

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

Docket Nos. 2438, 2442 & 2445	Date of Decision: 03/11/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification:	Under University of Maryland University College RFP #90615
Appellant/Respondent:	Eisner Communications, Inc. University of Maryland University College

Decision Summary:

Timeliness of Bid Protest - When there is a factual dispute concerning the timeliness of the filing of a bid protest - specifically the issue of when a protestor could have and should have known the basis for the protest - such disputed facts will be resolved in favor of the protestor for purposes of a motion to dismiss the protest on timeliness grounds.

Competitive Negotiation - Standard of Review - The award of a contract in a competitive negotiation procurement involves the exercise of discretion and judgement which is necessarily subjective. Such an award is entitled to great weight and will not be overturned unless evidence indicates that a procurement officer's judgement was clearly arbitrary, capricious, irrational, or contrary to law.

Competitive Sealed Proposals - Non-Binding Nature of Scores - The use of numerical scores in a competitive sealed proposal procurement serve as useful guides for decision-making, but are not themselves controlling or binding in making a determination of an award of a contract.

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BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of Eisner)
Communications, Inc.)
) Docket Nos. MSBCA 2438, 2442 &
) 2445
Under University of Maryland)
University College RFP #90615)

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OPINION BY BOARD MEMBER BURNS

Appellant appeals the denial of three protests raising various issues regarding a solicitation to provide marketing services to the University of Maryland University College. These appeals, captioned above, were consolidated for hearing.

Findings of Fact

1. Respondent, University of Maryland University College (UMUC), is one of the eleven degree-granting institutions of the University System of Maryland.
2. UMUC is an international university, providing degree and

- non-degree programs to a varied student clientele both nationally and internationally.
3. UMUC programs are provided to residents of the State of Maryland, members of the U.S. Armed Services and their families stationed around the world, and national and international students studying online.
 4. In 2004, UMUC enrolled approximately 90,000 students worldwide including 36,000 students within the United States.
 5. UMUC's procurement activity is governed by the University System of Maryland Procurement Policies and Procedures, which were enacted by the University System Board of Regents and approved by the Maryland State Board of Public Works.
 6. These University System of Maryland Procurement Policies and Procedures, not the regulations contained in the Code of Maryland Regulations, governed the procurement at issue.
 7. On March 16, 2004, UMUC issued Request for Proposals Number 90615 for Marketing Services. The University's objective was to select a contractor to support its Office of Communications with marketing services. Because of UMUC's business approach and the need to generate qualified leads to convert into students, UMUC determined that its marketing firm should have "a strong background" in direct response marketing. The Request for Proposals (RFP) stated, "[a] strong background in direct response marketing is required. A firm with extensive national experience is preferred and at least some international experience is desirable."
 8. The RFP utilized the Competitive Sealed Proposal procurement selection method.
 9. The RFP laid out a process of evaluation that would involve several steps. After a pre-proposal conference, technical proposals were to be submitted and evaluated, and a short list of the best proposers created. Such "short-listed"

firms were to be invited to submit a more detailed second phase technical proposal and provide an oral presentation, after which a second-phase technical evaluation was to be completed. Proposers who remained short-listed after the second phase technical evaluation would be invited to submit a price proposal.

10. The technical evaluation criteria were set forth in RFP § 3.2.C, in order of decreasing importance:
 1. Approach to Contract/Questionnaire
 2. Key Personnel/Staffing Requirements/References
 3. Firm Profile/Firm Experience/Financial Reports/References
 4. Economic Development/Minority Business Enterprise (MBE) Participation.

A detailed explanation of each of these criteria was provided in the RFP.

