

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of FEI.com, Inc. d/b/a FEI Systems	*	
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Under Department of General Services RFP No. BPM043644	*	Docket No. MSBCA 3301
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OPINION AND ORDER BY MEMBER STEWART

The Maryland State Board of Contract Appeals (“Board”) held a merits hearing in this Appeal on June 24, 2025. After Appellant FEI.com, Inc. d/b/a FEI Systems (“FEI”) rested its case, Respondent Maryland Department of General Services (“DGS”) moved for judgment pursuant to COMAR 21.10.05.06E. The Board unanimously granted Respondent’s motion and stated that a written decision would follow. This Opinion and Order sets forth the bases for the Board’s decision.

PROCEDURAL HISTORY AND FINDINGS OF FACT

On May 10, 2024, DGS issued Request for Proposals Statewide Agile Resources and Teams 2024 RFP No. BPM043644 (“RFP”) to obtain Agile resources, or teams, or a combination of both with the technical skills to support the State of Maryland’s technology modernization

activities and staffing service needs. The purpose of the procurement was to create a pool of qualified contractors that would be engaged through a rotational Work Order process to provide services on an on-going, as-needed basis. The RFP solicited proposals for three functional areas: Functional Area 1: Software Engineering Resources; Functional Area 2: Software Engineering Teams Bundle; and Functional Area 3: IT Management Consulting Services. Offerors were only allowed to submit a proposal for one Functional Area.

DGS intended to award up to 40 contracts in the three Functional Areas - no more than 15 awards in Functional Area 1; no more than 20 awards in Functional Area 2; and no more than 5 awards in Functional Area 3. For purposes of this Appeal, only the RFP's solicitation for offers for Functional Area 2 is relevant.

The procurement method was Competitive Sealed Proposals per COMAR 21.05.03. Offerors were required to submit a Technical Proposal and a Financial Proposal. Proposals submitted by offerors were to be evaluated by an Evaluation Committee. Technical Proposals were required to be evaluated for technical merit and then ranked. Financial Proposals were to be evaluated separately from Technical Proposals, and upon completion of the evaluations, each offeror was to be assigned an overall ranking for Functional Area 2. Section 6.5.3 of the RFP provides:

Upon completion of the Technical Proposal and Financial Proposal evaluations and rankings, each Offeror will receive an overall ranking for each Functional Area. The Procurement Officer will recommend award of the Contracts to the responsible Offerors that submitted the Proposals determined to be the most advantageous to the State. **In making this most advantageous Proposal determination, technical factors will receive greater weight over the financial factors.** (Emphasis added).

Section 3.10.1 of the RFP required offerors to provide at least three case studies from the past five years that could attest to the offeror's ability to perform the services under the contract. Offerors were to provide this information in their Staffing Management Plan per Section 5.3.2.F

and Qualifications and Capabilities per Section 5.3.2G. Further, Sections 5.3.2.H and I required offerors to provide three references the State could use to evaluate an offeror's qualifications and a list of current or prior State contracts held by the offeror.

Section 6.2 of the RFP sets forth the Technical Proposal Evaluation Criteria:

**6.2.1 Offeror's Technical Response to Requirements and Work Plan
(See RFP § 5.3.2.F)**

The State prefers the Offeror's Technical Proposal to illustrate a comprehensive understanding of work requirements and mastery of the subject matter, including an explanation of how the work will be performed. Proposals which include limited responses to work requirements such as "concur" or "will comply" will receive a lower ranking than those Proposals that address and demonstrate an understanding of the work requirements and include plans to meet or exceed them.

6.2.2 Offeror Qualifications and Capabilities, including proposed subcontractors (See RFP § 5.3.2.G)

6.2.3 Economic Benefit to State of Maryland (See RFP § 5.3.2.O)

6.2.4 Experience and Qualifications of Proposed Staff (See RFP § 5.3.2.P)

DGS received a total of 200 proposals for all three functional areas. 54 proposals were not reasonably susceptible for award for various deficiencies. Ultimately, 146 proposals were deemed reasonably susceptible of being selected for contract award - 59 in Functional Area 1, 36 in Functional Area 2, and 51 in Functional Area 3.

