BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
WEXFORD HEALTH SOURCES, INC.	*	
	*	Docket No. MSBCA 3066, 3081 (Consolidated)
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES	*	
RFP No. Q0017058		

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ORDER AND OPINION BY CHAIRMAN BEAM

The Procurement Officer (PO) properly determined that the Offeror that submitted the lowest priced Financial Proposal and highest ranked Technical Proposal was a responsible Offeror. There being no allegation or evidence of bad faith, the Board concludes that the PO's responsibility determination was not arbitrary, capricious, unreasonable, or unlawful. In addition, the PO's evaluation of Appellant's Technical Proposal was in accordance with the dictates of the solicitation, was within the PO's discretion, and was not arbitrary, capricious, unreasonable, or unlawful.

FINDINGS OF FACT

Appellant, Wexford Health Sources, Inc., has been providing Respondent, Maryland Department of Public Safety and Correctional Services ("DPSCS"), with inmate medical care since 2012, and utilization management services since 2005. On December 29, 2016, Respondent issued Request for Proposals Solicitation No. Q0017058 Inmate Care and Utilization Services (the "RFP") for approximately 22,000 inmates housed in its facilities throughout the State for a period of five years. The services to be provided by the contractor were to be one component of inmate health; Respondent has separate contracts for inmate mental health, dental, and pharmacy services.

The PO for this procurement, Cecilia Januskiewicz, was the principal drafter of the RFP. She spent approximately 40 hours reading each proposal, and evaluated them for compliance with the evaluation criteria set forth in the RFP. She was required to conduct the final evaluation (using three evaluators as her advisors, all of whom comprised the Evaluation Committee), and to make the recommendation for award of the Contract to the Secretary of DPSCS.

Ms. Januskiewicz has extensive experience in State budget and procurement. She is an attorney who clerked for the U.S. Tax Court for two years, then worked in private practice for several years. She worked for the Maryland Attorney General's Office for 15 years as the principal counsel to the Budget Department. She was Deputy Secretary of the Budget Department and ultimately served as the Secretary of the Budget Department (now known as the Department of Budget and Management), which is the control agency for this procurement.

Offerors were to submit separate Technical and Financial Proposals. Technical and Financial Proposals were to be evaluated separately per Section 5.5.2.4 of the RFP and COMAR 21.05.03.03. The Technical Proposal Evaluation Criteria are set forth in Section 5.2 of the RFP and were listed in descending order of importance:

5.2.1 Offeror's Technical Response to RFP Requirements and Work Plan (See RFP § 4.4.2.6)

5.2.2 Experience and Qualifications of Proposed Staff (See RFP § 4.4.2.7)

5.2.3 Offeror Qualifications and Capabilities, including proposed Subcontractors (See RFP § 4.4.2.8 – 4.4.2.14)

5.2.4 Economic Benefit to State of Maryland (See RFP § 4.4.2.15)

These criteria were not assigned any numerical weight relative to the others, and there was no numerical scoring system employed.

The RFP provides that upon completion of the Technical Proposal and Financial Proposal evaluations and rankings, each Offeror would receive an overall ranking. The PO would then recommend award of the Contract to the responsible Offeror that submitted the proposal determined to be the most advantageous to the State, considering price and the evaluation factors set forth in the RFP. In making this most advantageous proposal determination, technical factors would receive equal weight with financial factors.

A Pre-Proposal Conference was held on January 12, 2017. The final amended due date for proposals was May 10, 2017. The PO issued ten amendments to the RFP. Four offerors submitted proposals in response to the RFP. One of the proposals was deemed not susceptible of award and was not evaluated. The remaining three offerors were deemed to be responsible shortly after the proposals were initially received in May 2017.

In determining that one of the offerors, Corizon Health Services, Inc. ("Corizon"), was a responsible offeror, the PO relied upon materials submitted by Corizon, including certain financial information it provided; as well as its Dun and Bradstreet report; the fact that it was the largest correctional healthcare provider in the country; and that it was then, and is currently, providing similar services in other states. The PO also spoke with Ruth Naglich, the Associate Commissioner for Health Services at the Alabama Department of Corrections, who was listed as a reference for Corizon. Three other references in Kansas, Missouri, and Philadelphia were checked by another evaluator.

The Evaluation Committee (*i.e.*, the PO and three evaluators) met during the months of June and July 2017 for their initial review of the Technical Proposals. The PO provided the evaluators with a document entitled "Guidelines to an Evaluation Committee" ("Guidelines") to be used as a guide to assist in evaluating the proposals. The Guidelines state that:

> [e]ach criterion must be mutually exclusive. That is, any given facet of an offeror's proposal is to be evaluated against one, and only one criterion. If there is information in a proposal, which doesn't obviously fall within the scope of an evaluation criterion, committee members, possibly with the guidance of the procurement officer, should discuss which criterion, if any, the topic most appropriately falls within. Once there is agreement on the most appropriate criterion, all members must evaluate the information under that criterion.

Neither the RFP nor the Guidelines expressly prohibited consideration of an offeror's past or current performance under any of the evaluation criteria.

The Guidelines also state that each proposal should be evaluated "first against the specifications in the RFP (this can be construed as evaluating against the ideal manner of achieving the specifications) and then against the other proposals." The PO testified that the proposals of each offeror were evaluated individually; they were not compared side-by-side.

The RFP provides that during the review process, "oral presentations and discussions may be held. The purpose of such discussions will be to assure a full understanding of the State's requirements and the Offeror's ability to perform the services as well as to facilitate arrival at a Contract that is most advantageous to the State." COMAR does not specifically require that these be held. In fact, the RFP provides that "the State reserves the right to make an award without holding discussions."

According to the PO, "cure letters" may be sent to offerors so that the offerors can remedy any issues identified with their proposals, if they choose. According to the Guidelines, "[a]nything significant that an offeror will be downgraded on needs to be addressed to the offeror while it still has the opportunity to cure the apparent deficiency by answering questions about it and/or revising its proposal. An offeror should not have a major negative issue presented to it for the first time at a debriefing."

