BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Consolidated Appeals of Qlarant Integrity Solutions, Inc.	*	
	*	**Docket Nos. MSBCA 3157, 3158, 3163, and 3169**
Under MDH RFP MDH/OPASS 19-18325	*	
	*	
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ORDER AND OPINION BY MEMBER STEWART

The Board conducted a merits hearing on these Consolidated Appeals on June 23-24, 2021. After considering all witness testimony, the admitted exhibits, and the arguments made by counsel, both at the hearing and in their post-hearing briefs, the Board denies these Consolidated Appeals.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

Respondent, Maryland Department of Health ("MDH"), issued an October 18, 2019 Request for Proposals No. MDH/OPASS 19-18325 for a Surveillance and Utilization Review Subsystem and Review System ("SURS") for the State Medicaid program ("the RFP"). SURS is a flexible user tool capable of providing, among other things, surveillance and under/over utilization data that may identify suspected fraud or provider abuse.

Appellant, Qlarant Integrity Solutions, Inc. ("Qlarant"), attended Respondent's November 22, 2019 Pre-proposal Conference at which the procurement officer, Dana Dembrow, ("PO Dembrow")[1] answered questions posed by potential offerors. In response to a question regarding how the scores for the technical proposals would be weighted, PO Dembrow explained that although the State reserved the right to give a numerical rating, it would not be using numerical scores. The technical proposals would be rated using "an adjective title rating; excellent, very good, good, fair, poor and we develop our rankings based on those adjectives."[2] None of the attendees sought further clarification of how the proposals would be rated or ranked. Ultimately, six offerors submitted proposals; however, one offeror later withdrew its proposal.

The contract resulting from the RFP was to be awarded via the Competitive Sealed Proposal Method set forth in COMAR 21.05.03. The evaluation process in the RFP provided for: (a) an Evaluation Committee; (b) oral presentations; (c) rating[3] and ranking of technical proposals; (d) separate ranking of financial proposals; (e) Best and Final Offers ("BAFOs"); and (g) overall rankings. After giving equal weight to technical and financial factors,[4] PO Dembrow was required to award the contract to the responsible offeror that submitted the proposal that was the most advantageous to the State.

To assist in objectively evaluating the Offerors' Technical Proposals, the Evaluation Committee was provided training, Instructions, Evaluation Forms, and Reference Forms. It took six months of meeting once or twice a week, for three to five hours at each meeting, for the

[1] Queen Davis later replaced Dana Dembrow as the procurement officer on this procurement. She will be referred to as "PO Davis."
[2] *See* Pre-Bid Meeting Tr. 40:5-9. In fact, the final rankings reflected only the following three adjectival descriptions: Exceptional, Good, and Meets Expectations.
[3] Pursuant to RFP Section 6.2, there were three criteria to be used in rating technical proposals, which were listed in descending order of importance: (i) Offeror's Technical Response to Requirements and Work Plan, (ii) Experience and Qualifications of Proposed Staff, and (iii) Offeror Qualifications and Capabilities.
[4] RFP Section 6.5.3 provides that "[i]n making the most advantageous Proposal Determination, technical factors will receive equal weight with financial factors."

Evaluation Committee to individually consider, section by section, the substance of each Offeror's Technical Proposal. The Evaluation Committee also requested and received responses to four sets of clarification questions from Appellant. Additionally, Appellant conducted a two-hour oral presentation before the Evaluation Committee.

Addendum No. 8 to the RFP deleted the original financial form and replaced it with a new financial form, which called for a firm, fixed contract price. However, following the Offerors' oral presentations, Respondent requested BAFOs, which were the only financial forms ever actually received and reviewed by the Evaluation Committee. The Evaluation Committee rated and ranked the five Offerors as follows[5]:

OFFEROR	**SUBFACTOR TECHNICAL RATING**	**OVERALL TECHNICAL RATING**	**OVERALL TECHNICAL RANKING**	**OVERALL FINANCIAL RANKING**	**OVERALL RANKING**
SAS	6.2.1 – Exceptional 6.2.2 – Exceptional 6.2.3 – Good	Exceptional	1	3 ($8,525,917.78)	1
Health Tech	6.2.1 – Exceptional 6.2.2 – Good 6.2.3 – Good	Good	2	5 ($9,895,776.66)	2
Qlarant	6.2.1 – Good 6.2.2 – Good 6.2.3 – Meets Expectations	Good	3	2 ($7,977,768.32)	3
Offeror A	6.2.1 – Meets Expectations 6.2.2 – Meets Expectations 6.2.3 – Meets Expectations	Meets Expectations	4	4 ($9,880,444.70)	4

[5]This table was complied by Appellant as part of its Post-Hearing Brief and appears on page 8 thereof. The substance of the table was drawn from the EC Memorandum. *See* Joint Exhibit 32 at pp. 4-11.

Offeror B	6.2.1 – Meets Expectations 6.2.2 – Meets Expectations 6.2.3 – Meets Expectations	Meets Expectations	5	1 ($6,719,897.19)	5

The Evaluation Committee sent an August 13, 2020 Memorandum ("EC Memorandum") to PO Dembrow recommending that the contract be awarded to SAS Institute, Inc. ("SAS" or the "Interested Party").,. On August 14, 2020, PO Dembrow attached the EC Memorandum to a one-page Memorandum of his own ("PO Dembrow Memorandum") and sent both to the Secretary of MDH for approval. In PO Dembrow's Memorandum to the Secretary, he stated: "only two (2) of the five (5) offerors presented measurably superior capability of service delivery, and with a price of about $8.5 million, SAS is $1.5 million less expensive than its only comparable competitor [Health Tech]."