FEI submitted a Technical Proposal and Financial Proposal for Functional Area 2 by the due date for submission of proposals. Upon reviewing FEI's submission, the Procurement Officer ("PO") noticed FEI took an exception to Section 29 of Attachment M, the sample contract DGS included with the RFP. After reviewing the exception, the PO determined that FEI was not reasonably susceptible of being selected for contract award and sent a notice rejecting its proposal on September 5, 2024. FEI filed a protest of that decision on September 10, 2024 ("First Protest").

DGS sustained FEI's First Protest on September 23, 2024, but asked FEI to remove its exception to Attachment M by September 25, 2024. FEI removed its exception and DGS then evaluated FEI's Technical and Financial Proposals. The PO evaluated qualified offerors' Technical Proposals for each of the RFP's Technical Evaluation Criteria set forth in RFP Section 6.2, but unlike the three members of the Evaluation Committee, the PO did not assign scores for each.

On October 8, 2024, the PO invited all Functional Area 2 offerors to submit financial Best and Final Offers ("BAFOs"). FEI submitted a BAFO on October 10, 2024. DGS completed its final rankings of the 36 qualified offerors for Functional Area 2 on October 15, 2024. *See* Merits Hr'g Exhibit 1, DGS 92-93, Table 2.2. Functional Area 2; DGS 96-97, Table 3.2 - Functional Area 2.

FEI ranked 31st technically, 13th financially, and 30th overall. DGS issued a Non-Award Notification to FEI on December 23, 2024, informing FEI that it was not among the 20 firms recommended to receive a contract for Functional Area 2. On December 29, 2024, FEI filed a protest ("Second Protest"). After the virtual debriefing held on January 2, 2025, FEI filed a supplement to its Second Protest on January 8, 2025 ("Supplemental Protest"). Together, the Second and Supplemental Protests alleged that DGS:

1. Improperly evaluated FEI's proposal for each evaluation criteria set forth in RFP Section 6.2;
2. Improperly evaluated FEI's Staffing Management Plan and Qualifications and Capabilities by not checking references submitted under Section 5.3.2.H;
3. Ignored the RFP's mandate in Section 6.5.3 to give technical factors greater weight than the financial factors, thus making the rankings and award determinations erroneous; and
4. Evaluated FEI's proposal after it made awards to other offerors under Functional Area 2.¹

¹During the merits hearing, Appellant withdrew this ground of protest from its Appeal. Merits Hr'g Tr., 85:18–86:11. Consequently, the Board will not address it.

On January 28, 2025, the PO issued a final decision denying the Second and Supplemental Protests (“Final Decision”). On February 6, 2025, FEI filed its Notice of Appeal of the PO’s Final Decision with this Board.²

The Appeal proceeded to a merits hearing which was held on June 24, 2025. Although the PO, Emmanuel G. Smith, was present in the hearing room and available to testify, Appellant did not call him as a witness, and instead chose to argue the Appeal on the existing record. After its case-in-chief, during which no witness was called, Respondent moved for judgment and the Board granted that motion.³

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’s action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See Hunt Reporting*, MSBCA 2783 at 6 (2012).

DECISION

This Statewide Agile Teams 2024 procurement was a massive undertaking for procurement officials at DGS. The contracts awarded as a result of this procurement are integral to support the operational requirements of Maryland’s health and human services benefit programs on the Maryland Total Human-services Integrated Network (“MD THINK”) platform. The services those contractors will provide are critical and necessary for State agencies such as the Maryland Department of Human Services, Maryland Department of Health, Maryland Health Benefit Exchange, and the Department of Public Safety and Corrections to deliver a range of essential

²On February 26, 2025, the Board of Public Works (“BPW”) approved DGS’s recommendation of awards to 20 offerors for Functional Area 2 while this Appeal was pending.

³After resting its case, Appellant made an oral Motion for Summary Decision on the record. Merits Hr’g Tr., 81:13-19; 88:9-13. Also at that time, Respondent renewed its previous Motion to Dismiss that was denied by the Board previously on the record on April 2, 2025 and on April 3, 2025 via the Board’s written Order. The Board denied both of those motions. Merits Hr’g Tr., 95:3-15.

services. The total amount of the contracts to be awarded across all three functional areas was significant, not to exceed \$445,000,000.

The programs on the MD THINK platform are funded through significant federal support, which mandates state pre-approval for any contracts receiving Federal Financial Participation. The approval process for these contracts typically requires 60 days, and no work orders can be issued until that approval is obtained. As such, awarding these contracts is critical to ensuring the uninterrupted delivery of essential services that millions of Maryland residents rely on.

Here, the PO and the Evaluation Committee were tasked with conducting this large procurement over a period of approximately six months, which posed significant challenges. In that short period of time, they had to review over 200 proposals to first determine those not susceptible for award, then evaluate the remaining 146 Technical and Financial proposals of the offerors deemed reasonably susceptible for award, rank them, and then make a recommendation for awards within time constraints dictated by receipt of federal funding. One could only hope that DGS did not allow itself to abandon best practices in conducting this procurement due to those time constraints, but based on the evidence as presented, the Board is compelled to grant Respondent's motion for judgment because Appellant failed to prove that any actions taken by the PO were biased, arbitrary, capricious, unreasonable, or in violation of law.

DGS' EVALUATION OF FEI'S PROPOSAL FOR EACH EVALUATION CRITERION
CONTAINED IN RFP SECTION 6.2

Appellant argues that DGS improperly evaluated its technical proposal against the evaluation criteria set forth in Section 6.2 of the RFP. In support, Appellant presented several "cherry-picked" examples from the evaluation forms completed by individual members of the Evaluation Committee, and highlighted discrepancies Appellant perceived in DGS' identification of strengths and weaknesses in FEI's Technical Proposal, in comparison to how the same criteria

were addressed and scored for the Technical Proposals of six other offerors.⁴ The Appellant also cited a single instance where two evaluators noted weaknesses for an offeror under an evaluation criterion by comparing that offeror to “the competition.”⁵

Curiously, despite his availability at the merits hearing, the PO was not called to testify. Absent testimony from the PO, evidence concerning how proposals were evaluated and the rationale underlying the rankings and award determination is limited to the PO’s Final Decision. As explained in the Final Decision:

- DGS “examined FEI’s Work Plan and believed it contained several good case studies and a quick onboarding process. DGS, though, believed other areas of the Work Plan (such as FEI’s quality assurance process) were deficient.”
- DGS reviewed “FEI’s qualifications and capabilities, DGS appropriately credited FEI’s prior experience with the State and health-related systems.”
- DGS “did not believe FEI’s proposed economic benefits were as strong as other offerors.”
- DGS “believed FEI’s proposed staff were very capable.”

The Board can only review whether the determinations of procurement officials regarding the evaluation of the technical merits of proposals are arbitrary, capricious, unreasonable, or in violation of law. Procurement officials’ determinations concerning the relative technical merits of proposals are discretionary and entitled to great weight. *Eisner Communications, Inc.*, MSBCA 2438, 2442 & 2445 at 18-19 (2005). 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.*

⁴Appellant noted in one example that, according to Section 6.2.2 Offeror Qualification and Capabilities, Evaluators 1 and 2 identified “ISO 9001” certification as a strength for 22nd Technologies, Inc.—the offeror with the highest-ranked proposal—but did not identify the same certification as a strength when evaluating FEI, although FEI also held ISO 9001 certification. Merits Hr’g Tr., 35:12–36:8.

⁵Evaluators 1 and 2 list as “21.6% turnover rate, this is higher than the competition” as a weakness in GCOM Software LCC under Section 6.2.2 Offeror Qualification and Capabilities, including proposed subcontractors of the RFP’s evaluation criteria. Merits Hr’g Tr., 42:24–43:9.

Therefore, a party who disagrees with the evaluation of proposals or seeks to disturb the recommended award has the burden of showing that the procuring agency's decision was unreasonable. *Clifton Gunderson, LLP*, MSBCA 2502 at 13 (2006). Further, a party's "mere disagreement with the judgment of the evaluators assigned to the evaluation panel for the procurement is insufficient to show that the evaluation of proposals is unreasonable." *Hunt Reporting Co.*, MSBCA 2783 at 6 (quoting *AGS Genasys Corp.*, MSBCA 1325 (1987)).

The Board held in *AGS Genasys Corp.*, MSBCA 1325 (1987), 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. Noting that "technical evaluation is a subjective process," 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.* at 13.

Not having offered any evidence concerning how DGS actually conducted the procurement or contradicting the PO's Final Decision, Appellant's argument that DGS' evaluation of proposals was inconsistent and deviated from the RFP's requirements remains just that – argument. Moreover, while acknowledging that this Board does not serve as a Super Evaluation Committee, Appellant's attempt to have us revisit the propriety of scores assigned to various offerors' proposals also appears to be an invitation to become a Super Evaluation Committee. We shall decline.

Accordingly, the Board finds that Appellant failed to produce sufficient admissible evidence concerning variations and inconsistencies in evaluations or deviations from the

evaluation procedures established by the RFP by individual members of the Evaluation Committee to prove that the evaluation of its Technical Proposal was arbitrary, capricious, unreasonable, or in violation of law.

DGS' EVALUATION OF FEI'S STAFFING MANAGEMENT PLAN AND
QUALIFICATIONS AND CAPABILITIES

Appellant argues that DGS improperly assessed its Staffing Management Plan and Qualifications because DGS did not contact any references required under RFP Section 5.3.2H. FEI contends it is unreasonable for DGS to require case studies, references, and a list of contracts with Maryland agencies but not contact any references during evaluation.

Since the PO did not testify at the hearing, the Board only has the reasons stated in his Final Decision for why references provided by FEI were not contacted. The PO's Final Decision states that neither the RFP nor Maryland Procurement Law required that references be checked. The PO used his discretion and "relied on the information each offeror provided in their proposals to assess offeror responsibility and analyze past performance," "chose to rely solely on the information contained in the body of each offeror's proposal when examining an offeror's case studies or work on State contracts," and "since DGS did not contact any reference for any offeror, it did not prejudice offerors."

The PO is correct that he has discretion to determine whether an offeror is responsible.⁶ In *Oakland Consulting Group, Inc.*, MSBCA 3092 (2019), the Board affirmed that the discretion of the PO to determine responsibility in a procurement conducted under the Competitive Sealed Proposal method set forth in COMAR 21.05.03 is the same as the discretion described in

⁶COMAR 21.01.02.01(77) defines "Responsible" as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance," and COMAR 21.01.02.01(64) defines "Person" as "any individual, or a corporation, partnership, sole proprietorship, joint stock company, joint venture, unincorporated association, union, committee, club, or other organization or legal entity."

Covington Machine and Welding Co., MSBCA 2051 (1998), which dealt with a procurement conducted under an Invitation for Bids method per COMAR 21.05.02. *Id.* at 15-16.

Section 6.5.3 of the RFP and COMAR 21.05.03.03F both require the PO to make a determination recommending award of a contract to the responsible offeror whose proposal is determined to be the most advantageous to the State. Checking references may be part of a responsibility determination, and this is the reason solicitations routinely require that they be provided. However, nothing in the RFP requires the PO to check those references, and the Board will not read such an affirmative obligation into the RFP.

Appellant's reliance on *Systems Assoc., Inc.*, MSBCA 1257 (1985) is inapposite. At issue in *Systems Associates* was *how* the references were used vis-à-vis the solicitation's technical evaluation criteria, not whether the references were required to be checked.

Best practice in evaluating a technical proposal is to check the references that the solicitation asked offerors to provide. However, since the PO did not testify at the hearing on the merits, the Board is left with his stated reasons in his Final Decision why he chose not to check them. There is no evidence before the Board to conclude that not checking references in this case was arbitrary, capricious, unreasonable, or in violation of law.

COST-BENEFIT ANALYSIS

RFP Section 6.5.3 provides that technical factors be given greater weight than financial factors in making the best value determination for recommendation for awards. This requires the PO to perform a cost-benefit analysis.

The 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.

L-1 Secure Credentialing, Inc., MSBCA 2793 at 34 (2012).

Here, FEI argues that there is no evidence that DGS performed the required cost-benefit analysis. Further, it contends that DGS simply used price as a tiebreaker when offerors' technical rankings were equal or adjacent to one another. Appellant points the Board to look at offeror's Technical Rankings, BAFO prices and Overall Rankings as evidence that no cost-benefit analysis was done.

In contrast to Appellant's argument, the PO stated in his Final Decision that:

- DGS performed a cost-benefit analysis when determining the final rankings of all offerors in each functional area.
- DGS finalized the offerors' technical rankings, then ranked each offeror's financial offer from lowest to highest priced.
- DGS then assessed each offeror's technical and financial rankings to determine an overall rank.
- DGS ranked FEI 31st technically and 13th financially.
- DGS placed more weight on technical factors or rankings than financial ones, and DGS ranked FEI 30th overall.
- DGS considered FEI's price but did not believe FEI's price significantly countered FEI's technical rank.

Had the PO testified, he may have been able to provide some greater insight into the evaluation process and whether a cost-benefit analysis was performed. As the record stands, however, we have no evidence supporting Appellant's assertion that a cost-benefit analysis was not done.

Appellant urges the Board to shift the burden of proof to Respondent to show that a proper cost-benefit analysis was conducted in which price was considered, citing *L-1*. Merits Hr'g Tr., 79:22–80:14. However, in *L-1*, where the solicitation required technical and price factors to be given *equal weight*, the final overall rankings were *identical* to the technical rankings determined prior to disclosure of financial submissions.

In contrast to *L-I*, the RFP here required technical factors to be given *greater* weight than financial factors, and final overall rankings were *not* identical to the technical rankings. For example, FEI's Technical Rankings was 31st, and after considering its BAFO Ranking of 13th, FEI's Overall Ranking was 30th. Appellant's allegation – that price was *only* used to break ties when Technical Proposals rankings were equal or adjacent – is mere supposition, not proof that a cost-benefit analysis was not done. Unlike *L-I* where there was no evidence whatsoever that a cost-benefit analysis was performed, in this Appeal we do have the PO's assertions that DGS placed more weight on technical factors or rankings than financial ones; DGS ranked FEI 30th overall; and DGS considered FEI's price but did not believe FEI's price significantly countered FEI's technical rank.

Given that that the final overall rankings were not identical to the technical rankings in this Appeal and that there is evidence that a cost-benefit analysis was performed, the burden of proof by a preponderance of the evidence falls entirely upon Appellant to establish that technical factors were not give greater weight than financial factors when determining the final overall rankings in this Appeal. *See L-I*, at 35.

In a procurement where one is mandated to give technical factors greater weight than financial factors, how is one supposed to differentiate between offerors whose Technical Proposals are equal or nearly equal? Flip a coin, or use the difference in price between the two to make a best value determination as required by the RFP's award determination? For example, FEI's Technical Proposal was ranked 31st, but so were the Technical Proposals of Amida Technology Solutions, Inc. ("Amida"), and ThoughtCodes, LLC ("ThoughtCodes"). FEI's BAFO price was \$124,419,700.00 while Amida's was \$187,633,980.00 and ThoughtCodes' was \$190,817,250.00. Thus, DGS' assignment of Overall Rankings of 30th to FEI, 32nd to Amida and 33rd to

ThoughtCodes appears consistent with the PO's Final Decision that technical factors were given more weight than financial factors.

Although the evidence before the Board concerning the cost-benefit analysis performed is not very detailed and even underwhelming, no admissible evidence presented at the hearing refuted the fact that it was done. Because the PO did not testify, Appellant missed the opportunity to call it into question.

Accordingly, the Board finds that Appellant failed to produce sufficient admissible evidence to prove that DGS did not consider price in evaluating and ranking offerors' proposals.

CONCLUSION

For the foregoing reasons, the Board concludes that Appellant failed to prove that any actions of DGS were arbitrary, capricious, unreasonable, or in violation of law.

ORDER

Based on the foregoing, it is this 15th day of July 2025, hereby:

ORDERED that Respondent Maryland Department of General Services' Motion for Judgment is GRANTED, and it is further

ORDERED that Appellant FEI.com, Inc. d/b/a FEI Systems' Appeal is DENIED.

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

I concur:

/s/
Sonia Cho, Esq., Chairwoman

/s/
Jill P. Carter, 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 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 Docket No. MSBCA 3301, The Appeal of FEI.com, Inc., d/b/a FEI Systems, under Maryland Department of General Services Request for Proposal BPM043644.

Date: 7/15/2025

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