11. Final ranking and selection would be achieved by combining the total normalized technical scores with the normalized financial scores to assist in the determination of which proposal would best serve the interests of UMUC, giving technical merit greater value than cost. The RFP specifically advised that final selection would not be determined solely by any numerical rating: "The Evaluation and Selection Committee will choose from among the highest rated proposals that one which will best serve the interests of the University." Appellant did not protest this section of the RFP.
12. Sharon Quinn was the Procurement Officer for this solicitation. Valerie Rolandelli, Ms. Quinn's supervisor, managed Ms. Quinn's work and assisted her with her duties as Procurement Officer.
13. In preparation for the issuance of the solicitation, Ms. Quinn collected a list of 19 potential vendors. The list included Appellant, Eisner Communications, Inc. (Eisner), as

well as the Interested Party, Grey Direct, Inc. (Grey Direct).

14. Ms. Quinn asked two of her staff members to contact each of the potential vendors to determine if they were interested in receiving the RFP.
15. The procurement file indicates that as to Grey Direct, the staff member merely left a voice mail message on the main line for the company, and made no further inquiry.
16. On April 9, 2004, Ms. Quinn was notified by an employee of UMUC that Grey Direct had not received a copy of the RFP, and that Grey Direct had requested that the solicitation be forwarded to it. Sending out the RFP to Grey Direct at this point increased the opportunity for firms to respond and thus was consistent with the goals of procurement law.
17. On April 13, 2004, the Procurement Officer emailed all prospective vendors and inquired about their intent to submit a proposal, so that UMUC could allocate sufficient resources to complete the review process.
18. Larry Kimmel, a representative of Grey Direct, responded on that same day in an email which stated:

Sharon,

On behalf of Grey Direct, I want to let you know that we are going to remove ourselves from consideration from this review. While we would love the opportunity to assist you, we believe that we would be disadvantaged in that we don't have an operation in Maryland.

I wish you the best of luck in your search and would be happy to assist you if you need anything from an outside agency's perspective.

Regards,

Larry

Lawrence M. Kimmel
Chairman/CEO
GREY DIRECT
212-537-3720

19. That same day, April 13, 2004, Ms. Quinn and Ms. Rolandelli placed a call to Mr. Kimmel in response to this message. Mr. Kimmel was not available so they left a message for him to return the call. When he did, Ms. Quinn was not available and so Ms. Rolandelli spoke with him.
20. During this conversation, Ms. Rolandelli reiterated what was stated in the RFP, pointing out that MBE/ Economic Benefit was fourth in the list of priorities, and that "an out-of-state firm could also add benefits to the State of Maryland."
21. In order to document this conversation, and to make all offerors aware of the information she had given Grey Direct, Ms. Rolandelli made several additions to RFP Addendum #3. She sent the revised addendum to Ms. Quinn so that it could be issued.
22. RFP Addendum #3 was transmitted to potential offerors on April 14, 2004, at 2:50 p.m. and stated, among other things:
 19. Question: Several questions have been received whether [sic] the information regarding the Benefit to Maryland Residents component of the RFP.

Answer: UMUC welcomes proposals from all qualified offerors. The University is seeking an offeror-regardless of location-that can meet its stated goals. If particular information is relevant, the offerors are invited to complete the form. However, if the benefit to MD's economy resulting from increased student enrollment is better expressed in another way or via other information, offerors are invited to provide that information to support their proposal.
 20. Question: Several questions have been

received regarding the weight given in the evaluation of the proposals regarding the benefit to Maryland residents.

Answer: As stated in the RFP, the evaluation criteria are listed in order of importance. The economic benefit to Maryland is last.

23. In his conversation with Ms. Rolandelli, Mr. Kimmel also stated that he would need an extension to the proposal deadline in order to prepare a proposal. This was not an unusual request, as procurement officers are often asked by vendors for extensions to prepare technical proposals. It is the University's practice to grant such extension requests in furtherance of the goals of broader competition and to get as many firms to respond as possible.
24. Ms. Rolandelli told Mr. Kimmel that the deadline for submission of proposals would be extended until April 22, 2004. Notice of the extension was provided to all offerors in Addendum #3.
25. Questions from potential vendors are not an infrequent occurrence during the proposal process and it is not unusual for answers to questions from potential vendors to be given to those potential vendors over the telephone. Such information is then given to all potential vendors by way of an Addendum to the RFP.
26. The next morning after his conversation with Ms. Rolandelli, Mr. Kimmel sent an email to Ms. Quinn stating the following:

Sharon,

I received a call from Valerie Rolandelli yesterday. Based on the information that she provided—that the deadline is now April 22nd and that the Maryland "Economic Benefit" is not a key selection criteria—we will participate in the process. (I should say that we believe Grey Direct can drive

greater national and international enrollments and revenue than any other agency-and in that fashion make a significant contribution to Maryland and the University.)

Jessica Rusczyk will be the key contact at the agency for the RFP process. If you have any questions, just let me know.

I look forward to meeting you soon.

Regards,

Larry

Lawrence M. Kimmel
Chairman/CEO
GREY DIRECT
212-537-3720

27. Ms. Quinn forwarded this note to Ms. Rolandelli. Ms. Rolandelli, having documented the conversation with RFP Addendum #3, did not take the time to write back to Mr. Kimmel to correct his interpretation of their conversation.
28. Initial technical proposals were due on April 22, 2004, and eight firms responded. On May 6, 2004, the evaluation committee made its initial technical evaluation and short-listed four firms, including Eisner and Grey Direct. Specific questions were generated for each of the short-listed firms with responses due by May 20, 2004.
29. Oral presentations were held on May 24, 2004, on which date the short-listed firms submitted their second phase technical proposals. After the second phase technical evaluation, two firms - Eisner and Grey Direct - remained on the short list and were requested to provide price proposals by June 8, 2004.
30. The price proposal was to include the management fee for "all types of services, including, but not limited to,

- creative services." The RFP noted that a "strong background in direct response marketing is required."
31. Eisner's June 8th price proposal did not include the cost for the subcontracted direct response marketing. After Ms. Quinn and Ms. Rolandelli reviewed the price proposals, they concluded that Eisner's price was incomplete. Accordingly, Eisner's price and Grey Direct's price could not be fairly compared because Eisner's did not include "all creative services."
 32. Because Eisner's price was not complete, further discussions were required. The extent of discussions required caused UMUC to become concerned about Eisner's understanding of the scope of work involved in the contract. The University did not, however, revisit Eisner's technical score, even though Ms. Rolandelli and Ms. Quinn concluded that Eisner's score did not accurately reflect its technical quality.
 33. Grey Direct had no equivalent issue. Accordingly, it was only told that the best and final proposal represented an opportunity for it to modify or improve its price proposal and that if it chose not to do so, its original price proposal would be used for the final evaluation.
 34. On June 28, 2004, the University issued RFP Addendum #9 instructing short-listed offerors to submit best and final price proposals using an attached form.
 35. On July 1, 2004, both Grey Direct and Eisner submitted their best and final price proposals/offers. Both filled out the price proposal form required by RFP Addendum #9. Both included additional documents besides the price proposal. Along with its price proposal, Grey Direct included a cover letter and a marketing document entitled "Driving Profitable Enrollment." Eisner also submitted additional marketing documents.
 36. The price proposal packages were sent to UMUC in Adelphi,

Maryland. When told that marketing information had been submitted along with the price proposals, Ms. Quinn, whose office is in Baltimore, Maryland, instructed UMUC's Procurement Office to forward only the price proposal form because documents other than the requested price proposal would not be considered.

