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BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2374, 2380, 2381, 2382 and 2389	Date of Decision: 03/24/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Transit Administration RFP No. MTA 0981A	
Appellant/Respondent: Yellow Transportation Maryland Transit Administration	

Decision Summary:

Bid Protest Costs - Certain costs are awardable in successful bid protest cases (COMAR 21.10.07.09A) when the Board sustains an appeal based on a violation of law or regulation by the unit conducting the procurement.

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- the Americans with Disabilities Act (ADA), are intended to offer disabled individuals similar public transportation resources as MTA provides on its fixed-route bus services.
3. Appellant has been MTA's contractor providing paratransit services in the Baltimore metropolitan area since 1998. During the year ending August, 2002, MTA's Mobility scheduled nearly 640,000 one-way trips. The area served by Mobility, and to be served under the Request for Proposals (RFP), includes Baltimore City, all portions of Baltimore and Anne Arundel counties located inside the Baltimore Beltway, and all other areas of those counties located within a three-quarter mile radius of the Baltimore metrorail system, the Central Light Rail line and MTA fixed-route bus service. In the current paratransit program, MTA operates 15 percent of the service with its own vehicles and drivers, and Appellant operates the remaining 85 percent of the service.
 4. In December 2002, MTA issued Request for Proposals 0981 "Paratransit Services" (the First Solicitation) seeking proposals for the provision of paratransit services in the Baltimore metropolitan area.
 5. The Procurement Officer for Request for Proposals 0981 was Mr. Mark Pemberton. The method of source selection for Request for Proposals 0981 was procurement by competitive sealed proposals under COMAR 21.05.01.01B and 21.05.03.
 6. Technical and financial evaluation committees were established in order to review independently the technical and financial proposals.
 7. The technical evaluation committee included Ms. Ruth Silverstone as the chair and members Ms. Joyce Callahan, Mr. Tom Curtis, Mr. Ken Hosen of KFH Group (KFH), Mr. Charles Samuel, and Mr. John Smolenski.
 8. Ms. Silverstone's job title was Director of Mobility Services,

and she was responsible for oversight of Appellant's incumbency as the paratransit contractor.

9. The financial evaluation committee included, among others, Ms. Buffy Ellis of KFH and Mr. Jim O'Donnell.
10. Mr. Pemberton provided the members of the technical evaluation committee with a copy of MTA's Evaluation Committee Duties & Responsibilities, which established rules governing the technical evaluation committee members. During his testimony, he stated that the rationales for these rules were, among other things, to insure the integrity of the procurement and to insure that information being provided to the vendors was fair and honest information.
11. The Evaluation Committee Duties & Responsibilities established "Responsibilities" among others to:
 1. [r]ender a fair, impartial evaluation based exclusively upon the evaluation criteria contained in the RPF, the contents of the offerors' proposal, and the information gained from clarification of proposals, oral presentations, discussions with offerors, or legitimate sources of reference.
 - ...
 4. [k]eep confidential all information contained in proposals or obtained during the evaluation process.
12. The Evaluation Committee Duties & Responsibilities provided "Duties" among others to:
 2. Read the RFP and acquaint yourself with the nature of the requested services or equipment. If you have questions or suggestions, immediately contact the issuing office. Also read and comment on the evaluation sheets (form).
 - ...
 6. In the Committee meetings, decide how many

references will be checked, who will check which references (reference checking can be divided among the committee members), and what uniform questions will be asked.

7. Each Committee member should read all proposals received and make appropriate notations directly on the evaluation sheets provided. These evaluation sheets with your written comments become a permanent part of the documentation of this procurement. In some instances notes may be available to a protester or its attorney. Therefore, notes should be factual, non-inflammatory and should contain neither offensive nor inappropriate remarks.

8. Notes should be consistent with your final overall ranking of all offerors. There should be a note for each significant area in which an offeror was either weak or strong. Also, frequently a new evaluation sheet will be provided after orals, discussions, and/or revised submissions. Although each set of evaluation sheets will be retained in the permanent procurement file, only the final one should be used for the final evaluation (evaluations aren't combined or averaged).

9. Clearly identify deficiencies/problems with each proposal. Vendors responding to an RFP who are judged to be reasonably susceptible of being selected for award of the contract, or potentially so, typically will be informed of problem areas identified by the Committee and be given an opportunity to resolve them.

13. The Evaluation Committee Duties & Responsibilities established "Evaluation Committee Cautions" that provided among others:

1. UNDER NO CIRCUMSTANCES SHOULD INFORMATION BE GIVEN OUT BY ANY MEMBER OF THE EVALUATION COMMITTEE TO ANY INDIVIDUAL OR GROUP OUTSIDE THE COMMITTEE, (this includes your co-workers, supervisor and, in particular, vendors.)

All information pertaining to the proposals or to the evaluation process is to be held in strict confidence by the Committee members both

prior and subsequent to final contract award. Any recommendation for award made by members of the Committee is advisory in nature, i.e. is subject to final approval by the Procurement Officer and the Department Head or designee. Premature release of any procurement information may compromise the State's ability to procure goods and services. Likewise, disclosure of information about an offeror's proposals could be damaging to an offeror. Vendors will be reluctant to participate in the State's procurements if they do not believe the information provided to the State will be protected from improper disclosure.

2. Promptly report to the Procurement Officer any attempts by a vendor or other interested party to contact you regarding the evaluation process. Don't accept questions from any vendor or seek to provide any information, advice, directions, etc. All communication with the offeror is to be through the Procurement Officer or other officially designated contact person.

14. There was no other officially designated contact person for Request for Proposals 0981 so all communications should have gone through the Procurement Officer, Mr. Pemberton. Mr. Pemberton provided the members of the technical and financial evaluation committees with "Evaluator's Acceptance". Each member of the separate committees executed the Evaluator's Acceptance affidavit and swore to agree to specific promises.
15. The Evaluator's Acceptance stated, in part:

I promise:

- (1) to keep all information obtained by me in the course of the evaluation, including but not limited to the contents of the proposals and the results of the evaluations by me and other evaluators, in the strictest confidence and not to reveal such information to any person or discuss it with any person except with the prior consent of the Procurement Officer, his Representative, or their superiors in the MDOT;

- (2) to evaluate proposals fairly and impartially;
- (3) to have no direct contact with any party submitting a proposal for this procurement; and
- (4) to notify the Procurement Officer, his Representative, or their superiors in the MDOT immediately if:
 - (a) any person other than the Procurement Officer, his Representative, or their superiors in the MDOT attempts to contact me for any reasons regarding the procurement; ...

- 16. In the spring of 2003, MTA received proposals from several offerors, including Appellant, Laidlaw Transit Services, Inc. (Laidlaw), MV Transportation, Inc. (MV), and First Transit, Inc. (First Transit).
- 17. MTA requested two rounds of best and final offers (BAFOs) from those offerors MTA deemed reasonably susceptible of being selected for contract award.
- 18. Request for Proposals 0981 provided for a performance bond. Appellant filed bid protests and filed appeals with this Board asserting that the amount of the performance bond was excessive. Presumably as a result of performance bond issues, MTA cancelled the First Solicitation on June 26, 2003.
- 19. By email dated June 26, 2003, Mr. Charles Lockridge, one of the members of the financial evaluation committee, raised concerns to Mr. Pemberton about whether the current technical evaluation committee would be "tainted since they have already been through the evaluation process."
- 20. On the same date, Ms. Magdaline Hamill, the Director of Contract Administration for MTA, sent an email to Mr. Pemberton and Ms. Silverstone. Ms. Hamill asked whether new technical and financial evaluation committees would be established. In response, Mr. Pemberton stated, "would recommend yes but will

defer to MTA.”