On July 13, 2017, the PO sent cure letters to two of the offerors that identified deficiencies with their Technical Proposals and requested clarification of certain items.[1] Responses to these cure letters were received on July 20, 2017. Oral presentations were then held on July 24-25, 2017. Many of the deficiencies and other issues identified in the Technical Proposals were discussed with the offerors during their oral presentations. On July 31, 2017, the PO requested additional clarifications from both offerors of certain issues and/or questions that arose during the oral presentations. Responses to these requests were received by the PO on August 4, 2017.

During the review process, each of the evaluators prepared handwritten notes identifying the strengths and weaknesses of each Technical Proposal relative to each of the four evaluation criteria. The PO prepared a hand-written summary (which incorporated the comments of the other evaluators) of each offeror's strengths and weaknesses for each of the four evaluation criteria. According to the PO's handwritten summary, some of the strengths and weaknesses of Appellant's Technical Proposal related to Appellant's past and current performance under the existing contract.

In connection with the most important evaluation factor, Offeror's Technical Response to RFP Requirements and Work Plan, each offeror was required to "describe in detail how it will deliver the required services and how its proposed services...will meet or exceed the requirement(s)." Throughout this section of Appellant's Technical Proposal (Tab E), Appellant repeatedly referred to its performance under the existing contract, repeatedly referred to itself as the incumbent, and repeatedly stated that it "would continue to provide" certain specified services under the new Contract.

Under the next most important evaluation factor, Experience and Qualifications of Proposed Staff, each offeror was to identify its proposed staffing plan, describe the management

[1] The PO requested clarification and/or cure of 20 separate items in Appellant's Technical Proposal.

structure it will utilize, summarize the relevant experience of the proposed staff, and include minimum hourly rates for each proposed position, among other things. Again, Appellant's Technical Proposal (Tab F) repeatedly referred to its performance under the existing contract, repeatedly referred to itself as the incumbent, and repeatedly stated that it "would continue to provide" the same or similar services by some of the same staff currently employed and providing services under the existing contract.

The third most important evaluation factor, Offeror Qualifications and Capabilities, requested that each offeror include information on "past experience with similar projects and/or services." The offeror was to describe how its organization could meet the requirements of the RFP. This criterion did not specifically request information on an offeror's past performance.

By repeatedly referring to its past (and continuing) performance under the existing contract and proposing to continue this performance, Appellant touted its past performance under the existing contract and used it as a selling point, thereby encouraging Respondent to consider Appellant's past and continued performance when evaluating Appellant's Technical Proposal under each of the evaluation criteria. According to the PO, the Evaluation Committee was concerned that Appellant's reliance on its past performance under the existing contract as a means of convincing the Evaluation Committee that it was the best offeror was misplaced.

On August 8, 2017, after the initial review meetings, after reviewing the cure responses, after the oral presentations, and after reviewing the clarification responses, the Evaluation Committee met again for a final review and ranking of the Technical Proposals. Due to changes in the RFP, the Financial Proposals were not opened and ranked because it was determined that at least one best and final offer ("BAFO") would be required.

A BAFO was issued on August 9, 2017, and responses were received on August 15, 2017. On August 16, 2017, the Evaluation Committee met to rank the Financial Proposals and to rank the Proposals overall considering both the technical and financial evaluations.

A second request for BAFOs was issued on August 22, 2017, with a response date of August 29, 2017. The second request was revised on August 25, 2017, but no change was made to the due date. Appellant submitted a timely 2nd BAFO. On August 29, 2017, Corizon submitted a 2nd BAFO that was incomplete because it did not include a figure for overhead percentage. Later that same night, the PO sent an email to Corizon requesting that the 2nd BAFO be resubmitted as soon as possible with the overhead percentage that had been omitted. At 12:53 p.m. on August 30, 2017, Corizon submitted the revised and complete 2nd BAFO that included its overhead percentage. The inclusion of the overhead percentage did not change Corizon's total proposed price.[2]

On August 30, 2017, the Evaluation Committee met again to rank the Proposals based on both the technical evaluation and the financial proposals. The Proposals were ranked as follows:

Offeror	Technical	Financial Price/Rank	Overall Rank
Corizon Health, Inc.	1	$659,259.142	1
Wexford Health Sources, Inc.	3	$708,930,883	2
Contractor A	2	$724,498,777	3

[2] According to the PO, offerors were required to submit an overhead rate for purposes of determining liquidated damages that may be assessed for failure to staff the Contract in accordance with its terms, and to consider how the Contract Price would be increased or decreased should the number of personnel be increased or decreased. The overhead rate was not an evaluated factor under the RFP.

The PO recommended award of the Contract to Corizon based on her conclusion that Corizon's Proposal was the most advantageous to the State. Her recommendation was issued to the Secretary of DPSCS on August 31, 2017, and he approved it the same day. On September 8, 2017, Corizon was notified of tentative award of the Contract. Appellant was notified on September 19, 2017, of the proposed award to Corizon.

On September 25, 2017, Appellant filed its First Bid Protest. The grounds of the First Bid Protest were as follows:

A. The evaluation of Corizon's Technical Proposal was flawed:

1. Corizon's Technical Proposal should have been downgraded to the extent that Corizon proposed fewer staff and/or less qualified staff than recommended in the RFP without reasonable support;

2. Corizon's proposal should have been downgraded to the extent Corizon proposed to lower wages, salaries, and other incentives which would negatively impact recruitment and retention of staff;

3. To the extent Corizon's proposal/price underestimated the amount and cost of Off-site services and/or other services required by the RFP, Corizon's proposal should have been downgraded and weaknesses should have been assigned in the Technical evaluation of Corizon's proposal;

4. Corizon has a history of negative performance that should have resulted in assigned weaknesses and downgrading of its technical proposal;[3]

5. Other aspects of the Technical evaluation of Corizon's proposal were likely flawed;[4]

B. Corizon is not a responsible offeror under the terms of the RFP and Maryland Procurement Law and that the PO failed to make a responsibility determination per the terms of the RFP Sections 1.15, 5.5.2.4 and 5.5.3,

[3] Appellant's First Bid Protest cites six alleged instances of Corizon's alleged negative performance of contracts for the provision of inmate medical services in other jurisdictions.