Respondent advised Appellant in a September 3, 2020 letter that it had not been selected for award. The letter included the following table reflecting the Evaluation Committee's final overall rankings of the top five offerors, together with each offeror's adjectival Technical and Financial Rankings:

OFFEROR	TECHNICAL RANKING	FINANCIAL RANKING	OVERALL RANKING
SAS	Exceptional	3	1
Health Tech	Good	5	2
Qlarant	Good	2	3
Offeror A	Meets Expectations	4	4
Offeror B	Meets Expectations	1	5

Appellant was advised that SAS was being recommended for award and that it could request a debriefing, which it did. Appellant attended its debriefing on September 10, 2020 and filed its first

protest ("Protest") the same day. Appellant alleged that

> the [Respondent] failed to apply the [RFP's] mandatory evaluation criteria by (1) improperly reweighting the Technical and Financial factors in its evaluation by giving more weight to the Technical factors, and (2) neglecting to apply the [RFP's] reciprocal preference to [Appellant] (a resident Maryland business) when the offeror recommended for award, [the Interested Party] is a resident business of a state that applies a similar preference.

Appellant also reserved its right "to supplement its ground(s) for protest to the extent that the supplemental protest ground(s) relate to new information discovered during the pendency of this protest, including information discovered during its requested Agency debriefing regarding this procurement."

PO Dembrow denied Appellant's initial Protest on September 24, 2020, asserting that Appellant lacked standing to protest the Recommendation for Award to the Interested Party because, even if successful in its Protest, it was not next in line for award because Appellant was ranked third behind both SAS and Health Tech. Health Tech, not Appellant, would be next in line for award. PO Dembrow also asserted that the technical evaluation was made in strict adherence to the criteria set forth in the RFP, explaining that

> [a]lthough both Health Tech and Qlarant received identical overall technical ratings of "Good," Health Tech was rated "Exceptional" in one of the technical criteria factors, namely, the very important heavily weighted factor of "Requirements & Work Plan," while Qlarant was rated only as "Good" on that most important technical evaluation criteria factor. Health Tech received a rating of "Good" on both of the remaining technical evaluation factors, while Qlarant was rated "Good" on one (l) of them and received an even lower rating of "Meets Expectations" on the remaining technical evaluation factor. In other words, Health Tech was rated on the high end of the overall rating of "Good," with one (1) "Exceptional" rating and two (2) "Good" ratings, while Qlarant was rated on the low end of the overall rating of "Good," with two (2) ratings of "Good" and one (l) rating of only "Meets Expectations." Importantly, Health Tech was rated higher than Qlarant on the heaviest weighted most important criteria factor.

PO Dembrow further explained that

> [t]he foregoing is somewhat immaterial in that neither Health Tech nor Qlarant is recommended for contract award. Contract award is recommended to SAS, which received an overall rating of "Exceptional" because it was rated "Exceptional" on the first and second technical evaluation criteria factors, and "Good" on the third factor, beating Qlarant by one (l) adjectival level, "Exceptional," instead of "Good" on two (2) technical evaluation factors, and beating Qlarant by one level of adjectival rating on the third technical evaluation criteria factor, for which SAS was rated "Good" while Qlarant was rated only as "Meets Expectations." To sum, SAS finished well ahead of all competitors in the technical evaluation, and Health Tech finished well ahead of Qlarant in the technical evaluation factors. Qlarant simply is not in line for contract award, finishing third overall, only ahead of [Offeror A] and [Offeror B], both of which received less favorable overall technical evaluation ratings of "Meets Expectations."

As to the Financial Proposals, PO Dembrow asserted that the Evaluation Committee did not select the lowest price or second lowest price offer, but

> [i]nstead, the Evaluation Committee conducted a cost benefit analysis and determined that the substantially superior offer presented by SAS and rated "Exceptional" was worth the higher cost ($8,525,917.78) as compared to [Offeror B] and Qlarant. The overall evaluation conferred equal weight to financial considerations as to the technical evaluation factors, as required by the express terms of the RFP, but SAS was rated so far ahead of Qlarant in the technical evaluation that the lower cost offered by Qlarant did not outweigh the superiority of SAS in the technical aspects of evaluation criteria.

Finally, PO Dembrow asserted that the application of the reciprocal preference was discretionary and not mandatory.

Prior to receiving PO Dembrow's final decision denying its initial Protest, Appellant filed its September 17, 2020 First Supplemental Protest asserting that it was "based on information first learned within the last seven days including information supplied at [Appellant's] September 10, 2020 debriefing…." The grounds for the First Supplemental Protest were that Respondent: (1) ignored relevant information regarding SAS's negative past performance on similar contracts, (2) improperly assessed weaknesses to Qlarant's Technical Proposal based on unstated evaluation criteria, and (3) failed to conduct fair and equal discussions with Qlarant regarding its proposal.

Appellant then filed its Second Supplemental Protest on October 5, 2020, asserting that it was "based on information first learned from [Respondent's] letter, dated September 24, 2020, in which it denied [Appellant's] initial September 10, 2020 Protest…." The grounds for the Second Supplemental Protest were that Respondent: "(1) conducted an arbitrary and capricious evaluation of proposals by improperly relying on subjective ranking determinations, and (2) failed to consistently evaluate offerors in accordance with the Solicitation."