21. In the same email, Ms. Hamill also asked to be advised of the recommended transition period after the notice to proceed. Mr. Pemberton recommended a six-month transition period.
22. On July 7, 2003, a representative of Laidlaw, Mr. Kim Chin, sent an email to Mr. Pemberton and Ms. Silverstone. He indicated that Laidlaw would “confirm estimated vehicle delivery dates” as soon as he had the information.
23. As of July 7, 2003, Mr. Chin believed the new RFP would be issued on July 8, 2003. When Mr. Chin learned from an official at MDOT that the new RFP would not be issued on July 8, he so notified Ms. Silverstone.
24. On July 9, 2003, Mr. Chin sent an email to Ms. Silverstone concerning the delivery of gas-powered vehicles. Ms. Silverstone responded by email on July 24, 2003 and asked about diesel vehicles. Mr. Chin responded on July 24, 2003 with the delivery window for diesel vehicles.
25. By letter dated July 14, 2003, MDOT advised offerors of the opportunity to offer suggestions regarding the new RFP by forwarding written responses to MDOT’s consultant, Nelson Nygaard.
26. Pursuant to COMAR 21.05.03, on July 29, 2003, MTA issued RFP 0981A paratransit services (the Second Solicitation). It contained a scope of work similar to the First Solicitation, but with a lower performance bond requirement.
27. The RFP sets forth certain Proposal Evaluation Process factors:
 1. Qualifications of the Firm
 - Specific experience in ADA paratransit service.
 - Demonstrated understanding of the needs of the MTA and commitment to provide effective and efficient ADA paratransit services.

- Experience and capabilities to provide the requested services.
- Effective hiring and training program to ensure the program is fully staffed and employees well trained.
- Wage and benefit package adequate to recruit, hire and retain a qualified work force.
- Sound financial responsibility and financial capability.
- Quality of the proposed vehicles.
- Commitment and responsibility to work in partnership with the MTA to improve the Mobility program and provide effective, efficient, and quality service.

2. Qualifications of the Proposed Staff

- Experience and qualifications of the proposed Project Manager.
- Experience and qualifications of proposed staff for the remaining key positions: Operations Manager, Maintenance Manager, and Safety and Training Manager.
- Specific experience of the key management staff with ADA paratransit services.

3. Service Plan

- Effective work plan to meet all the requirements described in Section 3, Scope of Work.
- Effective maintenance plan to ensure a well-maintained paratransit fleet, minimizing downtime and road calls.
- Detailed and reasonable start-up and implementation plan.
- Approach to dealing with peak period ridership demand.
- How the proposed response satisfies the goals and objectives of this RFP.

4. Economic Benefits to the State

28. The Procurement Officer for the Second Solicitation was again Mr. Mark Pemberton.
29. No person other than the Procurement Officer was designated as an official contact person.
30. The technical evaluation committee was again composed of Ms. Silverstone (again, as chair), Ms. Callahan, Mr. Curtis, Mr. Hosen, Mr. Samuel, and Mr. Smolenski. The record reflects that the Procurement Officer considered the judgement of the technical evaluation committee regarding the evaluation of the technical proposals.
31. The financial evaluation committee again included, among others, Ms. Ellis and Mr. O'Donnell.
32. The same Evaluation Committee Duties & Responsibilities governing the First Solicitation, as set forth in part above, governed the Second Solicitation. Likewise, the Evaluator's Acceptance and the promises contained therein carried over to the Second Solicitation.
33. The RFP and addenda established a common date of August 29, 2003 for the submission of technical and price proposals.
34. At the pre-proposal conference, the Procurement Officer informed offerors that contact with him, alone, was allowed.
35. By email dated August 12, 2003, Ms. Silverstone contacted Mr. Chin of Laidlaw and stated "Service hours are the same. Vehicle numbers have grown!"
36. By emails of August 28, 2003, Mr. Chin and Ms. Silverstone exchanged correspondence concerning the receipt of Laidlaw's proposal by MTA.
37. Appellant, Laidlaw, MV, First Transit and four other offerors submitted their respective technical and financial proposals on August 29, 2003. One firm was eliminated for failure to provide

- the required bid bond.
38. By email dated September 2, 2003, Mr. Chin indicated that Mr. Pemberton and Ms. Silverstone should "let us know if you need anything as you review the proposals." By email the next day, Ms. Silverstone contacted Mr. Chin and asked "[w]hat site have you identified???"
 39. By email dated September 4, 2003, Mr. Chin transmitted an "excerpt" concerning Laidlaw's facility to Ms. Silverstone. Ms. Silverstone replied by email to Mr. Chin and stated that she "already read this in your [Laidlaw's] proposal."
 40. By email dated September 8, 2003, Mr. Chin informed Mr. Pemberton and Ms. Silverstone of his personal travel plans due to illness of his father. The same day, Ms. Silverstone contacted Mr. Chin via email expressing condolences.
 41. By email dated September 10, 2003, Mr. Chin transmitted an article from *Passenger Transport* to Ms. Silverstone. Ms. Silverstone contacted Mr. Chin via email in response stating "Thanks - Great Article."
 42. By email dated September 11, 2003, Ms. Silverstone forwarded the *Passenger Transport* article to Ms. Callahan. Ms. Callahan responded to Ms. Silverstone regarding the article on September 11, 2003 and stated that Mr. Chin "is certainly a wonderful salesman, quite unobtrusive. Besides his product is also excellent as proven."
 43. By email dated September 11, 2003, Ms. Callahan contacted Mr. Chin with a subject line of "thinking of you" to inform him that Ms. Silverstone "shared the article" with her and that Ms. Callahan had "manipulated it into our daily clips for the powers to be to see. Keep up the good work."
 44. On September 15 and 16, 2003, MTA conducted oral interviews and held discussions with Appellant, Laidlaw, MV, and First Transit.
 45. Laidlaw's oral interview, which Mr. Chin did not attend due to

the death of his father, was conducted on September 15, 2003. First Transit's oral interview was also conducted on September 15, 2003. Appellant's oral interview and MV's oral interview were conducted on September 16, 2003.

46. By email dated September 15, 2003, Ms. Callahan contacted Mr. Chin, regarding Laidlaw's oral interview, and stated:

your team did an excellent job, as you knew they would. you have definitely set the pace for the rest of the interviews to follow. I enjoyed meeting the additional team members, very hands on guy. My sincere condolences on the passing of your father. I recall talking to you that your mother had recently passed also? You are no stranger to the process, but it never makes it easier. Life can certainly throw us some fast balls when we are not looking, can't they? Hopefully this process of selection will soon be over and we can get on to quality customer service for our customers with disabilities. No matter the consequences I am privileged to know you and hold you as an example of excellence in this industry.

47. By email dated September 16, 2003, Mr. Chin thanked Mr. Pemberton, Ms. Silverstone, Ms. Callahan, Mr. Samuel, and Mr. Hosen for the oral interview. He stated that he would check with those individuals by telephone to see if anything else was needed from Laidlaw.
48. The same day, September 16, 2003, Ms. Callahan contacted Mr. Chin by email and stated, in part, "[y]ou are welcome and, the pleasure was all mine. I certainly did enjoy seeing what is possible for our future success."
49. The next day (September 17, 2003), Ms. Silverstone contacted Mr. Chin by email and, after offering condolences on the death of his father, informed him "[t]he presentation was good, but we did miss you."
50. Following the oral interviews, MTA deemed the proposals of Appellant, Laidlaw, MV, and First Transit reasonably susceptible

- of being selected for contract award, and by letters dated September 24, 2004, the Procurement Officer requested BAFOs from those four offerors and provided the offerors with "Technical Clarifications" and/or "Financial Questions."
51. Appellant, Laidlaw, MV and First Transit submitted their respective BAFOs on October 2, 2003.
 52. On October 2, 2003, Mr. Chin and Ms. Silverstone exchanged emails in which Ms. Silverstone confirmed receipt of Laidlaw's BAFO.
 53. By email on October 2, 2003 to Ms. Silverstone, Mr. Chin informed Ms. Silverstone "[a]ll technical questions answered with a 2% reduction in overall costs for all three years."
 54. During her testimony, Ms. Silverstone claimed she didn't know what he [Mr. Chin] was talking about when Mr. Chin informed her of a "2% reduction in overall costs."
 55. The final meeting of the technical evaluation committee occurred on October 10, 2003.
 56. By email dated October 10, 2003, Mr. Chin transmitted a newspaper article to Ms. Silverstone and Ms. Callahan which was apparently not favorable to Appellant and MTA's existing paratransit operation.
 57. By email to Mr. Chin the same day, October 10, 2003, Ms. Silverstone decried the article and stated that "[s]oon we will be able to announce the REAL improvements to the Service!"
 58. By email on October 10, 2003, Ms. Callahan contacted Mr. Chin regarding the article and stated that "I hope this encourages you to come show em [sic] how paratransit service should operate. A perfect opening for you."
 59. By email dated October 13, 2003, Mr. Chin informed Ms. Silverstone and Ms. Callahan that Mr. Steve Hirano, editor and associate publisher of Metro Magazine, a trade journal, "would be willing to do a story on the new and improved Mobility. Let

me know as soon as it is appropriate.”

60. By email dated October 13, 2003, Ms. Callahan contacted Mr. Chin and stated:

[y]ou should know by the end of the week, I would suspect. Let me just say, we chose the two vendors that would turn this city around and have the nation take notice of Baltimore on HOW TO run paratransit. I think it may be very sweet for Laidlaw, after the transition, which will not BE sweet. I look forward to a new era. Please make this note disappear! The biggest load will be on YOU.

61. By email the following day, October 14, 2003, Ms. Silverstone contacted Mr. Chin in response to when Metro Magazine could do a story on MTA Mobility, and she stated “After Award!”
62. On October 14, 2003, Mr. Pemberton met with Ms. Silverstone and Mr. Hosen of the technical evaluation committee, as well as Ms. Ellis and Mr. O’Donnell of the financial evaluation committee, to decide on the final selections and recommendations for contract award. There is no evidence that the recommendations of the technical evaluation committee had changed significantly between October 10, 2003 and October 14, 2003.
63. By email dated October 15, 2003, Mr. Chin asked Ms. Silverstone “any feel for when an announcement will be made?” Ms. Silverstone contacted Mr. Chin via email the next day and stated “STAY TUNED!!”
64. The Procurement Officer made a recommendation for contract award to Laidlaw and MV by memorandum to the MTA Administrator dated October 16, 2003.
65. Mr. Pemberton and Ms. Silverstone briefed the MTA Administrator, Mr. Robert Smith, who approved such recommendation on October 17, 2003. Mr. Smith generally asked Mr. Pemberton about the process and whether various procedures had been followed.
66. Mr. Pemberton was unaware of many of the email communications between Mr. Chin, Ms. Silverstone, and Ms. Callahan until the

hearing of the appeal. Had he been aware of such communications he would have made inquiry prior to his award recommendation. He acknowledged that such communications were precluded by the evaluators' promise to have no direct contact with offerors. When examined by the State, however, he opined that no confidential, proprietary, or source selection information was exchanged in these emails, and that none affected the integrity of the procurement process. Mr. Pemberton further opined that the evaluation process was fair and was conducted according to law. He did not regard any technical evaluator as being biased or partial, and he was comfortable in relying on their technical judgement in the evaluation of the proposals.

67. Mr. Smith was unaware of the email communications between Mr. Chin, Ms. Silverstone, and Ms. Callahan until the hearing of the appeal. Had he been aware of such communications, he would have made inquiry prior to approving the Procurement Officer's award recommendation, and he would have discussed the matter with legal counsel. He acknowledged that such communications were precluded by the evaluators' promise to have no direct contact with offerors. When examined by the State, however, he opined that with knowledge of the email correspondence he would still have approved the Procurement Officer's award recommendation. He further opined that no confidential, proprietary, or source selection information was exchanged in these emails.
68. The emails set forth above evidence that Ms. Silverstone and Ms. Callahan were biased in favor of Laidlaw. Similar communications do not exist between Ms. Silverstone, Ms. Callahan, and representatives of MV, Appellant, and First Transit. Expressions of condolences to the representative of an offeror, confirmation of receipt of offers, discussion of routine procedural matters, and exchanges of pleasantries as contained in some of the email correspondence set forth above do not reflect bias in favor of such offeror. However, receipt of

- a magazine article which is then manipulated by Ms. Callahan into daily clips for the powers to be to see, receipt of information by Ms. Silverstone apparently kept to herself and not shared with the Procurement Officer relating to a 2% cost reduction, and Ms. Callahan's critique of the performance of a single offeror compared to others in an oral interview during the competitive process provide "substantive hard facts or evidence" of the existence of bias, in this case favoritism towards Laidlaw during the technical evaluation process.
69. A hearing was held concerning these appeals in February and March of 2004.
 70. For the reasons stated in a written decision filed on April 9, 2004, the Board of Contract Appeals ("Board") sustained the appeal.
 71. A Petition for Judicial Review of the Board's decision was filed in the Circuit Court for Baltimore County, Maryland, on April 21, 2004.
 72. The Board's decision was affirmed in a written Opinion and Order issued by Judge John O. Hennegan dated October 20, 2004 (Civil Action Nos. 03-C-04-004315 and 03-C-04-004978).
 73. The decision was appealed to the Maryland Court of Special Appeals in a Notice of Appeal filed on or about November 19, 2004.
 74. The appeal to the Court of Special Appeals was eventually withdrawn.
 75. Appellant Yellow filed a Petition for Bid Protest Costs on or about May 10, 2004.
 76. The Petition for Bid Protest Costs was held by the Board for decision until such time as the appeal process had been concluded.
 77. Yellow filed a "First Supplement to Petition for Bid Protest Costs" ("Petition") on November 15, 2005.
 78. On March 7, 2006 a hearing was held before the Board concerning

Yellow's Petition.

79. At the hearing on Yellow's Petition, the Maryland Transit Administration ("MTA"), while not conceding that Yellow was entitled to any costs, did acknowledge that the amounts claimed by Yellow for each item of costs (except for items 13 and 14 regarding witness fees for Yellow employees Ron Hartman and Dick Alexander) in the Petition were supported by evidence and did not contest the amounts claimed, only the entitlement to the amounts by Yellow.
80. Yellow has complied with the legal requirements for recovering bid protest costs outlined in the Code of Maryland Regulations ("COMAR").

Decision

As the Board noted in the decision sustaining Yellow's appeal in Yellow Transportation, MSBCA 2374, 2380, 2381, 2382 and 2389, MSBCA (2004), the contest of a procurement award is a serious matter and an Appellant has the burden of proving that a Procurement Officer's award of a contract was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion. A protester may establish that a procurement determination is unreasonable by demonstrating that the procurement procedure followed involved a clear and prejudicial violation of applicable statutes and regulations. United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989) at p.59.

As discussed at great length in Yellow transportation, supra, the Board found there was overwhelming "substantive hard facts or evidence" of impermissible contacts between one offeror - Laidlaw - and two members of the technical evaluation committee - Ms. Silverstone and Ms. Callahan. These repeated contacts evidenced impermissible bias in favor of Laidlaw on behalf of technical

evaluation committee members Ms. Silverstone and Ms. Callahan. The other offerors in this procurement - First Transit, MV, and Appellant Yellow - were clearly not "accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarifications of proposals." There was actual bias in favor of Laidlaw by Ms. Silverstone and Ms. Callahan, which, in turn, resulted in actual bias against First Transit, MV, and Appellant Yellow.

The Board further found that this bias contaminated the workings and evaluations of the technical evaluation committee, which in turn contaminated the judgement of the Procurement Officer, resulting in a Recommendation for Award by the Procurement Officer and the Administrator of the MTA which was found to have been, because of the actions of Ms. Silverstone and Ms. Callahan, unreasonable and violative of Maryland Law and Regulations.

In summary, the evaluation process involved in this matter was tainted, resulting in an award that was unreasonable and in violation of Maryland procurement law and regulations.

Yellow's protest appeal was, therefore, sustained by the Board.

Pursuant to COMAR 21.10.07.09 A., "[U]pon sustaining an appeal arising from the final action of a unit on a protest relating to the formation of a procurement contract", the Board is empowered to award to a protestor "the reasonable costs of filing and pursuing the protest and appeal, not including attorney's fees, when the Appeals Board sustains the appeal based on a violation of law or regulation by the unit conducting the procurement."

Before awarding the reasonable costs of filing and pursuing such a successful protest and appeal, however, the Board shall require the protestor to certify under oath or affirmation its costs in pursuing the protest and appeal. COMAR 21.10.07.09 B. Yellow has complied with this requirement.

All costs associated with filing and pursuing the protest and appeal shall also be substantiated by documented evidence supporting the validity of the claim. Supra. Yellow has also complied with this

requirement.

Upon the request of a party to the proceeding, or upon order of the Board, a hearing may be conducted to determine the reasonableness of the costs which are sought for recovery. Supra. Such a hearing was held upon the order of the Board in this matter in order to determine the reasonableness of the costs sought by Yellow.

According to COMAR 21.10.07.09 C.:

"[T]he reasonable costs of filing and pursuing a protest and appeal include, but are not limited to, the:

- (1) Cost of postage, printing, and reproduction incurred in filing the protest and appeal;
- (2) Witness fees and expenses;
- (3) Costs arising out of written requests for production of documents;
- (4) Cost of additional limited discovery determined by the Appeals Board to be necessary to avoid substantial unfairness or prejudice; and
- (5) Filing fees, if any, that may be required by the unit or Appeals Board to be paid upon the filing of the protest or appeal.

The Board is given wide discretion in determining what the "reasonable costs" a successful appellant, such as Yellow, is entitled to receive in a case where a protest and appeal is sustained by the Board based on a violation of law or regulation.

Appellant Yellow has submitted a First Supplement to Petition for Bid Protest Costs ("Petition") requesting costs for 14 separate items. As noted in the Findings of Fact, the Maryland Transit Administration ("MTA"), while not conceding that Yellow was entitled to any costs, has acknowledged that the amounts claimed by Yellow for each item of costs (except for items 13 and 14 regarding witness fees for Yellow employees Ron Hartman and Dick Alexander) in the Petition were supported by evidence and the MTA did not contest the amounts claimed, only the entitlement to the amounts by Yellow. The Board, therefore, accepts Yellow's dollar figures for each item requested by

Yellow in considering Yellow's Petition.

The Board has reviewed the evidence and heard oral argument from counsel and rules on these items as follows:

(1) Free State Reporting transcript costs in the amount of \$16,952.00. These are the costs for the transcript of the (rather lengthy) hearing held before the Board concerning the protest and appeal in 2004. Petition Exhibit 4. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$16,952.00 for this item.

(2) Brower, Kriz & Stynchcomb costs for the production of exhibits and related costs of hearing preparation in the amount of \$10,065.29. Petition Exhibit 5. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$10,065.29 for this item.

(3) Hallock Reporting Services for transcription services related to the hearing in the amount of \$1,105.85. Petition Exhibit 6. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$1,105.85 for this item.

(4) Board reporting costs associated with the cost of the daily expense associated with the holding of the hearing in the amount of \$1,050.00. Petition Exhibit 7. The Board finds that these costs are not reasonable and does not award them. Each of the parties, including Yellow, agreed to split the daily costs associated with the hearing reporter required for the hearing. The Board finds that Yellow is not entitled to these costs and awards Yellow \$0 for this item.

(5) Docuprint Imaging, Inc. for printing costs associated with the hearing (including exhibit preparation) in the amount of \$768.07. Petition Exhibit 8. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$768.07 for this item.

(6) Warner Construction Consultants, Inc. for costs associated with the hearing (including exhibit preparation) in the amount of \$531.00. Petition Exhibit 9. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$531.00 for this item.

(7) Legal Images of Baltimore, LLC for printing costs associated with hearing preparation and the hearing in the amount of \$15.62. Petition Exhibit 10. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$15.62 for this item.

(8) Office Depot for costs associated with the hearing (including exhibits) in the amount of \$166.07. Petition Exhibit 11. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$166.07 for this item.

(9) Kinko's for costs associated with the hearing (including exhibits) in the amount of \$516.44. Petition Exhibit 12. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$516.44 for this item.

(10) Scheduled Express for costs associated with the hearing (including delivery costs) in the amount of \$18.40. Petition Exhibit 13. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$18.40 for this item.

(11) Falcon Express for costs associated with post-hearing briefs (including delivery costs) in the amount of \$32.51. Petition Exhibit 14. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards Yellow \$32.51 for this item.

(12) Federal Express for costs associated with post-hearing briefs (including delivery costs) in the amount of \$114.83. Petition Exhibit 15. The Board finds that these costs are reasonable and that Yellow is entitled to these costs and awards

Yellow \$114.83 for this item.

(13) Witness fees and related costs for Mr. Ron Hartman, an employee of Yellow, for an estimated 100 hours of "Mr. Hartman's time at a rate of \$104.50 per hour for a total of \$10,450.00". The Board finds that these costs are not reasonable and does not award them. COMAR excludes attorney's fees from the reasonable costs which a successful protestor such as Yellow can collect. COMAR 21.10.07.09 A. Although COMAR does list witness fees and expenses as a "reasonable cost" of pursuing a protest and appeal, the Board does not believe that it is reasonable to reimburse Yellow for the "costs" of having Yellow's own employees testify at the hearing. The Board finds that the claim of \$10,450.00 for the time associated with witness Ron Hartman it is not reasonable and the Board further finds that Yellow is not entitled to these costs and awards Yellow \$0 for this item.

(14) Witness fees and related costs for Mr. Dick Alexander, an employee of Yellow, for an estimated 50 hours of "Mr. Alexander's time at a rate of \$74.14 per hour for a total of \$3,707.00". The Board finds that these costs are not reasonable and does not award them. As previously noted, COMAR excludes attorney's fees from the reasonable costs which a successful protestor such as Yellow can collect. COMAR 21.10.07.09 A. Although COMAR does list witness fees and expenses as a "reasonable cost" of pursuing a protest and appeal, the Board does not believe that it is reasonable to reimburse Yellow for the "costs" of having Yellow's own employees testify at the hearing. The Board finds that the claim of \$3,707.00 for the time associated with witness Dick Alexander it is not reasonable and the Board further finds that Yellow is not entitled to these costs and awards Yellow \$0 for this item.

The total amount to be awarded to Yellow is, therefore, \$30,286.08.

Wherefore, it is Ordered this day of March, 2006 that Appellant Yellow Transportation is hereby awarded \$30,286.08 pursuant to its First Supplement to Petition for Bid Protest Costs in the above-captioned matters.

Dated:

Michael W. Burns
Board Member

I Concur:

Robert B. Harrison III
Chairman

Michael J. Collins
Board 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 decision in MSBCA 2374, 2380, 2381, 2382 & 2389, appeals of Yellow Transportation under Maryland Transit Administration RFP No. MTA 0981A.

Dated:

Michael L. Carnahan
Deputy Recorder