[4] At the time of the filing of Appellant's First Bid Protest (September 25, 2017), a debriefing was scheduled for October 5, 2017, and Appellant had a Maryland Public Information Act request pending regarding the evaluation of Corizon's proposal.

COMAR 21.05.03.03F and State Finance and Procurement Article §13-206(a)(1)(ii);

C. The evaluation of Wexford's Technical Proposal was flawed; and

D. Contrary to the RFP, DPSCS did not select the "most advantageous" offeror.

On October 5, 2017, after Appellant's First Bid Protest was filed, a debriefing was held by the PO with Appellant. The Debriefing Summary in the Agency Report reflects that the PO explained to Appellant that she and the Evaluation Committee followed the criteria set forth in the RFP in evaluating Appellant's Technical Proposal, specifically Section 5.2. The PO shared her conclusions regarding the strengths and weaknesses of Appellant's Technical Proposal and noted that price was weighted equally with technical factors. She concluded that "the differences in [Appellant's] technical proposal and prices edged [Appellant] from top ranking."

On October 11, 2017, after the debriefing, Appellant filed its First Supplemental Bid Protest. The grounds of the First Supplemental Bid Protest were as follows:

A. The evaluation of Wexford's Technical Proposal was arbitrary and did not comply with the RFP;[5]

B. DPSCS failed to conduct meaningful and equal discussions with Wexford;

C. DPSCS arbitrarily failed to assign strengths to Wexford's proposal;

D. DPSCS failed to comply with Maryland Procurement Law and/or the RFP in determining that Corizon was a responsible offeror;

E. DPSCS engaged in improper post-BAFOs discussions;

F. DPSCS failed to perform a price analysis as required by COMAR 21. 05.03.05 to determine the reasonableness of Corizon's bid; and

G. DPSCS's most advantageous determination that gave rise to the selection recommendation of Corizon was flawed.

[5] Appellant cites 13 specific instances wherein it alleges that the PO's assignment of weakness to its Technical Proposal was arbitrary and unreasonable.

The PO issued her final decision denying Appellant's First Bid Protest and First Supplemental Bid Protest in a 15-page letter dated December 19, 2017. In her final decision, the PO asserted 19 separate grounds for denying the protests and provided a detailed analysis and explanation of her reasoning with respect to each. The 19 general grounds for denial were as follows:

A. DPSCS properly evaluated Corizon's Technical Proposal, and Wexford's challenge to that evaluation is based on nothing more than conjecture and erroneous assumptions;

B. The PO properly determined Corizon to be a responsible offeror;

C. The evaluation of Wexford's Technical Proposal was conducted in accordance with the RFP and in full compliance with the law;

D. DPSCS properly assigned a weakness to Wexford for not proposing a "Corporate Director of Nursing" or equivalent position;

E. DPSCS properly assigned a weakness to Wexford for proposing low minimum rates for certain positions;

F. DPSCS properly assigned a weakness for Wexford's proposed medical records division;

G. The DPSCS properly assigned a weakness under the Offeror's Technical Response to RFP requirements and Work Plan criterion for operational issues under the current contract;

H. The assignment of a weakness to Wexford's proposed staff hiring and retention initiatives did not significantly change the overall evaluation result;

I. DPSCS properly assigned a weakness for Wexford's approach to chronic care;

J. Wexford's response to the *Duvall* Settlement Agreement has been unsatisfactory;

K. DPSCS properly assigned a weakness to Wexford's proposal for inadequate or no corporate support;

L. DPSCS properly assigned a weakness to Wexford for poor employee retention and staffing fill rates;

M. DPSCS properly assigned a weakness to Wexford's Technical Proposal for poor data management and verification;

N. DPSCS properly assigned a weakness to Wexford's proposal for unsatisfactory implementation of the multi-vendor model;

O. DPSCS properly assigned a weakness to Wexford's proposal for unstable local leadership;

P. DPSCS properly assigned a weakness to Wexford's proposal for lack of Continuous Quality Improvement;

Q. DPSCS afforded all offerors fair and equitable treatment with respect to any opportunity for discussions;

R. DPSCS did not engage in improper post-BAFO discussions; and

S. DPSCS was not required to perform a price analysis under COMAR.

Appellant filed a Notice of Appeal of the PO's final decision regarding its First Bid Protest and First Supplemental Bid Protest on January 8, 2018, which was docketed as MSBCA No. 3066.

On February 1, 2018, Appellant filed a Second Supplemental Bid Protest. The grounds for Appellant's Second Supplemental Bid Protest were as follows:

A. Corizon's proposal cannot be the basis for award because it is ambiguous regarding the identity of the offeror;

B. Corizon's proposal cannot be the basis for award because it is ambiguous whether Corizon took exception to, or accepted, the requirements of the RFP;

C. Corizon's financial information raised serious questions regarding its responsibility, which were ignored by the PO;

D. Corizon's proposal did not fully disclose past performance that was required to be disclosed, and DPSCS did not fully evaluate Corizon's past performance;

E. DPSCS engaged in disparate treatment of offerors during the evaluation process:

1. DPSCS allowed Corizon to reserve the right to negotiate RFP/Contract Provisions after selection and before award but required Wexford to agree to all terms of the RFP and its attachments;

2. DPSCS assignment of weakness to Wexford for proposing low rates for "some" positions was disparate treatment if DPSCS did not assign the same or similar weakness to Corizon;

3. DPSCS's failure to assign weakness to Corizon for proposing to hire Wexford's staff was disparate treatment; and

F. To the extent that DPSCS failed to document its evaluation and selection decision or to retain such documents in a permanent record of the procurement, the evaluation and selection decision are arbitrary and contrary to law.

On February 8, 2018, Appellant filed a Third Supplemental Bid Protest. The grounds for Appellant's Third Supplemental Bid Protest were as follows:

A. Corizon's first BAFO did not comply with DPSCS's instructions and therefore should have been rejected; at a minimum, it should have required a new evaluation of Corizon's understanding of the work;

B. DPSCS engaged in post-BAFO and post-selection discussions with Corizon, including apparently allowing Corizon to change its proposed price;

C. DPSCS engaged in disparate treatment of offerors during the evaluation process;

1. DPSCS assigned strengths to Corizon for proposing to hire Wexford personnel but did not assign a strength to Wexford for already having those same personnel;

2. DPSCS assigned a weakness to Wexford for proposing low rates for "some" positions but did not assign a similar weakness to Corizon for proposing low rates for "some" positions;

3. DPSCS assigned a strength to Corizon for "Emergency preparedness with custody representation" but did not assign Wexford a strength for equal or better emergency preparedness;

4. DPSCS assigned a strength to Corizon for "Technology solutions including Carelog and CARES scheduling system" but did not assign Wexford a strength for equal or better technology solutions;

5. DPSCS assigned a strength to Corizon for proposing a recruiting video but did not assign a strength to Wexford for proposing a similar video;

6. DPSCS assigned a strength to Corizon for its Internal Locum Tenens initiative but did not assign a strength to Wexford for its Internal Locum Tenens initiative;

7. DPSCS's assigned Corizon a strength for proposing "12 hour shifts and loan repayment program for nursing staff" but did not assign a strength to Wexford for its similar proposal;

8. DSPCS assigned a strength to Corizon for "Educational tools for inmates including Baby and Me" but failed to assign a similar strength to Wexford for similar educational programs/tools; and

D. Based on the incomplete Agency Report, there may have been other potential irregularities in DPSCS's evaluation process.

On March 15, 2018, the successor PO, Anna Lansaw,[6] issued her final decision denying Appellant's Second and Third Bid Protests. Once again, the PO provided a detailed analysis and explanation of her eight (8) separate reasons for denial. The general grounds for denial were as follows:

A. Corizon Health, Inc. was the unambiguous Offeror;

B. Corizon took no exception to, and accepted, the requirements of the RFP;

C. The PO considered the financial information submitted by Corizon, and properly determined Corizon to be a responsible offeror;

D. Corizon's disclosures of past performance met the RFP requirements, and DPSCS properly evaluated Corizon's past performance;

E. DPSCS provided fair and equal treatment of all offerors during the evaluation process;

[6] The original PO for this procurement had retired.

F. DPSCS documented its evaluation and selection decision and retained a procurement record in accordance with COMAR 21.05.03;

G. Corizon's response to DPSCS's first BAFO request did not require rejection or re-evaluation of technical proposals; and

H. DPSCS and Corizon did not engage in improper post-BAFO discussions, and Corizon did not change its proposed price.

On March 23, 2018, Appellant filed an appeal of the PO's final decision denying its Second and Third Supplemental Bid Protests, which was docketed as MSBCA No. 3081.

On March 29, 2018, Appellant filed a Fourth Supplemental Bid Protest contending that one of the members of the Technical Evaluation Committee was biased against Appellant as a result of its performance on the existing contract. The PO denied Appellant's Fourth Supplemental Bid Protest on May 1, 2018. On May 11, 2018, Wexford appealed the PO's denial, which was docketed as MSBCA No. 3086.

On May 16, 2018, the appeals in Docket Nos. 3066, 3081, and 3086 were consolidated by Order of the Board. On June 27, 2018, the Board held a hearing on six (6) dispositive motions filed by Appellant, Respondent, and Corizon, the Interested Party. By Order dated July 5, 2018, the Board granted Respondent's Cross-Motion for Summary Decision in Docket No. 3081, holding that certain language in the Interested Party's Technical Proposal did not constitute a reservation of rights that served as an exception to the requirements of the RFP.

On July 26, 2018, the Board granted, in part, the Interested Party's Motion to Dismiss, or in the Alternative for Summary Decision, in Docket No. 3066, concluding that the Board did not have jurisdiction to hear the issue of whether the Interested Party lacked financial capacity to perform the Contract because the issue had not been raised by Appellant in its First Bid Protest or First Supplemental Bid Protest, and thus had not been finally decided by the PO. On the same day, Appellant filed a Notice of Withdrawal of its appeal in Docket No. 3086.

A hearing on the merits was held August 7-8, 2018. The PO was the only witness called by Appellant. At the close of Appellant's case, the Interested Party and Respondent moved for judgment on Appellant's contention that (i) the PO was required by COMAR 21.05.03.05 to perform a price analysis, (ii) the PO had failed to do so, and (iii) if a price analysis had been performed as required, the PO would have concluded that the Interested Party's price was too low. The moving parties argued that Appellant had failed to meet its burden of proof that the PO failed to do a price analysis and find that the Interested Party's price was too low.

Without rendering any decision on whether a price analysis was indeed required under COMAR, the Board granted the Motion based on the unrebutted testimony of the PO that she did perform a price analysis. Specifically, the PO testified that (i) she considered each of the price proposals in relation to each other and found them to be in the same relative range, (ii) she considered the fact that the Interested Party was performing similar contracts in other states, and (iii) she found the Interested Party's price to be the most advantageous to the State.

The Interested Party also moved for judgment on the grounds that Appellant lacked standing to bring the appeals. The Board denied the Motion at that time but did not prohibit the Interested Party from renewing its Motion at the close of all the evidence.

Respondent recalled the PO in its case in chief. Respondent did not call any other witnesses. The Interested Party did not call any witnesses, and Appellant did not call any rebuttal witnesses. As such, all of the PO's testimony was unrebutted.

The PO was credible and knowledgeable about the procurement process, including her obligations as a procurement officer and Respondent's obligations under the procurement laws. The PO's evaluation of each of the offerors' technical and financial proposals was thorough and comprehensive, her analysis of Appellant's protests and denials thereof were well-reasoned and

demonstrated sound judgment, and her conclusions were supported by the information available to her.

The Interested Party renewed its Motion for Judgment after all parties had rested their cases. In lieu of closing arguments, the parties elected to submit post-hearing briefs, which were due and filed on August 23, 2018.

DECISION

In its post-hearing brief, Appellant summarized its arguments in these appeals and grouped them into four categories:

1. Absent meaningful and equal discussions and a proper technical evaluation, it is impossible to determine which proposal was most advantageous to the State;
2. [Respondent] failed to follow the RFP criteria;
3. [Respondent] failed to hold meaningful and equal discussions; and,
4. The PO's responsibility determination was based on inadequate information and was not reasonable.

We address each of these in turn.

Appellant begins by asserting that Respondent's and the Interested Party's lack of standing defense (*i.e.*, that Appellant's Technical Proposal did not warrant a $50 million price premium) presupposes a finding that Appellant was given a fair chance to submit its best technical proposal and best price, that the PO actually evaluated Appellant's Technical Proposal in accordance with the RFP, and that all proposals were evaluated equally. Appellant concludes by asserting that none of these circumstances occurred because Respondent engaged in disparate treatment. As a result, it argues, any determination that Appellant's Proposal "was or was not worth a specific price premium is premature and speculative, especially here—where [Respondent] argued that a 7.5% price difference was, in effect, expected and within reason." In short, Appellant contends that it is

impossible to know whether its Proposal was worth the price because its Technical Proposal was not fairly evaluated.

Appellant's conclusory arguments are not supported in this section of its brief, but the Board will address the issue of standing nonetheless.[7] The Board recently considered this issue in the case of *Conduent State and Local Solutions, Inc.*, MSBCA No. 3071 (2018), in which the appellant contended that it was prejudged due to its past performance and thus its technical proposal was not properly evaluated and received a lower ranking than it should have. *Id.* at 3. Applying the standard established in *Active Network, LLC,* MSBCA No. 2920 (2015) at 6, in which this Board held that

> [i]n order to have standing sufficient to pursue a bid protest, an appellant must not only allege that the State did something improper; it must also be able to demonstrate that, had the impropriety not occurred, that that particular offeror would have been awarded the contract[,]

the Board concluded that Conduent lacked standing to pursue the appeal, reasoning that even if we assumed the truth of all of Conduent's allegations of prejudgment and bias (as we were required to do in the context of a motion to dismiss), the price disparity between Conduent's proposal and the proposed awardee's, which was approximately 26%, was too significant to warrant a conclusion that Conduent would have been awarded the contract. *Id.* at 9. As this Board stated in *Active Network*, "[w]here there is no reasonable possibility of an appellant receiving contract award even if successful in its protest appeal, appellant lacks standing to pursue an appeal." *Id.* at 9.

In this case, Appellant has similarly alleged that it was prejudged based on its past performance, that its Technical Proposal should have been ranked higher than the Interested

[7] Respondent argued its lack of standing defense at the hearing on its Cross-Motion for Summary Decision in MSBCA No. 3066 on June 27, 2018. On July 24, 2018, the Cross-Motion was denied.

Party's, and that, but for Respondent's impropriety, it would have been awarded the Contract. Unlike the appellants in both *Active Network* and *Conduent*, in which the appellants essentially priced themselves out of the market, here, Appellant argues (and the Interested Party concedes) that all three of the offeror's prices were in a "very close grouping." Even the PO testified that she was not concerned that the Interested Party's price was $50 million lower than Appellant's because over the course of the five-year contract, it was not a stark departure from what Appellant had proposed. Thus, assuming Appellant's Technical Proposal had been ranked first rather than third, the 7.5% differential between Appellant's and the Interested Party's Financial Proposals is not enough to support a conclusion that "there is no reasonable possibility of receiving contract award even if successful in its protest appeal." *Id.* We disagree with Respondent and the Interested Party that Appellant lacked standing to pursue this appeal.

Appellant next argues that Respondent failed to follow the RFP's evaluation criteria, asserting four bases for its conclusion:

> A. [Respondent] improperly elevated the importance of, and double-counted, past performance.
>
> B. [Respondent] failed to evaluate [Appellant's] Technical Response and Staffing under the two most important evaluation factors.
>
> C. [Respondent] misevaluated [Appellant's] past performance.
>
> D. In assigning strengths and weaknesses, [Respondent] engaged in disparate treatment of offerors and otherwise acted arbitrarily.

Appellant's arguments essentially boil down to the fact that Appellant disagrees with the PO's evaluation of its Technical Proposal because it believes its past performance was improperly evaluated—that it was considered under the wrong RFP criteria and was thus overweighed. Appellant argues that its past performance was considered under the first and second evaluation

criteria, when it should only have been considered under the third criterion and, as a result, it was "double-counted" and "triple-counted" and thus elevated in importance.

Appellant argues that Respondent "never evaluated the merits of [Appellant's] technical approach and staffing" because it was improperly focused on evaluating whether Appellant succeeded in the past. In other words, Appellant contends that the Evaluation Committee and the PO were so blinded by Appellant's alleged poor past performance that they were unable to fairly assess the merits of its work plan and staffing plan. According to Appellant, this constituted disparate treatment since Respondent did not similarly consider the past performance of the Interested Party.

Appellant further asserts that its past performance was misevaluated and given more significance (or weight) than appropriate because the PO, who had no personal knowledge of Appellant's previous performance, relied on the other members of the Evaluation Committee, one of whom had only had limited exposure to Appellant's past performance.

Appellant also takes issue with the evaluators and the PO's assigning of "strengths" and "weaknesses" to its Technical Proposal, contending that weaknesses were assigned to Appellant for certain components of its Technical Proposal that were not also assigned to the Interested Party, even where the components were the same. Likewise, Appellant contends that certain strengths were assigned only to the Interested Party for components that were also present in Appellant's Technical Proposal. Appellant concludes that this conduct by the evaluators and the PO amounted to disparate treatment.

Before we begin our analysis of Appellant's multitude of contentions, we pause to emphasize what we have repeatedly explained over the years, and which was discussed in great detail in the case of *Eisner Communications, Inc.*, MSBCA No. 2438 (2005) at 18-19, that is, our

role in reviewing the decisions of evaluators of proposals submitted in response to RFPs in competitive negotiations. The Board has consistently ruled that it will only review whether the determinations of procurement officials regarding the evaluation of the technical merits of proposals are arbitrary, capricious, unreasonable, or contrary to law or regulation, since procurement officials' determinations concerning the relative technical merits of proposals are discretionary and entitled to great weight. *See, Delmarva Cmty. Servs, Inc.*, MSBCA No. 2302 (2002) at 8-9; *see also*, *Covington Machine and Welding Co.*, MSBCA No. 2051, 5 MICPEL ¶436 (1998); *Environmental Controls, Inc.*, MSBCA No. 1356, 2 MICPEL ¶168 (1987).