Appellant filed an October 8, 2020 Notice of Appeal of the denial of its initial Protest, which was docketed as MSBCA No. 3157.

PO Dembrow issued an October 20, 2020 final decision letter denying both the First Supplemental Protest and the Second Supplemental Protest. PO Dembrow once again asserted that Appellant lacked standing to file a protest and that the first ground of Appellant's First Supplemental Protest and the entire Second Supplemental Protest were untimely filed. PO Dembrow also stated that information on SAS's negative past performance on a contract between it and Florida's Agency for Health Care Administration had been in the public domain for two and a half years before Appellant was notified that SAS was selected for award; thus, Appellant was on inquiry notice and should have included such information in its initial Protest. As to the Second Supplemental Protest, PO Dembrow stated that based on statements in its First Supplemental Protest, Appellant had actual notice concerning Respondent's evaluation of its Technical Proposal, including the use of subjective adjectival ratings, as of the September 10, 2020 debriefing and that these grounds should have been asserted within seven days from the September 10, 2020 debriefing.

Appellant filed an October 30, 2020 Notice of Appeal of the denial of its First and Second Supplemental Protests, which was docketed as MSBCA No. 3158. The Board issued a November 19, 2020 Order consolidating these first two Appeals.

Appellant filed its Third Supplemental Protest on December 8, 2020. PO Davis, who had recently replaced PO Dembrow, denied Appellant's Third Supplemental Protest on January 20, 2021. Appellant filed a Notice of Appeal of the denial of its Third Supplemental Protest on January 29, 2021, which was docketed as MSBCA No. 3163. The Board consolidated all three Appeals on February 5, 2021.[6]

Appellant filed its Fourth Supplemental Protest on February 25, 2021 asserting that the Evaluation Committee Members' (1) evaluations of proposals improperly strayed from the Solicitation's technical factors, and (2) their individual evaluations of proposals were inconsistent with the evaluation instructions and adjectival rating definitions, resulting in improper final ratings and rankings.

PO Davis denied Appellant's Fourth Supplemental Protest on March 9, 2021. PO Davis, as PO Dembrow had done before, asserted that Appellant lacked standing to protest. PO Davis further asserted that both issues were redundant of issues already raised in MSBCA Appeal Nos. 3157, 3158, and 3163. Finally, PO Davis found that the Fourth Supplemental Protest lacked merit, asserting that Appellant's disagreement with the individual evaluators did not meet the heavy burden of showing the award was unreasonable, improper, illegal, or otherwise inconsistent with COMAR regulations.

[6] The Board need not address the details of either the Third Supplemental Protest or the Third Appeal because MSBCA No. 3163 was ultimately withdrawn by Appellant at the merits hearing.

Appellant filed a Notice of Appeal of the denial of its Fourth Supplemental Protest on March 19, 2021, which was docketed as MSBCA No. 3169. The Board consolidated all four Appeals on March 24, 2021.

On March 17, 2021, two days before Appellant filed its Fourth Appeal, the Board conducted a virtual hearing on the Interested Party's Motion to Dismiss Consolidated Appeals Nos. 3157, 3158, and 3163.[7] The Board unanimously agreed and Chairman Beam issued an April 2, 2021 Order and Opinion dismissing portions of these Consolidated Appeals. The Board ruled that the RFP did not require Respondent to either "apply, or even consider applying, the reciprocal preference" or "to include negative past experience on similar projects." *See Qlarant Integrity Solutions, Inc.*, MSBCA Nos. 3157, 3158, 3163, and 3169 (April 2, 2021) at 9, 11 ("*Qlarant I*").

At the hearing on the merits, Appellant called two witnesses: Dr. Ronald Forsythe, CEO of Appellant; and Calvin Johnson, the Contract Officer ("CO") for the procurement.[8] Neither PO Dembrow, who made and approved the Recommendation for Award, nor PO Davis was called to testify. At the close of Appellant's case, both Respondent and the Interested Party moved for judgment, which the Board held *sub curia* in accordance with COMAR 21.10.05.06.E.

STANDARD OF REVIEW

A procurement officer's decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *Montgomery Park, LLC*, MSBCA No. 3133 (2020) at 36-37. *See also Hunt Reporting*, MSBCA No. 2783 (2012).

[7] The Interested Party initially filed its Motion to Dismiss on January 5, 2021. The Board issued a Consent Order allowing the parties to supplement their previously filed Motions and Responses to address subsequently filed Appeals. All parties filed supplements prior to the March 17, 2021 hearing.

[8] Mr. Johnson was not the PO for this procurement, but served the function of a contract officer and was chiefly concerned with facilitating the solicitation process. He was not a subject matter expert.

DECISION

STANDING

In each of these Consolidated Appeals, both Respondent and the Interested Party have asserted that Appellant does not have standing to protest or appeal the recommendation of award to SAS. In *Qlarant I*, the Board summarized the arguments for and against standing:

> In this case, the [Interested Party] contends that there is no reasonable possibility that Appellant would be awarded the contract if it were to prevail on its protests because Appellant was not in line for award, as it was ranked third overall, not second. Appellant, however, contends that if it were to prevail on its protest(s), it would not only be next in line for award, but could possibly be first in line for award because, as Appellant asserted in its initial Protest, Respondent "improperly reweight[ed] the Technical and Financial factors in its evaluation by giving more weight to the Technical factors.[9]

Id. at 7. As we have emphasized in our previous opinions, an "Interested Party" may protest the proposed award of a contract, and is defined as "an actual or prospective bidder, offeror, or contractor that **may be aggrieved** by the solicitation or award of a contract, or by the protest." (emphasis added). COMAR 21.10.02.02 & 21.10.02.01B(1). We have further explained that whether a party has been, or may be, aggrieved, does not solely depend on whether a party is next in line for award or has a reasonable possibility of receiving the award, but also depends on other factors, such as whether a party has been affected competitively by the actions of a procurement officer, and is a question of fact which, when disputed, requires a hearing on the merits. *See*, *e.g.*, *MGT Consulting Group, LLC*, MCBCA No. 3148 (2020) at 9-11.

[9]The Board denied the Interested Party's Motion to Dismiss for lack of standing, stating: "[a]ssuming the truth of the allegations that Respondent improperly weighted Technical over Financial, and that not only Appellant's ranking but all the rankings were affected, it is reasonable to infer that Appellant would have a reasonable possibility of being next in line for award or, indeed, awarded the contract. At this juncture, we cannot say that Appellant's competitive position was not affected by Respondent's actions or that Appellant is not aggrieved." *Id.*

After the hearing on the merits, the Board concluded that Appellant made a *prima facie* showing that it **may** have been aggrieved by the manner in which the Evaluation Committee evaluated the proposals of all offerors in this procurement. Accordingly, Appellant has standing to protest and pursue these Consolidated Appeals.[10]

No. 3157 (Appeal of Initial Protest)

Ground No. 1: Failure to Properly Apply the RFP's Evaluation Criteria

COMAR 21.05.05.03A(1) provides that proposals "shall be based on the evaluation factors set forth in the request for proposals and developed from both the work statement and price." When evaluating proposals, the "PO must follow COMAR and the language of the RFP and [u]nexpressed criteria may not be considered in evaluating a proposal, nor may specific requirements or criteria in an RFP be ignored by the evaluating agency." *Gantech, Inc.*, MSBCA Nos. 3021 & 3023 (2017) at 12 (citing *Walbert P'ship*, MSBCA No. 1633 (1992)). Section 6.5.3 of the RFP mandates that the procurement officer "recommend award of the Contract to the responsible Offeror that submitted the Proposal determined to be the most advantageous to the State" and in making that determination, "**technical factors will receive equal weight with financial factors**." (emphasis added).

In this solicitation, the evidence demonstrates that the Evaluation Committee rated both the Technical Proposals and the Financial Proposals in accordance with the instructions set forth in the RFP. For the Technical Proposals, the Evaluation Committee provided adjectival ratings of "Exceptional," "Good," or "Meets Expectations" to each of the technical subfactors set forth in

[10]The Board recognizes the "cart-before-the-horse" dilemma presented by requiring that a factual determination must first be made regarding whether a party has been or may be aggrieved so as to confer standing on a party to protest. Requiring an Appellant to prove its entire case on the merits to establish that it has been or may have been aggrieved and therefore has standing to protest is unduly burdensome. However, that is currently the regulatory language that we are required to follow.

the RFP and then, after evaluating the subfactors collectively, gave an overall adjectival rating to each of the Technical Proposals. The Evaluation Committee then compared the overall adjectival technical ratings of the various proposals against each other and ranked them 1 through 5.[11]

For the Financial Proposals, the Evaluation Committee simply opened the BAFOs and ranked them 1 through 5, with 1 being the least-expensive option.

The question of whether equal weight was properly given to the Offerors' Technical and Financial Proposals arises because the Overall Rankings of the Offerors' Proposals were exactly the same as the Overall Technical Rankings. Appellant argues that this fact alone is sufficient proof that equal weight was not given to the Financial Proposals, or that no weight was given to the Financial Proposals at all.

The following facts are not disputed. SAS received an Overall Technical Rating of "Exceptional," an Overall Technical Ranking of No. 1, submitted the third highest-priced Financial Proposal, and was ranked No. 1 Overall. Health Tech received an Overall Technical Rating of "Good," an Overall Technical Ranking of No. 2, submitted the highest-priced Financial Proposal, and was ranked No. 2 Overall. Appellant received an Overall Technical Rating of "Good," an Overall Technical Ranking of No. 3, submitted the second lowest-priced Financial Proposal, and was ranked No. 3 Overall.

As set forth in detail *supra*, SAS was the only Offeror that had an Exceptional Technical Ranking, and the Evaluation Committee did a cost-benefit analysis and determined that the substantially superior Exceptional Technical Proposal submitted by SAS was worth the higher

[11] *See* Joint Exhibit 32 at p. 9: In the EC Memorandum, SAS was ranked first, Health Tech was ranked second, and Qlarant was ranked third. This table supports PO Dembrow's statement that even though both Health Tech and Qlarant had similar "Good" adjectival technical ratings, the Evaluation Committee nevertheless ranked Health Tech's Technical Proposal higher than Appellant's. In other words, the Evaluation Committee determined that all "Goods" are not equal.

cost. PO Dembrow went even further and explained that based on its higher technical subfactor ratings, Health Tech finished well ahead of Appellant even though they both had overall "Good" Technical Ratings. This is supported by the Evaluation Committee's ranking of Health Tech's Technical Proposal No. 2 and Appellant's No. 3.[12] It is further supported by a statement in PO Dembrow's Memorandum that two (*i.e.,* SAS and Health Tech) of the five Offerors presented measurably superior capabilities and that SAS is more than $1.5 million cheaper than its only comparable competitor, Health Tech.

