

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

THE ETHOS FOUNDATION, INC., and)	CAB No. P-581
)	
THE GRACE CLINIC, INC.)	CAB No. P-582
)	(Consolidated)
Under RFP No. 8178-AA-NS-1-EW)	

For the Protester, The Ethos Foundation: Philip I. Brennan, J.D., Ph.D., President. For the Protester, The Grace Clinic: Michael Grace, Director. For the District: Warren J. Nash, Esq., Chris Malone, Esq. and Howard S. Schwartz, Esq., Assistants Corporation Counsel.

Opinion by Chief Administrative Judge Lorilyn E. Simkins, with Administrative Judges Jonathan D. Zischkau and Phyllis W. Jackson, concurring.

OPINION

The Ethos Foundation ("Ethos") challenges the award of a contract by the Office of Contracting and Procurement ("OCP") under a solicitation to provide a First Offender Pre-Trial Diversion Program for persons charged with Driving Under the Influence ("DUI") or Driving While Intoxicated ("DWI"). According to Ethos, the solicitation contained a requirement that only firms attending the pre-proposal conference were eligible for award of the contract. Subsequently, the Grace Clinic filed a protest asserting the same issue as Ethos. In addition to asserting that the award was limited to attendees of the pre-proposal conference, Grace maintains that personnel from OCP removed a December 14, 1998 "Open Letter" from its initial proposal and removed a February 26, 1999 letter from its best and final offer, thereby adversely affecting the evaluation of its proposal and best and final offer. Grace also claims that it has suffered compensable damages as a result of the District's failure to provide a contract for a promised "transition period."

We conclude that the solicitation was not limited to attendees of the pre-proposal conference. We also conclude that OCP committed no error with regard to Grace's "Open Letter." Further, we find no evidence of a promise by the District to provide a "transition period" contract. Accordingly, we dismiss in part and deny in part.

BACKGROUND

On November 10, 1998, the Office of Contracting and Procurement ("OCP") on behalf of the Office of Corporation Counsel ("OCC") issued RFP No. 8178-AA-NS-1-EW ("RFP") seeking qualified offers to provide a first offender pre-trial diversion program for persons cited for driving under the influence and driving while intoxicated.¹ (Motion to Dismiss and Agency Report of the District of Columbia, ("AR") Ex. 1). On November 23, 1998, OCP held a pre-proposal conference, pursuant to Section L.24 of the RFP, which states:

A mandatory pre-proposal conference will be held at 10AM on Monday, November 23, 1998 Prospective Providers will be given an opportunity to ask questions regarding this solicitation at the conference.

Representatives from Grace, Ethos, Second Genesis and the Psychiatric Institute, Inc., as well as the Program Manager, Program Assistant and Contract Specialist for the District, attended the pre-proposal conference. (AR Ex. 2). Ethos' representative at the pre-proposal conference asked the Contract Specialist what the District meant by "Mandatory Pre-Proposal Conference." The Contract Specialist responded that the phrase meant that only those organizations represented at the pre-proposal conference would be considered for contract award. (Protest of Ethos and Grace; Ward Aff. ¶ 4). The awardee of the contract, The Family and Medical Counseling Service, Inc. ("FMCS"), did not attend the conference. OCP issued two amendments to the RFP after the pre-proposal conference. (AR Ex. 3).

On December 15, 1998, FMCS, Grace, Second Genesis and Ethos submitted proposals to OCP. Grace also submitted with its proposal an "Open Letter", dated December 14, 1998, in which Grace described what it viewed as major issues which were not addressed in the RFP, and discussed the experience that it had gained over the years as the provider of pre-trial services. The letter states that it is not to be considered part of Grace's official response. (AR Ex. 10).

Section M.4 of the RFP allows for a maximum of 85 technical points, which are divided

¹ The RFP describes that the OCC handles approximately 3,000 alcohol-related cases per year. In order to minimize the substantial burden placed on the OCC and Superior Court by the number of persons charged with driving a motor vehicle while intoxicated or under the influence of intoxicating beverages, the OCC instituted a first offender pre-trial diversion program. The program fees are all paid for by the first offender. (See RFP Section C for General Description of the Program).

among the following evaluation criteria: (a) staffing and organizational support – 25 points; (b) program services–screening – 30 points; and (c) program services–treatment – 30 points. (AR Ex. 1). Price accounted for up to 15 points and preference points accounted for up to 12 points. An offeror could therefore receive a maximum of 112 total points.

On February 18, 1999, the Chief, General Crimes Section, OCC submitted to the Contracting Officer the completed technical evaluation materials of the three-member evaluation panel. (AR Ex. 11). The average scores of the offerors excluding price were: Grace 67.5; Ethos 75; Second Genesis 51.7; and FMCS 79.6. By letter dated February 18, 1999, the Contracting Officer requested that the offerors submit by February 26, 1999, best and final offers ("BAFO's"). The Contracting Officer instructed each offeror to submit complete total annual projected costs for the base year and option year. (AR Ex. 12). Each offeror responded by the deadline. (AR Exs. 13, 14, 15 & 16). Second Genesis did not submit total costs for the base or option year in either its offer or its BAFO, and was deemed not to have complied with the BAFO. (AR Ex. 17). Grace also submitted another letter with its BAFO questioning what had happened to the "Open Letter" attached to its initial submission. Grace again included the "Open Letter." (*Id.*)

The Offerors proposed the following prices for the base and option year:

<u>Offeror</u>	<u>Base Year</u>	<u>Option Year</u>	<u>Total</u>
Grace	\$459,150	\$459,150	\$ 918,300
FMCS	\$665,336	\$676,831	\$1,342,167
Ethos	\$743,800	\$766,114	\$1,509,914

(AR Ex. 20). The average combined technical and price scores for the four Offerors are recorded in the Memorandum of Negotiations as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>Price Score</u>	<u>Combined Score</u>	<u>Rank</u>
FMCS	83.3	10.3	93.6	1
Ethos	75	9.1	84.1	2
Grace	67.7	15	82.7	3
Genesis	51.7	0	51.7	4

(AR Exs. 17 & 20).

On March 11, 1999, the Contracting Officer approved the award of the contract to FMCS, and on April 2, 1999, awarded the contract to FMCS (AR Ex. 19). On or about April 9, 1999, the Contracting Officer notified the other offerors of the award to FMCS. (*Id.*) On

April 9, 1999, Ethos filed its protest and on April 20, 1999, Grace filed its protest. The Contracting Officer supplemented the selection decision, price evaluation and responsibility determination on May 6, 1999 (Ex. 20 & 21).

ANALYSIS

We exercise jurisdiction over these protests pursuant to D.C. Code § 1-1189.3 (Supp. 1997).

A. *"Mandatory Pre-Proposal Conference" Issue*

Both Ethos and Grace claim that they detrimentally relied on Section L.24 of the RFP and the interpretation of that section by the Contract Specialist that the bidding was limited to those who attended the pre-proposal conference. Both contractors assert that they would have altered their proposal if they had known that contractors, other than the four who attended the pre-proposal, were eligible for award. Grace is silent on how it would have changed its proposal. Ethos, however, explains that it would have researched the experience and prices of all competitors performing DWI/DUI services in the surrounding area. Ethos claims that the District's oral and written representations induced it to limit its research, and to focus only on the organizations which participated in the pre-proposal conference. Ethos claims that had it known that the competition would not be restricted to the three entities who attended the pre-proposal conference, its original and BAFO pricing would have been "radically different." (Reply to Agency Report).

While the District concedes that a contract specialist told the participants that the award would be limited to those attending the pre-proposal conference, the District argues that the phrase "mandatory pre-proposal conference" is ambiguous, and subject to more than one interpretation. We conclude that the language of Section L.24 does not clearly express an intention to render non-attending contractors ineligible to bid. The District correctly points out that an oral statement at a pre-proposal conference is not binding upon the District, unless the solicitation is amended in writing to reflect that statement.² The pertinent procurement

² The minutes of the pre-proposal conference confirm that the attendees were told that the award would be limited to those attending the conference. The minutes were provided to the Protesters for the first time in the Agency Report. Apparently, none of the conference participants requested a copy of the minutes, which are released only upon written request to the contracting officer or designated representative. (See 27 DCMR § 1605.2(d)). The minutes cannot be construed as an amendment of the solicitation, but are simply a written

regulations provide that:

The contracting officer shall inform all pre-proposal conference attendees of the following:

- (a) That remarks and explanations at the conference do not qualify or amend the terms of the solicitation; and
- (b) That the terms of the solicitation and specifications remain unchanged unless the solicitation is amended in writing.

27 DCMR § 1605.3. Neither of the two amendments which OCP issued after the pre-proposal conference addressed the issue of the "mandatory pre-proposal conference." (AR Ex. 4).

Even if the contracting agency intended to make attendance at a pre-proposal conference a condition precedent to the award of a contract, we conclude that such a requirement would unduly restrict competition, and would further no recognized legislative or procurement purpose. *Computer Network Corporation*, 50 Comp. Gen. 355, 356 (1970). Nothing in this record suggests any valid reason to limit award of the contract to those firms which attended the pre-proposal conference. Regardless of whether it was reasonable for Ethos or Grace to believe that the District could properly limit competition to those who attended the pre-proposal conference, neither Ethos nor Grace have shown prejudice resulting from OCP receiving a proposal from FMCS.

Ethos claims that had it known that the competition would not be restricted to the four entities who attended the pre-proposal conference, its original and BAFO pricing would have been "radically different." Ethos' argument necessarily fails because Grace, who was one of attendees and thus a known competitor, submitted the lowest price proposal and BAFO, and received the maximum 15 points for the price factor. Moreover, Ethos stated that its prices "are not only considerably lower than our established prices, but they are as low as we can go and still provide the quality of therapists and treatment for which Ethos is known." (AR Ex. 14). Finally, even if Ethos had received the maximum points for price, it would not have displaced FMCS in the rankings.

Grace, for its part, does not explain how it was prejudiced by OCP's receiving or

record of the pre-proposal conference.

considering a proposal from FMCS.

This ground of protest is denied.

B. Removal of Grace's Letter from its Proposal and Best and Final Offer

Grace submitted a letter dated December 14, 1998 with its initial proposal, which OCP personnel removed. The letter entitled "Open Letter from Michael Grace of Grace Clinic, Inc." states:

This is not a complete list and *this letter is not to be considered part of our official response*. It is just some of my thoughts and concerns. As the current vendor I thought you might find them helpful. (Emphasis supplied).

The December 14 letter presents arguments in favor of continuing services with Grace under the present arrangement, presents arguments against a competitive solicitation under the subject RFP, and criticizes the program structure proposed by the RFP. Grace learned that its letter had not been seen by the technical evaluation panel ("TEP") during a conversation with District personnel who asked for Grace's BAFO. In response, Grace wrote another letter dated February 26, 1999, incorporated the December 14 letter and attached it to its BAFO. The Contracting Officer, not the TEP, reviewed the BAFOs. If Grace had wanted the December 14 letter to be considered by the technical evaluation panel as part of its proposal, it should have stated as much. Because Grace stated in that letter that it was not to be considered part of its response to the RFP, we find no error in the OCP's actions. We deny this ground of protest.

C. Transition Period Issue

Grace claims that it was promised a transition period, which would have allowed for transfer of its database to the new contractor, would have permitted a smooth transition of clients with special needs from Grace, and would have allowed Grace some warning to lessen the economic impact resulting from loss of this contract. Grace claims that the delay between the award of the contract to FMCS on April 2, and notice to it of the award on April 9 and a subsequent period when OCC personnel apparently checked on the possibility of a contract for a transition period was somehow evidence of deceit. Grace claims that it has suffered serious economic damage in that all new intakes for one week (April 5-9) were directed to FMCS. Grace apparently contemplated that time period as a transition period for itself. Grace states that the transition period was mentioned in the minutes from the pre-proposal conference and in the letter from the Contracting Officer notifying it that it did not get the award.

The minutes of the pre-proposal conference states:

5. Transitions from one vendor to another shall be a smooth process where interruptions in services are limited. A change in vendors will require all parties to work together to accomplish the change.

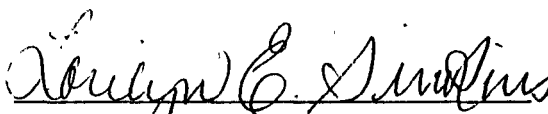
(AR Ex. 2). The Contracting Officer's letter dated April 2, 1999, informing Grace that it had not been awarded the contract states that "[a] transition plan needs to be developed. Eric Ward will call you in the next few days."

Based on these two statements, Grace concludes that it had been promised a contract to cover a transition period, and that the actions of the District personnel in not awarding it such a contract are a demonstration of deceit. We do not address the wisdom of having a transition period during which time Grace could have briefed the new contractor, and provided the District with the database of past participants of the program. These are issues of program administration which are matters within the discretion of the contracting officer and are not subject to this Board's review, absent a contract wherein Grace and the District agreed to a transition plan. However, there is no evidence of a promise by the District or a resulting contract to provide for a transition period. This ground of protest is therefore dismissed.

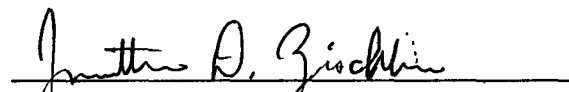
Accordingly, we deny these consolidated protests in part and dismiss them in part.


SO ORDERED.

DATE: June 16, 1999


LORILYN E. SIMKINS
Chief Administrative Judge

Concurring:


JONATHAN D. ZISCHKAU
Administrative Judge


PHYLLIS W. JACKSON
Administrative Judge