Moreover, the Board does not serve as a "Procurement Super-Evaluation Committee that reviews in minute detail every aspect of a procurement officer's decision to award a contract." *Eisner Communications, Inc.*, MSBCA No. 2438 (2005) at 19. "[T]he process of weighing the technical merits is a subjective one that relies on the business and technical judgment of the Procurement Officer." *Id.* (citing *Information Control Systems, Corp.*, MSBCA No. 1198, 1 MICPEL ¶81 (1984)). The evaluation of proposals in a competitive negotiation procurement is a matter left in the procurement officer's sole discretion after receiving the advice of an evaluation panel, if one is used. *Id.* (citing *United Communities Against Poverty, Inc.*, MSBCA No. 1312, 2 MICPEL ¶144 (1987)). We will not substitute our judgment for that of a procurement officer, except under extremely limited circumstances.

"Mere disagreement with the evaluation of proposals or the recommendation for an award is insufficient to meet an appellant's burden to show that the evaluation of proposals and/or the award of a contract, has been unreasonable." *Id.* (citing *Delmarva Cmty. Services, Inc.*, MSBCA No. 2302, 5 MICPEL ¶523 (2002)). The Board does not second-guess an evaluation of a proposal,

but will determine whether or not a reasonable basis exists for the conclusions reached. *Id.* (citing *Baltimore Industrial Medical Center, Inc.*, MSBCA No. 1815, 5 MICPEL ¶368 (1994).

In *Covington Machine and Welding Co.*, we reiterated the rationale for granting procurement officers such discretion, as we discussed more fully in *Charles Center Properties*, MSBCA No. 1629, 2 MICPEL ¶297 (1992)(citing 39 Comp. Gen. 228, 230 (1963)):

> Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the [procurement] contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the State's [Government's] behalf. 39 Comp. Gen. 705, 711.

Id. at 5. In sum, because it is the agency that will have to live with the results of a procurement officer's decision, unless the decision was clearly erroneous and/or unreasonable because it was not based on facts and specified criteria, or unless the decision was made in bad faith, was arbitrary or capricious, or was contrary to law or regulation, this Board will not disturb or interfere with a procurement officer's decision.

With these standards of review in mind and guiding our analysis, we now turn to Appellant's contentions. With regard to the weight assigned to Appellant's past performance, we first note that there was no scoring system or numerical weights assigned to the evaluation criteria. The weighing of the merits of each proposal was a subjective determination made by each individual evaluator and ultimately determined by the PO. Thus, the allegation that Appellant's past performance was "double-counted" and "triple-counted" is technically inaccurate.

Appellant contends that the third criterion—Offeror Qualifications and Capabilities, including proposed Subcontractors—is the only criterion under which it was proper to consider

Appellant's past performance. Appellant argues that the Evaluation Committee's consideration of its past performance under the first two criteria (which were more heavily weighted) "improperly elevated the importance of, and double-counted, past performance." The third criterion requested that each offeror include information on *past experience* with similar projects and/or services. Appellant's contention that its past performance should only have been considered under the third criterion wrongly equates *past performance* with *past experience*. Past experience (with similar projects) is not the same as past performance. The type of work a contractor did in the past (including where it was done and by whom) is separate and distinct from the quality of the work that was done. Just because a contractor has experience building a variety of different types of houses in a variety of different locations, doesn't mean that any of the houses were well built. The third criterion requested information on its prior experience, not the quality of its experience.[8] In short, the third criterion did not specifically request information on an offeror's past *performance*; therefore, it was no more, nor more less, appropriate to consider Appellant's past performance under the third criterion than it was to consider it under any other criterion.

What is troublesome to the Board is that Appellant seems to want it both ways—it wants credit for its positive past performance, but wants its negative past performance to be ignored, or at least limited to consideration under only the third and less important criterion. Throughout its Technical Proposal (including Tabs E and F, which are its technical response/work plan and staffing plan), it repeatedly touts its "past performance" as a selling point, attempting to convince the Evaluation Committee that its proposed approach "to continue to provide" certain services

[8] More specifically, the third criterion requested "(a) [t]he number of years the Offeror has provided similar services; (b) [t]he number of clients/customers and geographic locations that the Offeror currently serves; (c) [t]he names and titles of headquarters or regional management personnel who may be involved with supervising the services to be performed under the Contract; (d) [t]he Offeror's process for resolving billing errors; and (e) [a]n organizational chart that identifies the complete structure of the Offeror, including any parent company, headquarters, regional offices, and subsidiaries of the Offeror."

would be advantageous to the State. Yet Appellant objects to having its negative "past performance" considered under either of these two criteria. Appellant fails to acknowledge that many of the "strengths" that it was assigned during the evaluation process arose out of its past performance as the incumbent. Striking all of its past performance would necessarily require that many of these strengths be ignored.

We cannot overlook the fact that its proposed approach (*i.e.*, its technical response/work plan and its staffing plan), particularly insofar as it pledged to continue doing much of what it was doing under the current contract, became inextricably linked with its past performance as the incumbent. As the Interested Party properly concluded, "[Appellant's] reliance on its incumbency as the basis for its proposed performance makes its incumbency so intertwined with its technical proposal that [Respondent] could not evaluate [Appellant's] future performance without considering [Appellant's] past performance." We agree. It would be one thing if Appellant's proposal had stated that "we have been doing 'X' under the existing contract, but under the new contract we propose to do 'Y'," or even that "we propose to do 'X' plus 'Y'." But it did not. Instead, Appellant's proposal stated that "we have been doing 'X' under the existing contract, and we will continue to do 'X' under the new contract. In these instances where Appellant touts its incumbency, it is impossible not to consider what Appellant had been doing under the existing contract (and how well it had been doing it), when it specifically proposed that it would continue doing the same. The Appellant repeatedly "opened the door" for the Evaluation Committee to consider its performance under the current contract, but then seemed surprised when it did. The PO testified that she found nothing in Appellant's Technical Proposal that would warrant the expenditure of an additional $50 million.