Mere supposition does not equate to proof. Although the Overall Technical Rankings mirror the Overall Rankings and may raise suspicions about the rankings, Appellant still has the burden of proving by a preponderance of the evidence that equal weight was not afforded to the evaluation of technical and financial proposals. *See L-1 Secure Credentialing, Inc.*, MSBCA No. 2793 (2012) at 35. As set forth *supra*, the evidence before the Board conclusively shows that the Evaluation Committee did consider price as part of its cost-benefit analysis.

As the Board stated in *L-1 Secure Credentialing, Inc.*, "[t]he obligation to conduct a cost-benefit analysis is not an onerous one. It merely mandates that an agency accurately computes or projects and thereafter takes into consideration the cost of each proposal, giving deliberate and intelligent attention to whether a difference in higher cost to the State is justified by the added value of purchasing the more expensive option." *Id.* at 34.

The evidence before the Board concerning the cost-benefit analysis performed by the Evaluation Committee may not have been very detailed and may seem underwhelming, but it was

[12] *See* Joint Exhibit 32 at p. 9.

not contradicted by any evidence submitted by Appellant.[13] The Board notes that none of the parties called PO Dembrow as a witness at the merits hearing.[14] Had PO Dembrow testified, he may have been able to provide some greater insight into the evaluation and cost-benefit analysis performed by the Evaluation Committee. However, which witnesses to call is a trial strategy decision that is generally left to the discretion of the attorneys of record, and not to members of the Board.[15]

Appellant called just two witnesses. The first witness, Dr. Forsythe, testified that the RFP review criteria said that the technical and financial weightings would be weighted equally in determining the Final Overall Ranking. Dr. Forsythe further testified that it did not make sense to him as an engineer that Health Tech and Appellant both received the Overall Technical Ranking of "Good," but that Health Tech, "presumably the most expensive...was ranked higher overall than [Appellant]." Hr'g Tr. Vol. I, 96:4-25. Dr. Forsythe's testimony can be best summarized as "this just does not look right." However, his opinion alone is insufficient evidence to prove that the cost-benefit analysis done by the Evaluation Committee and PO Dembrow was in any way improper.

Appellant's second witness, Mr. Johnson, the CO, testified about the evaluation process and how he facilitated it. Appellant did not elicit any testimony from the CO, or offer any other evidence, proving that the Evaluation Committee did not perform a cost-benefit analysis as it claimed.

Appellant simply failed to meet its burden of producing sufficient evidence to show that the Evaluation Committee and PO Dembrow failed to give equal weight to the Technical Proposals

[13]Contrast *L-1 Secure Credentialing, Inc.*, where the Board found "there was insufficient evidence adduced by testimony or otherwise to prove that a fair and adequate trade-off analysis was ever actually fully undertaken by [the Agency], rather than just inserted into the RFP pro forma and thereafter ignored. Indeed, it appears that the Evaluation Committee simply decided that it preferred the [recommended awardee's solution] and therefore ranked it first technically and then also first in the overall final ranking, regardless of cost. No offered document or oral evidence establishes otherwise." *Id.* at 35.

[14] Respondent requested, and the Board issued, a subpoena for PO Dembrow to testify at the hearing, but there is no indication whether it was served. The Board was not made aware of any attempts by Appellant to obtain the attendance of either PO at the hearing.

[15] That is not to say that the Board is unable to call its own witnesses if it chooses.

and the Financial Proposals or that the cost-benefit analysis that the Evaluation Committee performed and PO Dembrow independently reviewed was arbitrary, capricious, unreasonable or unlawful. Accordingly, this ground of the Appeal is denied.[16]

Ground No. 2: Disclosure of Technical Pricing Information

In its Appeal, Appellant contends that Respondent improperly released protected source selection information to the recommended awardee prior to contract award and during the pendency of a protest and appeal. This issue, however, was not raised in the initial Protest appealed in MSBCA No. 3157. In fact, it could not have been raised therein because the alleged violation happened the same day that Respondent issued the September 28, 2020 final decision letter addressing the initial Protest. Additionally, it was never made a part of any of the other protests that are part of these Consolidated Appeals. Since this issue was never specifically raised by way of a protest to either PO, this Board lacks jurisdiction to review it. *See Merciers, Inc*., MSBCA No. 2629 (2008) at 4-5.

No. 3158 (Appeal of First and Second Supplemental Protests)

Appeal No. 3158 contains five separate grounds originally raised in Appellant's First and Second Supplemental Protests, all of which are denied. Two grounds were untimely filed, one was both untimely filed and redundant, and two lack merit.

[16] Although the Board would have liked to have seen more evidence concerning the cost-benefit analysis performed by the Evaluation Committee, which was reviewed and accepted by PO Dembrow, it is not the Board's role to serve as a "Procurement Super-Evaluation Committee." *See Eisner Communications, Inc*., MSBCA No. 2438 (2005). The Board stated *supra* that it found that the evidence concerning the cost-benefit analysis is not very detailed and may even be underwhelming. Notwithstanding, it is not so underwhelming that it rises to the level of arbitrary, capricious, unreasonable or unlawful.

TIMELINESS

Ground No. 1: Respondent Ignored SAS's Negative Past Performance

COMAR 21.10.02.03B mandates that a protest "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." The seven-day protest deadline begins to run on the day the protestor has either actual knowledge, or implied knowledge based on inquiry notice, of the basis for its protest. *Milani Constr., LLC,* MSBCA 3074 & 3088 at 27, *rev'd on other grounds by Maryland State Highway Admin. v. Milani Constr., LLC,* No. 1334, Sept. Term 2019, 2020 WL 5797870, at *9 (Md. Ct. Spec. App. Sept. 29, 2020). Under COMAR 21.10.02.03C, timing requirements are strictly construed. A late protest may not be considered. *See State Ctr., LLC v. Lexington Charles Ltd. P'ship,* 438 Md. 551, 606 (2014); *See also Kennedy Temporaries v. Comptroller of the Treasury,* 57 Md. App. 22, 40-41 (1984).

The alleged negative past performance at issue is based upon publicly-available information relating to a contract SAS had with Florida's Agency for Health Care Administration.[17] Appellant alleged that it was not on notice of the basis for this Protest until it was supplied with information at the September 10, 2020 debriefing. The Board disagrees.

The record before the Board demonstrates that Appellant was on inquiry notice much earlier. Appellant attended the Pre-proposal Conference on November 22, 2019 and knew that Overall Technical Rankings were going to be based on adjectival ratings. It was further aware of the Technical Subfactors being considered, including Offeror Qualifications, as set forth in RFP Section 6.2.3. Most importantly, on September 3, 2020, when Respondent notified Appellant that

[17]Appellant claimed a March 30, 2018 article from the *Orlando Sentinel* concerning a Florida Agency for Health Care Administration audit of SAS's 2014-2017 contract with the State of Florida contained relevant negative past performance that the Evaluation Committee failed to consider.

SAS had been selected for award, it knew that SAS's overall Technical Rating[18] was "Excellent" and that its Overall Technical Rating was "Good."

Appellant failed to provide any evidence of any new information it learned at the September 10, 2020 debriefing. Dr. Forsythe testified that after the debriefing, he started "Googling SAS to see what they had better than us" and that through these actions he discovered the article about the alleged negative performance on the Florida contract. However, Dr. Forsythe also confirmed that he already knew SAS was the recommended awardee before the debriefing.[19] The Board fails to understand why this search was not conducted promptly upon learning that SAS had been recommended for award based on its higher technical rating and finds that Appellant was on inquiry notice of the basis for this ground of the First Supplemental Protest on September 3, 2020. It should have been included in Appellant's initial Protest filed on September 10, 2020.

Ground No. 2: Respondent Improperly Relied on Subjective Ranking Determinations

In addition to COMAR 21.10.02.03B mandating that a protest be filed not later than seven days after the basis for protest is known or should have been known, whichever is earlier, COMAR 21.10.02.03A further mandates that "[a] protest based upon alleged improprieties in a solicitation that are apparent before ... the closing date for receipt of initial proposals shall be filed before ... the closing date for receipt of initial proposals."

PO Dembrow informed Appellant at the November 22, 2019 Pre-proposal Conference that although the State reserved the right to give a numerical rating, it would not be using numerical scores. Instead, technical proposals would be rated using adjective title ratings. Accordingly, Appellant had actual knowledge that adjectival technical ratings were going to be *used* before it

[18]The letter used the term Technical "Ranking" but provided the adjectival descriptions (*i.e.,* ratings) instead of numeric rankings.
[19] Hr'g Tr. Vol. I, 118:9-23.

submitted its proposal. Any protest over PO Dembrow's decision to use adjectival technical ratings had to be filed before the January 2, 2020 closing date for receipt of proposals. No such protest was filed.

Appellant also had actual knowledge of the Evaluation Committee's *application* of adjectival ratings to its Technical Proposal, at the latest, as of the September 10, 2020 debriefing. It noted in its September 17, 2020 First Supplemental Protest that it learned during the debriefing that Respondent assessed two weaknesses to Appellant's Technical Proposal that were not related to evaluation factors stated in the RFP. This ground of Appellant's Second Supplemental Protest was not filed timely because it was not filed until October 5, 2020, more than seven days after the debriefing.

Ground No. 3: Respondent Failed to Consistently Evaluate Offerors in Accordance with the Solicitation

The Board finds that this ground is redundant and is merely a more detailed restatement of the issue raised and denied *supra* in Appeal No. 3157. However, even if this issue were being raised for the first time in this Appeal, it would not have been timely filed as Appellant was made aware of all Offerors' technical, financial, and overall rankings in Respondent's September 3, 2020 letter notifying Appellant that it had not been selected for award. Appellant then learned more information concerning the evaluation of its Technical Proposal and of the overall evaluation process at the September 10, 2020 debriefing. Accordingly, the October 5, 2020 Second Supplemental Protest, which re-asserts this issue, was filed well more than seven days after Appellant knew or should have known the basis for filing a protest.

MERITS

Ground No. 4: Respondent Improperly Assessed Weaknesses to Appellant's Technical Proposal Based on Unstated Evaluation Criteria

Evaluation factors must be based upon the criteria recited in the RFP. *Walbert P'ship,* MSBCA No. 1633 (1992); *Fujitsu Business Communications Systems,* MSBCA No. 1729 (1993). In *Fujitsu Business Communications Systems* the Board stated:

> Generally in a competitive negotiation it is required that the solicitation document (RFP) inform offerors of the broad scheme of scoring that the procuring agency intends to use to evaluate proposals and give reasonably definite information as to the relative importance of particular factors to be used in the evaluation of proposals in order to permit fair and equal competition. Subfactors need not be disclosed so long as they merely are definitive of the principal evaluation factors listed in the RFP. However, as noted offerors should be informed of the broad scheme of scoring to be employed and given, reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other.

Id. at 30-31 (internal citations omitted). 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. Procurement officials' determinations concerning the relative technical merits of proposals are discretionary and entitled to great weight. *Eisner Communications, Inc.,* MSBCA No. 2438 (2005) at 18-19. 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.*

Appellant asserted in its First Supplemental Protest that Respondent assessed the following weaknesses to its Technical Proposal based on factors not included in the RFP's evaluation criteria: (1) Appellant had no prior contracts with the State of Maryland; (2) Appellant's proposed technical solution, the RIViR system would be unable to be integrated with Maryland's MMIS; and (3) Respondent's staff would require extensive training to use RIViR. The Board disagrees with

Appellant's contention that the Evaluation Committee assessed weaknesses to its Technical Proposal based on unstated evaluation criteria.

It is undisputed that Appellant did not have prior contracts with the State of Maryland.[20] It is further undisputed that Section 6.2.3 of the RFP included the Technical Subfactor of Offeror Qualifications and Capabilities, and Section 5.3.2.J of the RFP asked Offerors to provide a list of contracts they currently had with the State or that were completed within the last five years. It also informed Offerors that their level of performance on State contracts would be "considered as part of the experience and past performance evaluation of the RFP." Accordingly, the Evaluation Committee's consideration of whether Appellant currently had State contracts or had completed a State contract within the last five years was not arbitrary, capricious, unreasonable, or unlawful and, therefore, this ground of Appellant's Appeal is denied.

Additionally, the Evaluation Committee's decision to assess a weakness to Appellant's Technical Proposal because RIViR does not "integrate" with the MMIS was neither arbitrary, capricious, unreasonable, nor unlawful. RFP Section 2.2 identifies the purpose of the SURS:

> The purpose of SURS is to produce claim reports data for use by the Medicaid, Program Integrity, Federal, and other State agencies. The SURS provides comprehensive profiles of the utilization of services by Providers and recipients of the Medicaid Program who deviated from predefined criteria for the purposes of analysis and review. These reports are used to assist in the detection of program fraud and abuse, monitor quality of services, and provide a function for the development of program policy.

The SURS solution ferrets out fraud and abuse by using data from MMIS. RFP Section 2.3.1.2.N requires that the SURS solution "[i]ntegrate current and any future State-owned data" from the MMIS and other State-owned databases. Dr. Forsythe testified that it is not a requirement that the

[20] Dr. Forsythe testified that although Appellant did not have contracts with the State of Maryland currently or in the past, its "sister" organization, Qlarant Quality Solutions, has an established successful relationship with various Maryland agencies. Hr'g Tr. Vol. I, 75:23-25 – 76:1-3.

SURS solution integrate with MMIS as far as reporting back to MMIS. However, RFP Section 2.3.1.2.M provides that Offerors "[p]rovide a SURS that is flexible and **integrate** with other MMIS modules as they are deployed." (emphasis added).

While the Board agrees that integration with the current MMIS was not a stated requirement of the SURS solution in the RFP, the RFP's plain language allowed the Evaluation Committee to consider future integration with the MMIS as it may be modified. Consideration of this factor was within the discretion of the Evaluation Committee and allowed by the RFP, thus the Board denies this ground of Appellant's Appeal.

Finally, the Evaluation Committee's assessment of a weakness to Appellant's Technical Proposal based on the fact that Respondent's staff would require extensive training to learn how to properly use RIViR was neither arbitrary, capricious, unreasonable, nor unlawful. Sections 2.3.1.2.X and Section 3.1.4 of the RFP required that offerors train MDH staff on use of the proposed SURS system during the implementation phase, during User Acceptance Testing, and thereafter. Since the plain language of the RFP allowed the Evaluation Committee to consider the training that would be necessary for MDH staff to implement and use the proposed SURS systems, the Board denies this ground of Appellant's Appeal.

Ground No. 5: Respondent Failed to Conduct Fair and Equal Discussions with Appellant Regarding Its Offer

Appellant asserts that Respondent failed to "communicate meaningfully" with it regarding the weaknesses in its proposal. 21.05.03.03(C)(3)(a) provides:

> **Qualified offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals**. The procurement officer shall establish procedures and schedules for conducting discussions. If discussions indicate a need for substantive clarification of or change in the request for proposals, the procurement officer shall amend the request to incorporate the clarification or change. Except as provided in §C(3)(b)(ii), below, disclosure to a competing offeror of any information derived from a proposal of, or

> from discussions with, another offeror is prohibited. Any oral clarifications of substance of a proposal shall be confirmed in writing by the offeror.

The CO testified that there were established procedures and schedules for conducting discussions with all offerors. Appellant also answered four sets of requests for written clarification from the Evaluation Committee and gave a two-hour presentation. Appellant presented no evidence that it was not accorded the same opportunity to discuss and clarify its Technical Proposal as other Offerors. Although Appellant cites several examples of how it disagrees with the manner in which the Evaluation Committee evaluated its Technical Proposal, "[m]ere disagreement with the evaluation of proposals ... is insufficient to meet an appellant's burden to show that the evaluation of proposals ... has been unreasonable." *Eisner* at 20. Accordingly, the Board denies this ground of Appellant's Appeal.

No. 3169 (Appeal of Fourth Supplemental Protest)

Appeal No. 3169 contains two grounds that we restate as follows: (1) the Evaluation Committee Members' evaluation of Technical Proposals improperly strayed from the Solicitation's technical evaluation factors, and (2) the individual Evaluation Committee Members' evaluations were inconsistent and unjustified.

Ground No. 1: The Evaluation Committee Did Not Follow the Evaluation Factors Set Forth in the RFP

The Board finds this ground is redundant of grounds previously addressed and denied in Consolidated Appeals Nos. 3157, 3158, and 3163. Appellant offered no additional evidence specifically relating to this ground; thus, it is also denied.

Ground No. 2: The Individual Evaluations are Inconsistent and Unjustified

Appellant argues the evaluation of Offerors' Technical Proposals was flawed based on several "cherry-picked" examples from the evaluation forms filled out by individual members of

the Evaluation Committee concerning identifying strengths and weaknesses in each Technical Proposal.[21] Further, Appellant notes that weaknesses identified in those individual evaluation forms are not entirely consistent with weaknesses identified in the Evaluation Committee's written recommendation of award to PO Dembrow.

We have repeatedly held that "[t]his Board does not constitute a "Procurement Super-Evaluation Committee" reviewing in minute detail every aspect of a procurement officer's decision to award a contract." *Eisner* at 19. The evaluation of proposals in a competitive negotiation procurement is a matter left to the procurement officer's sole discretion, after receiving the advice of an evaluation panel, if one is used. *Id.*

AGS Genasys Corp., MSBCA No. 1325 (1987) held that a disappointed offeror failed to prove that the State acted arbitrarily in its evaluation and award to another offeror where the disappointed offeror pointed only to normal and reasonable variations in the scoring of proposals by individual members of the evaluation panel under the numerical scoring system set forth in the request for proposals. The Board noted in *AGS* that "technical evaluation is a subjective process." *Id.* at 13-14. The Board also found it reasonable that evaluators scored "proposals differently based on different evaluation factors and the exercise of their individual judgments concerning each proposal." *Id.*

Here, the CO testified that, although members of the Evaluation Committee were instructed to identify strengths and weaknesses in Offerors' Technical Proposals, Appellant's characterization of how the evaluation process was conducted was oversimplified:

[21] There was no testimony at the merits hearing concerning the individual Evaluation Committee Members' alleged inconsistencies in evaluating the Technical Proposals. The evaluation forms of the individual evaluators were admitted into evidence as part of Joint Exhibit 47. Two examples are cited by Appellant in its Post-Hearing Brief: 1) Evaluator A did not list any weaknesses for Appellant's Technical Proposal under Subfactors 6.2.2 and 6.2.3, and 2) Evaluator C did not list any weaknesses for Appellant's Technical Proposal under Subfactor 6.2.2. Additionally, Appellant refers the Board to a laundry list of alleged inconsistencies in individual evaluations set forth in its February 21, 2021 Fourth Supplemental Protest.

> Q: Okay. So are they -- they're to take each of the sub-criteria, each of the criteria, for each of each of the evaluation criteria, give it an individual ranking, and then based upon that individual ranking, give an overall ranking for the technical proposal; is that right?
>
> A: I think that's somewhat of a [sic] oversimplification of the process . Any time that there is a ranking, there's typically a robust conversation that follows any review of the proposal, of all of the proposals, and the requirements and the proposal -- the offerors response to the proposal -- to the requirements. And so whereas one member may interpret a section or requirement as one thing, another offeror may --another evaluation member may interpret it totally different, and can have some information within the proposal to back it up. So that's the reason why we encourage robust conversation. So it's a -- it's a little over simplifying to simply say they're going to read it, says, oh, that's a strength, oh, that's a weakness. Because ultimately what's going to happen is they're going to have a conversation regarding how they noted that particular section or that requirement. So it may very well change in the midst of them reviewing it, and their conversation with other members of the evaluation committee.

Hr'g Tr. Vol. II, 284-15:25 – 285:1:15. The CO's testimony confirms the detailed analysis performed both by the Evaluation Committee, and its individual members, in determining Offerors' Overall Technical Rankings.

The Board finds that Appellant failed to produce sufficient admissible evidence concerning variations in evaluations by individual members of the Evaluation Committee to prove that the evaluation of Offerors' Technical Proposals and that, ultimately, PO Dembrow's decision to recommend award to SAS was arbitrary, capricious, unreasonable, or in violation of law.

ORDER

Accordingly, for the reasons set forth *supra*, it is this 24th day of September 2021 hereby:

ORDERED that Appellant's Consolidated Appeals are DENIED, and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review or appeal shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

/s/
Michael J. Stewart, Jr., Esq., Member

I concur:

/s/
Bethamy N. Beam, Esq., Chairman

/s/
Lawrence F. Kreis, 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 contested cases.

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 ten 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 Nos. 3157, 3158, 3163 and 3169, the Consolidated Appeals of Qlarant Integrity Solutions, Inc., under Maryland Department of Health RFP MDH/OPASS 19-18325.

Dated: September 24, 2021

/s/
Michael L. Carnahan
Clerk