract that is already being performed. Today the Board *arguendo* assumes jurisdiction and authority and opts to dismiss JPMorgan's appeal on substantive grounds as more fully set forth below.

To sum up the essence of the Board's determination in this matter, the Board concludes that ACS' initial bid was fully responsive with respect to the question of the requirement of PMP certification of its proposed project manager. ACS' *prima facie* representation of requisite qualifications and experience of its proposed personnel is all that was required to render its bid responsive in this regard. The Board has previously held that procurement officers should consider the experience of corporate representatives when evaluating the corporation's level of experience, and the DHR procurement officer here appears to have properly considered that factor both with respect to responsiveness of the bid as well as responsibility of the bidder. See National Elevator Co., MSBCA 1266, 2 MSBCA ¶ 124 (March 7, 1986), Independent Testing Agency, Inc., MSBCA 1833, 4 MSBCA ¶ 369 (Nov. 4, 1994). Of course, responsiveness must be determined at the time of bid opening only on the basis of the information set forth on the face of the bid submission, in contradistinction to an agency's determination of bidder responsibility, which may be determined subsequent to bid opening at any time prior to the time of contract award. H. A. Harris Co., Inc., MSBCA 1392, 2 MSBCA ¶ 193, (Oct. 21, 1988).

Experience of personnel is usually an issue of responsibility, not responsiveness. See Independent Testing Agency, Inc., *op cit.*, Jailcraft, Inc., MSBCA 2147, 5 MSBCA ¶ 475 (Oct. 27, 1999), National Elevator Co., Inc., MSBCA 1251, 2 MSBCA

¶ 115 (Oct. 17, 1985), National Elevator Co., Inc., MSBCA 1329, 2 MSBCA ¶ 160 (Oct. 1, 1987), Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶ 168 (Dec. 14, 1987), Control Systems Services, Inc., MSBCA 1397, 2 MSBCA ¶ 189. MBE compliance has also been deemed an issue of responsibility. See Roofer, Inc., MSBCA 1284, 2 MSBCA ¶ 133 (July 11, 1986). More directly pertinent to the instant appeal, questions surrounding the adequacy of licensure and certification of the individual personnel actually performing a job have been held ordinarily to relate to the question of responsibility rather than responsiveness. See Cam Construction Co. of Maryland, Inc., MSBCA 1393, 2 MSBCA ¶ 195, (Nov. 3, 1998), Covington Machine and Welding Co., MSBCA 2051, 5 MSBCA ¶ 436 (May 28, 1998), Independent Testing Agency, Inc., *op cit.*, Mediterranean Construction Co., Inc., MSBCA 2583, _____ MSBCA ¶ _____ (Sept. 25, 2007).

This is not to imply that personnel licensure and certification questions are always issues of responsibility rather than responsiveness. If a given RFP, for example, specifies the necessity that bidders present a list of particular proposed personnel with proof of requisite experience or certification, a bid which fails to contain such proof may be properly deemed nonresponsive to the requirements of the RFP and therefore rejected at the time of bid opening from any further consideration. See Severson Group, B-298195, June 9, 2006 CPD ¶ 94, Verizon Fed., Inc., B-293527, Mar. 26, 2004, 2004 CPD ¶ 186 at 5, Techseco Inc., B-284949, June 19, 2000, 2000 CPD 105 at 3. But this is not the circumstance in the case at hand. Here, the amendment to DHR's RFP did not demand that certifications be attached to bids. It mandated only that the project manager hold a certain certification. ACS responded to the RFP properly and fully, naming a particular proposed project manager for whom the requisite certification set forth in the RFP was assured in good faith to be provided prior to contract start. The ACS bid was

therefore fully responsive to the RFP. Further inquiry pertaining to the bidder's actual compliance with the certification requirement was permitted by the procurement officer after opening of the award in follow-up evaluation of the bidder's level of responsibility to achieve sound work performance. In this instance, the successful bidder actually complied with all certification requirements prior to contract approval and award, albeit by eleventh hour substitution of new personnel never disclosed in the initial bid. The mere fact, as argued by JPMorgan, that this RFP did not identify the certification requirement of the project manager in its "Criteria for Technical Evaluation" did not and does not in this instance convert this factor from a question of responsibility into the precursor question of responsiveness.

In addition to state precedent, DHR also relies upon principles of law established by federal procurement decisions of the Comptroller General of the United States. Specifically, quite similar to the allegations set forth by JPMorgan in the instant appeal, in the Matter of Unisys Corporation, B-242897, June 18, 1991, 91-1 CPD ¶ 577, appellant's complaint centered on its allegation of a "bait and switch" practice on the part of the successful vendor in that 9 out of the 16 personnel listed as anticipated for contract performance were not ultimately used on the job. In that matter the Comptroller acknowledged that "bait and switch" personnel identification does indeed provide a basis for rejecting a proposal, but under the specific circumstances there presented the Comptroller found insufficient evidence to support contract rescission because the expected personnel were initially identified in good faith, stating:

"where the offeror provides firm letters of commitment and the names are submitted in good faith with the consent of the respective individuals (that is, the offeror is not proposing personnel it has no intention of providing), the fact that the offeror, after award, provides substitute personnel does not make the award improper." (pg. 2)

Unisys, id., relied in part upon a prior decision in the Matter of Informatics General Corporation, B-224182, Feb. 2, 1987, 87-1 CPD ¶ 105. In that case, the successful vendor identified a certain person to work in the key capacity of branch supervisor of an energy library. That person later agreed to work for the appellant, a competing firm, rather than the vendor selected for the job, a selection that was made at least in part on the government's important expectation of securing the highly valued work of that particular individual, just as appears to be the case in DHR's preference for ACS and its proposed Project Manager, Aviles, in the case at bar. Nonetheless, because facts were in dispute in Informatics, id., concerning the accuracy of the appellant's allegation that the successful vendor knew about the unavailability of the identified person to work for the selected bidder because of her making a subsequent job commitment with the challenger, the Comptroller determined that in the absence of "affirmative evidence of misrepresentation," the bid protest must fail. Setting forth additional precedent and justification for that determination, the Comptroller General further stated as follows:

"We have held that an agency's evaluation of an offeror's key personnel, even though some are changed after award, is not objectionable when the offeror provided firm letters of commitment, and the names were submitted in good faith with the consent of the respective individuals (that is, the offeror was not proposing personnel it had no intention of providing). Development Alternatives, Inc., B-217010, Feb. 12, 1985, 85-1 CPD ¶ 188. Conversely, where it is established that an offeror made intentional misrepresentations that materially influenced the agency's consideration of its proposal, the proposal should be disqualified, Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53, or the contract canceled if the award has already been made. New England Telephone and Telegraph Co., 59 Comp.Gen. 746 (1980), 80-2 CPD ¶ 225. (pg. 5.)

Surely these foregoing federal precedents set forth much stronger bases for contract rejection than the case at bar, but even under these circumstances, the federal appeals were held insufficient for contract reversal.

Here, there is no allegation that ACS misrepresented its intention to hire Mr. Aviles as Project Manager. ACS was consistently truthful and forthcoming in its continuing *bona fide* advice to DHR about the status of Mr. Aviles' efforts to secure PMP certification. To rescind the ACS contract under these circumstances would be as impermissible as if the basis of JPMorgan's appeal was that, following contract award, Mr. Aviles was unable to work on the project because he became ill, or died, or simply elected to work elsewhere than at ACS. None of these contingencies would compel rescission of DHR's contract with ACS. Instead, Aviles is working on the project, and has been for six (6) months. Aviles is simply working in a capacity other than Project Manager because he innocently failed his PMP certification examination, rendering him ineligible to serve in the capacity of ACS project manager on the DHR project because of DHR's rigorous requirements governing the credentials of the person allowed to assume that position, as established by DHR's amendment to its RFP. Aviles' restriction from assuming a particular job title and function was the direct result of DHR demands, and not any misrepresentation on the part of ACS. Without proof of deliberate misrepresentation of ACS' initial intent to name Aviles as Project Manager, his subsequent demotion to a different capacity on the project is virtually immaterial and most certainly does not compel or justify contract rescission. The secondary basis of this appeal, namely, that DHR failed to conduct discussions with JPMorgan in a fair and impartial manner equivalent to the treatment afforded ACS, is inadequately supported by the facts here presented. For all of these reasons, this appeal must be denied.

Wherefore, it is Ordered this day of December, 2007,
that the above-captioned appeal is hereby denied.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael W. Burns
Chairman

Michael J. Collins
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 2577, appeal of JPMorgan Electronic Financial Services, Inc. under Department of Human Resources Solicitation No. OTHS/EBT-06-02S.

Dated:

Michael L. Carnahan
Deputy Clerk