The Interested Party relies on two of the Board's previous decisions to support its contention that the Evaluation Committee properly considered Appellant's past performance when reviewing its proposed approach. In *Calso Communications, Inc.*, MSBCA No. 1377, 2 MICPEL ¶185 (1988), the Board held that an evaluator can properly consider an offeror's prior performance "where the evaluator is seeking to protect performance prospectively." *Id.* at 13. "[I]t is appropriate for the evaluators to consider prior performance with the State as it relates to the bidder's technical competence." *Id.* The Board also found that the testimony of the evaluators "support[ed] the inference that they were not downgrading Appellant on the basis of past experience, but rather looking to the proposal to see how Appellant intended to perform on the contract to be awarded." *Id.* at 16. Acknowledging that considering offeror experience in other evaluation factors could result in overvaluing past experience (as is alleged here), the Board nevertheless denied the protest where any duplication of consideration of past experience did not materially affect the competitive standing of the offerors.[9] *Id.* at 17. *See also*, *Maximus, Inc.*, MSBCA Nos. 2351, 2357 & 2370, 6 MICPEL ¶538 (2003)(finding that consideration of an incumbent offeror's past performance was reasonable when the offeror proposed that its future operations would be the same as its past performance).

Appellant claims that the Evaluation Committee was so focused on Appellant's poor past performance that they failed to fairly evaluate its technical response/work plan and its staffing plan. Appellant further contends that this somehow "smacks of disparate treatment."[10] This

[9] It is important to note that in *Calso*, the RFP required the use of a numerical scoring system by the evaluators, as opposed to subjective evaluations by the evaluators under each criterion as was done in this case. Absent numerical scores assigned to weaknesses under each criterion, it is impossible to know exactly how much weight was given to Appellant's past performance.

[10] The Board is so utterly confused by this assertion that it cannot even follow Appellant's argument. We believe Appellant is claiming that the Evaluation Committee engaged in disparate treatment simply because it did not consider the Interested Party's past performance in the same way that it considered Appellant's. If this is indeed Appellant's argument, then it would only be valid if the Interested Party's Technical Proposal proposed to use an approach it had used in the past with the State and which the State had found problematic.

conclusion is simply not supported by the record. It is clear from a review of the PO's handwritten notes that she and the evaluators identified not only weaknesses with Appellant's proposed technical response/work plan and staffing plan, but also many strengths, some of which related to its work as the incumbent. The simple fact is that the weaknesses in Appellant's proposed approach outweighed its strengths, and Appellant disagrees with the value judgments made by the PO and Evaluation Committee. To claim that Respondent "never evaluated the merits of [Appellant's] technical approach and staffing" is patently false.

Appellant next argues that its past performance was misevaluated, that is, its poor performance under the existing contract was not as bad as the PO believed.[11] Appellant finds fault with the PO's lack of personal knowledge about Appellant's performance and her reliance on one of the evaluators who had only limited experience with Appellant's performance under the existing contract. However, the PO testified that during the review process, she contacted State personnel who were the most intimately familiar with Appellant's performance, including subject matter experts, and she also relied on the impressions of the other evaluators and other State personnel, because she believed that the best reference for evaluating Appellant's proposed performance was their own experience in dealing with Appellant's past performance.[12]

For example, according to the PO's handwritten notes taken during the Evaluation Committee discussions of the proposals, weaknesses that were identified during the review of

[11] Appellant suggested that in some instances, its poor past performance might have been attributable to the State or other sources, which the PO acknowledged she had not considered when evaluating the proposals. But Appellant offered no evidence to show that this was indeed the case.

[12] Appellant was keenly aware of at least one recent example of its poor performance, which it acknowledged in its First Supplemental Protest. Appellant stated that "[w]hile there were performance issues in the last year of performance in one of the many facilities that have been serviced by Wexford, Wexford has worked diligently with DPSCS to be responsible and to resolve operational issues." According to Appellant, the Baltimore Jail "possesses environmental and operational challenges that are not present in any other US prison system." To address Appellant's performance issue at this facility, Appellant "replaced the management staff at the facility and initiated a comprehensive corrective action plan to obtain necessary improvements in performance."

Appellant's Offeror's Technical Response to RFP Requirements and Work Plan (the first and most important criterion) included:

Nursing model—no nursing support
Failed to live up to promises
Vacancy/retention [of staff]
WexCare reports not in Net
Lack of follow thru
Failure to honor multi-vendor model
Data integrity issues (no understanding of document mgmt. & reports)
Failure to comply with DuVall
Low minimum wage

Weaknesses that were identified during the review of Appellant's Experience and Qualifications of Proposed Staff (the second most important criterion) included:

Lack of leadership
Unstable local leadership
Diff[iculty] in filling vacancies
No corporate support
Low wages—no benefits
Chronic instability
Too many processes to Med Records
Sick call[s]
More legis. inquiries

Weaknesses that were identified during the review of Appellant's Offeror Qualifications and Capabilities, including proposed Subcontractors (the third most important criterion) included:

Removal of several key people
Retention
Orientation—no nurse mentors as required
CQI oversight of subs non-existent
Nursing weakness in State & corp.

The PO testified that the she and the Evaluation Committee found it difficult "to put [Appellant's] past performance to one side even though [Appellant was] focusing on it as a positive for the proposal." The PO and the Evaluation Committee identified these weaknesses when they compared what Appellant proposed to do under the RFP with what it had been doing under the

existing contract. We find that sufficient evidence in the record exists to substantiate the PO's and the Evaluation Committee's concerns about Appellant's poor past performance as an indicator of its future performance.

We find no merit in Appellant's contention that it was not treated fairly simply because the evaluators and the PO assigned strengths and weaknesses in a manner that was objectionable to Appellant. According to the PO, the proposals were not evaluated based on a side-by-side comparison. They were evaluated separately, with individual strengths and weaknesses separately identified for each proposal. As we stated previously, the process of weighing the technical merits is a subjective one that relies on the business and technical judgment of the PO. *Eisner Communications, Inc.*, MSBCA No. 2438 (2005) at 19 (internal citations omitted). Evaluating proposals is a matter left in the PO's sole discretion after receiving the advice of an evaluation panel. *Id.* We will not review in minute detail every aspect of the PO's decision, nor will we substitute our judgment for that of the PO unless we find that the PO's evaluation was in bad faith, arbitrary, capricious, unreasonable, or against the law.

Based on the foregoing, we hold that the PO's consideration of Appellant's past performance, both positive and negative, including what it did in the past, and how well it was done, under any of the evaluation criteria, was not unreasonable, particularly since Appellant invited such consideration, nor was it arbitrary, capricious, or contrary to law. The PO's concerns about Appellant's poor past performance were amply supported by the record.

Appellant next contends that Respondent "failed to hold meaningful and equal discussions" because the PO failed to identify, during the discussion period, "the vast majority" of weaknesses the PO and the evaluators identified in Appellant's Technical Proposal. As a result, according to Appellant, it was deprived of the opportunity to submit its best technical proposal and best price.

Appellant ignores the fact that the PO identified, in writing, approximately 20 separate instances of either deficiencies or requests for clarification that were raised in its first cure letter, and another three requests for clarification/confirmation after Appellant's oral presentation.[13] The PO testified that many of the weaknesses in Appellant's Technical Proposal were discussed during the oral presentation and were not necessarily the subject of a written request for clarification. And in at least one instance, the PO still had concerns about one weakness, despite Appellant having responded to the concern in its oral presentation and its clarification letter thereafter.[14]

Appellant had ample opportunity to submit its best proposal, whether in response to the 20 requests in the cure letter, at the oral presentation (where it delivered an approximately 20-page presentation), and in its response to the clarification letter. And Appellant submitted two separate BAFOs in which it had the option of reducing its price. In short, Appellant's contention that Respondent "failed to hold meaningful and equal discussions" and deprived it of the opportunity to submit its best technical and financial proposals is unsupportable, at best.

Appellant last contends that the PO's determination that the Interested Party was a responsible offeror was unreasonable. Appellant asserts that the PO's responsibility determination was based on inadequate information[15] and that the responsibility determination was not documented in the procurement file.

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[13] The RFP did not require that the PO hold any discussions. This was purely discretionary on the PO's part. The RFP clearly stated that the PO can recommend award without holding any discussions at all.

[14] For example, the PO testified that one weakness identified and discussed during Appellant's oral presentation was the concern that minimum hourly rates for positions other than top positions were low and that there was no indication of salary increases that would improve retention or recruitment. Appellant was given the opportunity to respond to this concern, which it did in its response to the clarification letter. Despite the response, however, the PO still had concerns about staff retention.

[15] Appellant contends that the PO had inadequate financial information and that the Dun and Bradstreet report did not contain sufficient information about assets, liabilities, income or expenditures, that is, the type of information that the PO testified she "would have liked to have had." Appellant also contends that Respondent performed "perfunctory reference checks" on Corizon. Yet Appellant offered no evidence to show that the reference checks were insufficient.

A "responsible" offeror is one "who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance." COMAR 21.01.02.01B(77). As we recently stated in *Rustler Constr., Inc.*, MSBCA No. 3075 (2018), "[a] procurement officer has discretion and latitude in determining whether or not the bidder [is responsible]." *Id.* at 5 (citing *American Powerzone, Inc.*, MSBCA No. 3017 (2017) at 4); *Custom Management Corporation,* MSBCA Nos. 1086, 1090, 1 MSBCA ¶28 (1982). It is well established that a procurement officer has broad discretion in determining whether a bidder is responsible. *Covington Machine and Welding Co.*, MSBCA No. 2051, 5 MICPEL ¶436 (1998); *Charles Center Properties*, MSBCA 1629, 3 MICPEL ¶297 (1992); *Allied Contractors, Inc.* MSBCA No. 1191, 1 MICPEL ¶79 (1984).

"When a procurement officer has reached a determination regarding responsibility based on facts and specified criteria, the Maryland State Board of Contract Appeals ("Board") upholds that decision." *American Powerzone, Inc.,* MSBCA No. 3017 (2017) at 4 (citing *Custom Management Corporation,* MSBCA Nos. 1086, 1090, 1 MICPEL ¶28 (1982)). "[T]he determination of whether a bidder is responsible is within the sole purview of the agency, and in the absence of a showing of bad faith, this Board will not interfere with such determinations." *Rustler Constr., Co., Inc.* MSBCA No. 3075 (2018) at 5-6 (internal citations omitted).

Here, the PO considered materials submitted by Corizon, including certain financial information it provided; as well as its Dun and Bradstreet report (even though it did not include the type of information she would have liked to have). The PO considered the fact that Corizon was the largest correctional healthcare provider in the country; and that it was then, and is currently, providing similar services in other states. The PO also spoke with Ruth Naglich, the Associate Commissioner for Health Services at the Alabama Department of Corrections, who was

listed as a reference for Corizon. And the PO relied on reference checks conducted by another evaluator of Corizon's references in Kansas, Missouri, and Philadelphia. There is simply no evidence to show that the PO failed to diligently evaluate whether the Interested Party "has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance."

Finally, Appellant offered no authority to support its contention that the PO was legally required to document its responsibility determination in the procurement file. Rather, under COMAR 21.06.01.01A, only a finding of non-responsibility must be documented.

We are not persuaded that there was anything unreasonable about the PO's determination that the Interested Party was responsible. Absent a showing of bad faith, or that the PO's determination was in any way arbitrary or capricious, we will not second-guess a PO's responsibility determination.

ORDER

Based on the foregoing, it is this 31st day of August, 2018, hereby:

ORDERED that Appellant's Appeals in Nos. 3066 and 3081 are DENIED.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Ann Marie Doory, Esq., Member

/s/
Michael J. Stewart Jr., Esq., 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 Order and Opinion in MSBCA Nos. 3066 & 3081, Appeals of Wexford Health Sources, Inc., under Department of Public Safety and Correctional Services, RFP No. Q00177058.

Date: August 31, 2018

/s/
Ruth Foy
Deputy Clerk