37. Eisner's price form indicated that it had included the information that had been missing from its original price proposal - the cost of the subcontracted direct response marketing - in its best and final price proposal. Other rates were reduced so that the net effect on Eisner's overall price was a decrease in price of approximately \$693.00
38. Grey Direct's price proposal was completed as specified. The chart was completed, a monthly retainer stated, with no qualifying statements or references to any other documents. Each page was initialed and the signature page was completed by an officer of the company, with the required witness. With no caveats or conditions, it lowered its rates by 18% from its original price proposal so that its annual cost was reduced by approximately \$220,000.
39. When Ms. Rolandelli and Ms. Quinn noticed that the monthly retainer of Grey Direct did not reflect the reduced rates, Ms. Rolandelli contacted a Mr. Traino from Grey Direct who confirmed that the monthly retainer should have been reduced to reflect the reduced rates. The figure was then corrected by UMUC.
40. Grey Direct's statements in the cover letter and in the document entitled "Driving Profitable Enrollment" - the so-called "incentive compensation plan" - were statements of a desire on the part of Grey Direct of its hope to develop, in the future, some type of incentive plan with UMUC which would be mutually acceptable to both parties.

41. The so-called incentive compensation plan was not considered by the evaluation committee, Ms. Quinn or Ms. Rolandelli in reviewing the proposals of Grey Direct.
42. The so-called incentive compensation plan has never been considered by officials of UMUC for inclusion in the contract at issue.
43. The Evaluation Committee reviewed the proposals of both Grey Direct and Eisner. Ms. Rolandelli and Ms. Quinn considered the conclusions of the evaluation committee and determined that Grey Direct would provide the best value to UMUC and recommended that the contract be awarded to Grey Direct.
44. On July 23, 2004, UMUC advised Eisner that it was not the recommended awardee of the contract resulting from the Procurement. Eisner requested a debriefing. By mutual agreement of the University and Eisner, the debriefing was ultimately scheduled for August 17, 2004.
45. The debriefing was conducted on August 17, 2004. Sharon Quinn, Valerie Rolandelli, and David Freeman (UMUC Vice-President for Communications and a member of the technical evaluation committee), on behalf of UMUC, and Sara Eisner, on behalf of Eisner, attended the debriefing. At the outset of the debriefing, Ms. Rolandelli advised Ms. Eisner of the University System's policies on debriefings, including the prohibition on discussion of other offerors' proposals or individual evaluator's scores. In accordance with University System policies, the University representatives advised Ms. Eisner of the strengths and weakness of Eisner's proposal.
46. Eisner was not given the numerical weight of the individual technical categories at the August 17, 2004 debriefing.
47. Eisner was not told that it had submitted the lowest price proposal at the August 17, 2004 debriefing.
48. Eisner was not given its own raw or normalized technical scores at the August 17, 2004 debriefing.

49. There is inconsistent testimony on whether or not UMUC was prepared to answer questions concerning the scoring of Eisner's proposal at the August 17, 2004 debriefing.
50. For example, Mr. David Freeman of UMUC testified that, at the beginning of the debriefing on August 17, 2004, Ms. Rolandelli "made clear that the scoring specifically would not be a topic of discussion" at the debriefing.
51. Ms. Eisner believed that the debriefing process did not conclude on August 17, 2004. In an email dated August 26, 2004, Ms. Eisner wrote that "[w]e would still like to know how we ranked numerically on each section of the proposal process (technical, oral, price) and if possible vs. our competitors."
52. In a September 1, 2004 email to Ms. Rolandelli and Ms. Quinn, Ms. Eisner stated that "[w]hat I was hoping was that since you were not able to give me the rankings when we debriefed a few weeks ago (I think Sharon said I couldn't get the rankings at the time because you were still in process), I was hoping to now be able to complete the debriefing and find out how we ranked by comparison to our competitors."
53. UMUC decided, "in a spirit of cooperation", to give additional information to Eisner. At no time before September 15, 2004 did UMUC notify Eisner that the debriefing process had concluded on August 17, 2004.
54. Ms. Rolandelli and Ms. Eisner had a telephone conversation on September 15, 2004. During that conversation, Ms. Rolandelli provided Ms. Eisner with more information regarding the evaluation process - including information concerning Eisner's scoring.
55. During the September 15, 2004 telephone conference UMUC gave Eisner information on scoring that enabled Eisner to determine information concerning both its own score and the

- score of Grey Direct.
56. The September 15, 2004 telephone conference was a continuation of the August 17, 2004 debriefing session.
 57. As a result of information received during the September 15, 2004 telephone conference with UMUC, Eisner filed its first protest on September 20, 2004.
 58. Eisner received various documents from UMUC on October 28, 2004 and filed its second protest on November 4, 2004.
 59. Eisner received additional documents from UMUC on November 15, 2004 and filed its third protest on November 22, 2004.
 60. The first protest was denied by Ms. Rolandelli of UMUC on October 1, 2004. The second protest was denied by Ms. Rolandelli on November 9, 2004. The third protest was denied by Ms. Rolandelli on November 29, 2004.
 61. Appellant appealed the denial of these protests to the Maryland State Board of Contract Appeals. Appellant appealed the denial of: its first protest to the Maryland State Board of Contract Appeals on October 12, 2004 (MSBCA 2438); its second protest to the Maryland State Board of Contract Appeals on November 19, 2004 (MSBCA 2442); and, its third protest to the Maryland State Board of Contract Appeals on December 3, 2004 (MSBCA 2445).
 62. The three appeals were heard by the Board on December 13-17, 2004.
 63. At the hearing, the Board deferred ruling on Respondent's Motion to Dismiss regarding the timeliness of the protests until after hearing evidence at the hearing and receiving written argument post-hearing concerning the issue.

Decision

I. Timeliness of Eisner's Protests

At the outset of the hearing of these appeals, UMUC moved to have the appeals dismissed on the basis that Eisner's protests were filed in an untimely manner. After hearing testimony and receiving evidence from all parties, the Board held the State's motion in abeyance. For the reasons that follow, UMUC's motion is denied.

The University of Maryland's Procurement Policies mirror the requirements from COMAR as to the timing of filing of protests:

3. Timing for Filing

- (a) A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date and time of receipt of initial proposals.
- (b) A protest based upon alleged improprieties in a solicitation that did not exist in the original solicitation but which are subsequently incorporated in an amendment to the solicitation shall be filed not later than the solicitation closing date and time for receipt of bids or proposals identified in the amendment (or in the original solicitation, if the opening date and time were not changed by amendment).
- (c) In cases other than those covered in 3(a) and (b) above, protests shall be filed not later than seven (7) days after the basis for the protest is known or should have been known, whichever is earlier.
- (d) A protest received by the Procurement Officer after the time limits described above may not be considered.
- (e) All costs associated with filing and prosecuting a protest shall be borne by the protestor.

University System of Maryland Procurement Policies and Procedures
(USM PP&P) §X.B.

On July 23, 2004, UMUC advised Eisner that it was not the recommended awardee of the contract resulting from this

Procurement. Eisner requested a debriefing on its proposal. By mutual agreement of UMUC and Eisner, the debriefing was held on August 17, 2004.

UMUC has argued that Eisner could have known the basis for its protest prior to the August 17, 2004 debriefing.

The Board does not agree. Considering the grounds of Eisner's appeals, Eisner clearly could not have known of the basis for its protests until the debriefing was held in this case.

The Board, therefore, first finds that the seven day period for the filing of a protest by Eisner could not have begun to run sooner than August 17, 2004.

At issue is whether the debriefing process ended on August 17, 2004 or, rather, at some later point in time.

There is clearly conflicting testimony and evidence of whether or not Eisner could and should have viewed the debriefing held on August 17, 2004 as having ended on that date.

As previously noted, the debriefing in this procurement began on August 17, 2004. Sharon Quinn (the procurement officer), Valerie Rolandelli (Ms. Quinn's supervisor), and David Freeman (UMUC Vice-President for Communications and a member of the technical evaluation committee), attended on behalf of UMUC. Sara Eisner attended the debriefing on behalf of Eisner Communications, Inc. At the outset of the debriefing, Ms. Rolandelli advised Ms. Eisner of the University System's policies on debriefings, including the prohibition on discussion of other offerors' proposals or individual evaluator's scores. In accordance with University System policies, the University representatives advised Ms. Eisner of the strengths and weakness of Eisner's proposal.

It is clear that Eisner: was not given the numerical weight of the individual technical categories at the August 17, 2004, debriefing; was not told that it had submitted the lowest price

proposal at the August 17, 2004 debriefing; and, was not given its own raw or normalized technical scores at the August 17, 2004 debriefing.

There is conflicting testimony on whether or not UMUC was prepared to answer questions about the scoring of Eisner's proposal at the August 17, 2004 debriefing.

For example, Mr. Freeman of UMUC testified that, at the beginning of the debriefing on August 17, 2004, Ms. Rolandelli "made clear that the scoring specifically would not be a topic of discussion" at the debriefing. Ms. Quinn and Ms. Rolandelli, however, both indicated in their testimony that they were prepared to discuss Eisner's scoring at that meeting.

It is clear from Ms. Eisner's testimony that Ms. Eisner, at least, felt that more information was to follow the August 17, 2004 meeting and that the debriefing process remained ongoing. Ms. Eisner testified that it was her view as a result of the meeting that the contract award "was still in process" and Eisner was still in the running for the contract.

In an email dated August 26, 2004, Ms. Eisner wrote that "[w]e would still like to know how we ranked numerically on each section of the proposal process (technical, oral, price) and if possible vs. our competitors."

This August 26, 2004 email illustrates that Ms. Eisner felt that more information was to follow the August 17, 2004 debriefing. It is also important to note that her email is not testimony months after the fact, but is, rather, contemporaneous evidence of her state of mind at the time of the events at issue.

In another email dated September 1, 2004 to Ms. Rolandelli and Ms. Quinn, Ms. Eisner stated that "[w]hat I was hoping was that since you were not able to give me the rankings when we debriefed a few weeks ago (I think Sharon said I couldn't get the rankings at the time because you were still in process), I was hoping to now be able to complete the debriefing and find out how

we ranked by comparison to our competitors.”

Once again, this September 1, 2004 email provides further evidence of Ms. Eisner’s view of the debriefing process at the time of the events at issue and bolsters her contention that the debriefing process was ongoing at that point in time.

UMUC eventually decided, “in a spirit of cooperation” as they put it, to give the additional information requested to Eisner. Pursuant to that decision, Ms. Rolandelli and Ms. Eisner had a telephone conversation on September 15, 2004. During that conversation, Ms. Rolandelli provided information regarding Eisner’s scoring.

During the September 15, 2004 telephone conference UMUC gave Eisner information on scoring that enabled Eisner to determine information concerning both its own score and (through deduction) the score of Grey Direct.

As a result of information received during the September 15, 2004 telephone conference with UMUC, Eisner filed its first protest on September 20, 2004.

Eisner received various documents from UMUC on October 28, 2004 and filed its second protest on November 4, 2004.

Eisner received still more documents from UMUC on November 15, 2004 and filed its third protest on November 22, 2004.

A protestor may properly delay filing its protest until after a debriefing where information provided to the protestor earlier left uncertain whether there was any basis for protest. United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989) at p.16. In addition, it is appropriate to resolve such doubts about timeliness in favor of the protestor. *Id.*

In this case, there is clearly uncertainty on when the debriefing process ended. It is clear, however, that various participants in the August 17, 2004 debriefing had differing views on what information that meeting could and did provide to

Eisner and where the debriefing process stood at the conclusion of that meeting. It is also clear that Eisner did not have a basis for its first protest until it received the information it actually received on September 15, 2004.

Importantly, at no point in time before September 15, 2004 did UMUC advise Eisner of its current position - i.e. that the debriefing process ended on August 17, 2004.

For purposes of Respondent UMUC's motion to dismiss, the Board finds that there are clearly doubts as to when Eisner could have and should have known the basis for its first appeal. These doubts will be resolved in favor of the protestor Eisner.

For purposes of the motion to dismiss, therefore, the Board finds that Eisner could have and should have known the basis for its first protest on September 15, 2004. Eisner filed its first protest on September 20, 2004, within the seven day period set out in USM PP&P §X.B.

Eisner's first protest was, therefore, filed in a timely fashion and Respondent's motion to dismiss the first protest is denied.

After consideration of the facts and arguments presented, the Board also declines to grant the Motion to Dismiss as to the second and third protests filed herein as well.

II. Eisner's Appeals-Introduction

Appellant Eisner raised a number of issues during the course of these protests and appeals. Eisner's post-hearing brief focuses on three claims for appeal relief. Since the Board finds no basis for appeal in the other issues raised throughout the appeal process by Eisner, it will discuss consider these three claims specifically in rendering a decision as to the merits of Eisner's appeals.

These claims involve issues relating to: Ms. Rolandelli's telephone call with Grey Direct on April 13, 2004; Grey Direct's best and final price offer; and, the weighting and scoring of the Minority Business Enterprise (MBE) and Economic Benefit factors in the evaluation process.

We first note that this Board has been very clear on its role in reviewing the decisions of evaluators of proposals submitted in response to Requests for Proposals (RFP) in a competitive negotiation¹:

The competitive negotiation process is used when an award cannot be based solely on price. It involves an evaluation of technical factors as well as price in order to determine which proposal is most advantageous to the State. The evaluation of technical factors requires the exercise of discretion and judgement which is necessarily subjective. B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58 (1983). Moreover, such an evaluation is competitive in nature in that the proposals are considered in relation to one another. Ardinger Consultants and Associates, MSBCA 1890, 4 MSBCA ¶383 (1995). Thus, the determination of the relative merits of the various proposals is a matter for the procuring agency. This determination is entitled to great weight. The role of the Board of Contract Appeals is not to substitute its judgement for that of the agency. Accordingly, the Board "will not disturb an agency's determination regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations." Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994) at pp. 5-6 quoting AGS Genasys Corp., MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 12.

Raid, Inc., MSBCA 2197, 5 MSBCA ¶485 (2000) at p. 5.

¹ The Board has used the terms "competitive negotiation" and "competitive sealed proposal" interchangeably over the years and continues that practice herein.

The Board has emphasized that:

It is not the function of this [Board] to evaluate proposals in order to determine their relative technical merits. The contracting agency is responsible for determining which technical proposal best meets its needs, since it must bear the major burden for any difficulties incurred by reason of a defective evaluation. Accordingly, we have consistently held that procuring officials enjoy "a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award," and that such determinations are entitled to great weight and must not be disturbed unless shown to be unreasonable or in violation of the procurement statutes or regulations. (Underlining added) (Citations omitted).

United Technologies Corp. and Bell Helicopter, Textron, Inc.,
supra, at pp. 58-59.

This 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. The law in Maryland regarding competitive negotiations is clear. In a procurement by competitive sealed proposal, the process of weighing the technical merits is a subjective one that relies on the business and technical judgment of the Procurement Officer. Information Control Systems Corp., MSBCA 1198, 1 MSBCA ¶ 81 (1984). The evaluation of proposals in a competitive negotiation procurement is a matter left in the Procurement Officer's sole discretion after receiving the advice of an evaluation panel, if one is used. United Communities Against Poverty, Inc., MSBCA 1312, 2 MSBCA ¶ 144 (1987). The MSBCA may overturn a procurement officer's determination to award to an offeror only if the procurement officer acts unreasonably, abuses discretion, or fails to follow a legal requirement in making that award. *Id.*, at

p. 10.² This Board has expressed reluctance to substitute its judgment for that of an agency, in part because it is the procuring agency that will have to “live with the results” of its decision. Klein’s of Aberdeen, MSBCA 1773, 4 MSBCA ¶ 354 (1994) at p. 7.

For example:

When evaluating the relative desirability and adequacy of proposals, a procurement officer is required to exercise business and technical judgment. Under such circumstances, a procurement officer enjoys a reasonable degree of discretion and, for this reason, his conclusions may not be disturbed by a reviewing board or court unless shown to be arbitrary or arrived at in violation of Maryland’s Procurement Law.

Baltimore Motor Coach Company, MSBCA 1216, 1 MSBCA ¶94 (1985) at p. 10.; B. Paul Blaine Associates, Inc., *supra*, at p. 14.

Mere disagreement with the evaluation of proposals or the recommendation for an award is insufficient to meet an appellant’s burden to show that the evaluation of proposals, and/or the award of a contract, has been unreasonable. Delmarva Community Services, Inc., MSBCA 2302, 5 MSBCA ¶523 (2002) at p. 5. The Board does not second-guess an evaluation of a proposal, but will determine whether or not a reasonable basis exists for the conclusions reached. Baltimore Industrial Medical Center, Inc., *supra*, at p. 5.

² See also, RAID, Inc., *supra*; B. Paul Blaine Associates, Inc., *supra*; Baltimore Industrial Medical Center, Inc., *supra*; and, AGS Genasys Corp., *supra*.

The contest of an 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. *E.g.*, Delmarva Community Services, Inc., *supra*, at p. 5; Astro Painting and Carpentry, Inc., MSBCA 1777, 4 MSBCA ¶355 (1994) at pp.8-9; AGS Genasys Corporation, *supra*, at p. 10; Xerox Corporation, MSBCA 1111, 1 MSBCA ¶948 (1983). Bias will not be attributed to procurement officials or those engaged in a procurement process based on inference or supposition. W. M. Schlosser Company, Inc., MSBCA 2126, 5 MSBCA ¶465 (1999) at p. 5; B. Paul Blaine Associates, Inc., *supra*. "Bias must be demonstrated to exist by substantive hard facts or evidence." Benton & Associates, MSBCA 2196 and 2201, 5 MSBCA ¶487 (2000) at p.6. The existence of actual bias for or against an offeror must be shown to be present. Benton & Associates, *supra*, at p. 6.

As the party seeking to disturb the Procurement Officer's decision, Eisner bears the burden of proof and must establish, for example, that the Procurement Officer's recommendation to award to Grey Direct was "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., *supra*, at p. 59.

This Board has, however, also stressed the importance of insuring competition among offerors on an equal basis. *See, e.g.*, United Technologies Corp. and Bell Helicopter, Textron, Inc., *supra*, at p.59; Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116 (1985); B. Paul Blaine Associates, Inc., *supra*. COMAR recognizes the importance of equal treatment of offerors in 21.05.03.03C.(3)(a) in stating that "offerors shall be accorded

fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarifications of proposals.”

III. The April 13, 2004 Telephone Conversation

With such guidelines established, the Board will now consider Eisner’s claims. Eisner first claims that a telephone conversation between Ms. Rolandelli of UMUC and Larry Kimmel of Grey Direct was improper and gives rise to several appealable issues. Eisner claims that an improper disclosure of evaluation criteria and other information occurred during this telephone conversation between Mr. Kimmel and Ms. Rolandelli on April 13, 2004. Eisner asserts that UMUC took a number of improper actions favoring Grey Direct - in particular Grey Direct receiving favorable treatment in the evaluation of the Economic Benefit and MBE Participation category (“particularly because of the April 13 telephone call, in which Ms. Rolandelli gave Grey Direct material information about how the proposals would be evaluated, including the diminished importance of the Economic Benefits category”). Eisner also claims that the evaluation method was changed to conform to what Grey Direct had been told during this telephone conversation. Eisner also asserts that information concerning the alleged altering of the evaluation method was not shared with any of the other offerors.

After a review of these claims, the Board does not agree with Eisner contentions and will deny Eisner’s appeals concerning the April 13, 2004 telephone call and related matters.

On April 13, 2004, in response to an email from Mr. Kimmel of Grey Direct, Ms. Quinn and Mr. Rolandelli telephoned Mr. Kimmel and left a message for him to return the call. