

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of	*	
GCOM Software, LLC	*	
Under MSDE	*	Docket Nos. MSBCA 3257 & 3279
Solicitation No. R00R3600219	*	
Appearance for Appellant	*	Philip M. Andrews, Esq.
	*	John F. Dougherty, Esq.
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	*	
Appearance for Respondent	*	Jeaneen J. Johnson, Esq.
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OPINION AND ORDER BY MEMBER BRINKLEY

After hearing testimony and considering other evidence admitted at a hearing on the merits of these consolidated appeals (“Appeals”) on November 6, 2024, and December 6, 2024, the Board sustains the Appeals.

FINDINGS OF FACT

On September 27, 2022, the Maryland State Department of Education (“MSDE”) issued a Task Order (“TO”) Request for Proposals R00R3600219 for System Operation and Maintenance Support for Maryland Accountability & Reporting System and Maryland Direct Certification System (“TORFP”). The TORFP sought one Master Contractor and its Minority Business Enterprise (“MBE”) subcontractor to provide labor and supervision for Operations and Maintenance support and development operations activities for the Maryland Accountability & Reporting System (“MARS”) and Maryland Direct Certification System (“MDCS”) applications

(collectively, the “Systems”). *See* TORFP § 2.1.1. According to the TORFP, the primary objective of the procurement was to maintain the stability and responsiveness of the Systems and enable MSDE staff and its customers to certify and reimburse qualified customers participating in Federal- and State-funded food programs. *See* TORFP § 2.1.2.

Proposals submitted in response to the TORFP were to be evaluated by an Evaluation Committee (“EC”) using specified criteria set forth in the TORFP. The EC was comprised of four members, whose identities have not been disclosed, with the exception of Mr. Andrew Neboshynsky, the Chairman of the EC. The TORFP specified that the responsibilities of the EC members were to “review TO Proposals, participate in Offeror oral presentations and discussions, and provide input to the TO Procurement Officer.” TORFP § 6.1.¹ The technical and financial proposals were to be evaluated independently of each other, and the technical proposal would be given greater weight than the financial proposal. *See* TORFP § 6.4(F). On March 2, 2023, MSDE re-issued the TORFP with amendments. Four bids were submitted in response to the TORFP, but only three were determined to be reasonably susceptible for award.

Communications Between ISSI and the PO

On May 10, 2023, via email, Mr. Frank Conaway, III, the Procurement Officer (“PO”) directed all qualified offerors to confirm the availability and references of the key personnel (i.e., Project Manager, Lead Quality Assurance Specialist, Lead Web Developer, and Integration Specialist) and to identify any changes to the key personnel by May 17, 2023. On May 16, 2023, Appellant, GCOM Software, LLC (“GCOM”) confirmed its key personnel as requested.

On May 11, 2023, prior to the deadline, Ms. Sajan Ahuja, the point of contact for International Software Systems, Inc. (“ISSI”), asked the PO via email if the key personnel would

¹ The Procurement Officer (“PO”) testified that he did not believe the TORFP included any requirement that the EC members attend all meetings, including oral presentations. Rather, he believed that the “evaluation handbook” required them to attend all meetings, but not the oral presentations.

be remote, hybrid, or onsite. On May 15, 2023, the PO ran the issue up the flagpole to his superior, Mr. Krishnanda Tallur, for clarification because “[t]he TORFP does not outline this item.” Mr. Tallur’s initial response was that remote work was permissible, although site visits for meetings or coordination might be needed. The PO conveyed this information to Ms. Ahuja, but later the same day the PO heard back from Mr. Tallur to “[h]old off. I may be mistaken.” The PO informed Mr. Tallur that he had already responded to the vendor (i.e., ISSI) and asked whether he should reach out. Mr. Tallur confirmed that he should, which he did at 5:15 p.m. that same day.

Having failed to receive an answer to this question by the May 17, 2023 deadline, ISSI submitted the following to the PO:

Integration Specialist:	Narashima Murthy Kotikalapudi, as previously proposed
Project Manager:	Swathi Mall, if remote work allowed Mahendra Sapa, if remote work not allowed
Lead Web Developer:	Balaji Sathyamoorthy, if remote work allowed Katakam Srinivas, if remote work not allowed
Lead Quality Assurance Specialist:	Manzoor Shanawaz, as a substitute for person previously proposed due to unavailability as of April 15, 2023.

On May 19, 2023, the PO reached out to Mr. Tallur to determine whether a decision had been made on remote work. On May 28, 2023, Mr. Tallur responded that remote work was permissible except as needed for meetings, support, etc. There is no evidence that the PO communicated this information to Ms. Ahuja at this time.

On May 31, 2023, Ms. Ahuja reached out to the PO via email seeking an update on the status of the procurement. The PO did not respond until June 12, 2023, stating: “No updates yet. Still under evaluation.” Conaway Aff., 16-17. At some point during that day, Ms. Ahuja called the PO regarding the labor classifications for key personnel, which appeared to be outdated, and again asked about remote work. *Id.* The PO responded to Ms. Ahuja’s email stating that he

would research the labor classification issue and that he was still awaiting confirmation regarding remote work. *Id.*

During the phone call on June 12th, the PO had requested that ISSI reconfirm its key personnel and submit their resumes and references.² At 6:53 p.m., after the phone call earlier in the day, Ms. Ahuja sent the following email to the PO seeking additional clarification:

Good Evening Frank,

As we get ready to send over the resumes in a separate email, I wanted to get additional clarity. Are you requesting resumes only for the candidates we are submitting or all the resumes including the original submissions? If you could kindly offer some clarity, I would sincerely appreciate it so we can make a timely submission.

At 7:53 p.m., the PO replied via email: “Send all so that they are together and we can identify who has been changed.”

At 9:56 a.m. on June 13th, Ms. Ahuja sent an email to the PO that identified the same key personnel as had previously been identified on May 17, 2023. However, because ISSI had again included substitute candidates if remote work were not possible, the PO emailed Ms. Ahuja to clarify and confirm that key personnel would be allowed to work remotely except for in-person meetings as needed. *See Conaway Aff.* 20. After receiving this email from the PO, Ms. Ahuja emailed the PO at 12:04 p.m. on June 13th, this time identifying the following key personnel:

Integration Specialist:	Narashima Murthy Kotikalapudi (as previously proposed)
Project Manager:	Swathi Mall
Lead Web Developer:	Katakam Srinivas
Lead Quality Assurance Specialist:	Manzoor Shanawaz (substitute for person previously proposed due to unavailability as of April 15, 2023)

² Some of the substance of the June 12th telephone call was documented in an email from Ms. Ahuja to the PO the following morning at 9:56 a.m.

In this submission, two of the key personnel proposed in ISSI's May 17, 2023 submission (i.e., the Project Manager, Mahendra Sapa, and the Lead Web Developer, Balaji Sathyamoorthy) were removed.

ISSI was the only qualified offeror to communicate directly with the PO after May 17, 2023, and continuing into June, requesting information and clarification about the option of remote work for its key personnel. Only ISSI was provided information confirming that remote work was permissible. And only ISSI was allowed to revise and make substitutions to its key personnel after the May 17th deadline.

Oral Presentations

On September 13, 2023, the PO held in-person oral presentations for each of the three qualified offerors at the MSDE headquarters located at 200 W. Baltimore St., Baltimore Maryland. The oral presentations were scheduled back-to-back, beginning at 10:00 a.m., in two-hour blocks. ISSI's presentation was scheduled from 12:30 p.m. to 2:30 p.m., and GCOM's presentation was scheduled from 3:00 p.m. to 5:00 p.m. ISSI requested that one of its key personnel be allowed to attend the presentation virtually, and this request was approved by the PO "provided they are on camera the entire time."

At 9:44 a.m. on the morning of the oral presentations, Mr. Neboshynsky sent an email to his "Team" stating: "I am heading home. I will dial into the MARS TORFP, but Steph can share details as to why I do not belong in the office today ;-)." Ms. Amber Schad testified on behalf of GCOM that other than GCOM personnel, only four people, including Mr. Conaway, were physically in attendance at GCOM's oral presentation. She had no indicia that anyone else was attending remotely: she did not physically see Mr. Neboshynsky in the room or elsewhere; she

did not receive any email(s) reflecting a Google Meet or Zoom meeting would occur;³ and there was nothing in the conference room or on the MSDE computer she was using for her PowerPoint presentation to indicate that anyone was attending by any type of remote means.

The PO testified that he did speak with Mr. Neboshynsky via Google Meet during the first oral presentation to confirm that he could hear everyone and that the audio was working (insofar as his camera was turned off). After the first oral presentation, everyone attending in person moved to a larger room. The PO was uncertain, however, whether Mr. Neboshynsky attended GCOM's oral presentation remotely because he did not speak to him during either of the latter two presentations.⁴ Notably, although Mr. Neboshynsky was present at the merits hearing, neither party elected to call him as a witness.⁵

On October 26, 2023, Mr. Neboshynsky sent an email to the PO summarizing the EC members' evaluations and rankings of the three qualified offerors' proposals. He concluded that ISSI be recommended for award and provided the PO with the final overall rankings. Later the same day, after receiving Mr. Neboshynsky's email, the PO sent an email to GCOM informing GCOM that it had not been selected for award.

GCOM requested a debriefing, which was held on October 31, 2023, via Google Meet. The PO, Mr. Neboshynsky, and Brett Sander attended on behalf of MSDE. Based on information obtained at the debriefing, on November 7, 2023, GCOM submitted its First Protest asserting the following: (1) hosting of the production environment was not listed as an evaluation factor, (2)

³ Although the PO testified that he sent out a Google Meet calendar invite to each of the offerors, no email documenting the receipt of any such invitation was offered or admitted into evidence by either party.

⁴ The PO stated that although each presentation had its own separate link to logon, he did not confirm with Mr. Neboshynsky that he was in attendance at either of the subsequent two presentations.

⁵ During MSDE's opening statement, counsel made a proffer of evidence that would be introduced by Mr. Neboshynsky. Counsel advised, however, that Mr. Neboshynsky "has memory issues. He has a documented history of several traumatic brain injuries. He does have memory issues. He did not recall ... exactly why he, he had missed the oral presentation." Notwithstanding counsel's proffer, because Mr. Neboshynsky did not testify, we have given no weight to counsel's representations.

MSDE misunderstood GCOM's organizational approach to the Contract, (3) Mr. Neboshynsky failed to attend or participate in GCOM's oral presentation, (4) MSDE failed to give GCOM an opportunity to cure the misunderstandings that MSDE formed after GCOM's oral presentation, and (5) the best value determination was erroneous, arbitrary, capricious, and irrational. The PO denied the First Protest on December 6, 2023.

Based on documents produced by MSDE on April 15, 2024 relating to the First Protest, on April 19, 2024 GCOM submitted a Supplemental Protest, contending that "ISSI should have been disqualified for engaging in improper communications with the PO, or in the alternative should have been ranked second or lower technically and overall." GCOM further contended that "the improper communications between the PO and ISSI may have so tainted the evaluation that the entire solicitation should be cancelled and re-solicited." The PO denied the Supplemental Protest on July 15, 2024.

GCOM timely appealed the First and Supplemental Protests on December 18, 2023 and July 26, 2024, respectively. The Board consolidated the Appeals on September 4, 2024. A hearing on the merits of the Appeals was held on November 6, 2024, and December 6, 2024. Only two witnesses testified: Ms. Amber Schad and Mr. Frank Conaway, III.

At the hearing, GCOM consolidated the issues into four arguments, which we have restated and reordered as follows: (1) the PO's private communications with ISSI and allowing ISSI to revise and/or make substitutions to its key personnel based on information he provided to ISSI after the May 17th deadline was improper and in violation of law, (2) Mr. Neboshynsky, the Chairman of the EC, failed to attend and participate in GCOM's oral presentation, which was a violation of his duties and responsibilities set forth in the TORFP, (3) the PO arbitrarily and capriciously determined that GCOM's assignment of MBEs to serve as key personnel was a

weakness because the PO believed it might create instability in the contract, and (4) using an evaluation criterion unstated in the TORFP, the PO arbitrarily and capriciously determined that GCOM's failure to recommend one production environment over another (i.e., Azure or AWS) at the oral presentations was a weakness, whereas ISSI was not assessed a weakness for its failure to make any such recommendation.

STANDARD OF REVIEW

In appeals concerning bid protests, an appellant must show by a preponderance of the evidence that a procurement officer's actions were biased, arbitrary, capricious, unreasonable, or in violation of law. Absent this showing, a procurement officer's decision will not be overturned. *See Montgomery Park, LLC v. Maryland Dep't. of General Servs.*, MSBCA No. 3133 (2020) at 36 – 37, *rev'd on other grounds, Montgomery Park, LLC v. Maryland Dep't. of Gen. Servs.*, 254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023); *Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6.

DECISION

The Board unanimously determined that this procurement did not accord all qualified offerors fair and equal treatment due to the PO's improper communications with ISSI and the EC Chairman's failure to attend and participate in all the oral presentations. Accordingly, we need not and, therefore, decline to address the remaining issues raised by GCOM.

The PO's Private Communications with ISSI Relating to Remote Work by Key Personnel Were Improper and in Violation of COMAR 21.05.03.03(a).

COMAR 21.05.03.03(a) provides, in pertinent part, that “[q]ualified offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals.” This regulation recognizes the importance of equal treatment of offerors, and this Board has repeatedly stressed the importance of insuring competition among

offerors on an equal basis. *See, e.g., United Technologies Corp. and Bell Helicopter, Textron, Inc.*, MSBCA 1407, 1409 (1989); *Yellow Transportation*, MSBCA 2374, 2380, 2381, 2382 & 2389 (2004).

GCOM argues that the PO's conduct violates this Board's precedent established in *Yellow Transportation*. Although we do not find that the extent, content, and timing of the communications between the PO and ISSI rise to the degree of bias found in *Yellow Transportation*, we nevertheless find that their private communications and the timing thereof were wholly improper, in violation of COMAR, and ultimately resulted in prejudice to the other two qualified offerors who were not provided the same information or allowed to make any changes, substitutions, or revisions to their key personnel after the May 17th deadline.

The PO had several options for responding to ISSI's inquiries. He could have responded that Ms. Ahuja's inquiry was improper at this time and should have been raised as a question during the Question & Answer period, which expired on October 25, 2022. He could have responded by reviewing the TORFP himself to determine whether clarification was necessary and, if so, issued an amendment to the TORFP, as required by COMAR 21.05.03.03A. Or he simply could have not responded. Any of these options would have been viewed as providing fair and equal treatment to all offerors.

Instead, he engaged in private email and telephone communications with ISSI, prompting him to consult with and obtain clarification from his upper management. He then conveyed such information to ISSI, and ISSI alone.

Further, he allowed ISSI to revise its key personnel submission not once, but twice, after the deadline of May 17, 2023, had long passed based on information only ISSI had been provided. And even if ISSI had not made any revisions or substitutions, the character, content,

and timing of the private communications raise the specter of impartial treatment. None of the other qualified offerors had the benefit of this information or the opportunity to consider whether they might want to revise their key personnel knowing that remote work was permitted.

As we said in *Yellow Transportation*:

[A]llowing one offeror to communicate with certain members of an evaluation committee, in some cases furnishing those members with information, while other offerors who obeyed the rules, did not engage in such communications, would be at complete odds with the policies and purposes of the Maryland procurement law and regulations.

Yellow Transportation, MSBCA 2374, 2380, 2381, 2382 & 2389 (2004) at 25. Here, the improper communication was between an offeror and the PO who is charged with overseeing the entire procurement, rather than with any of the EC members who report to and assist the PO. And the improper sharing of information happened in reverse—the PO provided information to only one offeror, which was unfair and prejudicial to the other offerors.

The EC Chairman’s Failure to Attend and Participate in All Oral Presentations Violated the Terms of the TORFP.

Section 6.1 of the TORFP clearly required that the EC “participate in Offeror presentations and discussions and provide input to the TO Procurement Officer.” The Board finds that Mr. Neboshynsky did not attend, much less participate in, GCOM’s oral presentation, nor could he have provided input to the PO on GCOM’s oral presentation having failed to attend and participate in it.

The PO admitted the following in his Affidavit attached to the Agency Report:

I, along with and [sic] the Evaluation Committee members, participated in the oral presentation session, with the possible exception of Mr. Neboshynsky. My recollection is that Mr. Neboshynsky was present remotely for the beginning of Offeror #3’s oral presentation. However, I am unable to recall whether Mr. Neboshynsky was present remotely for either GCOM’s or Offeror #1’s oral presentation. I do not recall Mr. Neboshynsky asking any questions of any offeror during any of the oral presentations.

Conaway Aff. 11. At the hearing, the PO was specifically asked whether he was certain that Mr. Neboshynsky attended GCOM's oral presentation remotely—he replied that he was not.

Ms. Schad testified that Mr. Neboshynsky was not physically in attendance, a fact which is undisputed. She further testified that she saw nothing during the oral presentation to indicate that he, or anyone else, was attending the presentation virtually or by any other remote means. GCOM used the MSDE computers for their PowerPoint presentations, and there was nothing on the computer screen that reflected an ongoing Google Meet/Zoom meeting, nor did she receive any email reflecting that a Google Meet/Zoom meeting would occur. In addition, she did not observe anything in the room to suggest that there was a telephone conference going on, she was not advised that the oral presentation was being recorded and, as far as she knew, no one other than the persons in the room were listening to or participating in GCOM's oral presentation. We find Ms. Schad's testimony credible. Moreover, MSDE offered no countervailing evidence to refute Ms. Schad's testimony, nor did it offer any contrary evidence to show that Mr. Neboshynsky attended or participated in any of the discussions at GCOM's oral presentation.

In the MSDE Final Decision denying GCOM's First Protest, the PO attempted to deflect from the significance of this TORFP violation by asserting that "GCOM has also failed to provide evidence demonstrating how Mr. Neboshynsky's attendance could have materially altered GCOM's competitive position." But the PO misses the mark with this "no harm, no foul" argument. The issue is whether MSDE accorded all of the qualified offerors fair and equal treatment, not whether the EC Chairman's failure to comply with the EC's duties and responsibilities as specified in the TORFP affected GCOM's competitive position. Mr. Neboshynsky was required to attend and participate in all offerors' presentations. By attending only one, the other two offerors were prejudiced.

CONCLUSION

During closing arguments, counsel argued that the issue in this appeal is not about “whether the procurement process was perfect. It is about whether the evaluation process fairly and equitably was conducted by MSDE.” We agree with this premise but disagree with MSDE’s conclusion. We find that GCOM was not accorded fair and equal treatment by MSDE and, therefore, sustain the Appeals.

ORDER

Based on the foregoing, the Board finds that this procurement was unlawfully conducted and did not accord all offerors fair and equal treatment.

ACCORDINGLY, it is this 17th day of January 2025 hereby:

ORDERED that GCOM’s consolidated Appeals are SUSTAINED.

 /s/
Bethamy B. Brinkley, Esq., Member

I Concur:

 /s/
Lawrence F. Kreis, Jr., Esq., Member

 /s/
Senchal Dashiell Barrolle, 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 Opinion and Order in MSBCA Nos. 3257 and 3279, Appeals of GCOM Software, LLC, under Maryland State Department of Education Solicitation No. R00R3600219.

Date: January 17, 2025

/s/
Michael A. Dosch, Jr.
Deputy Clerk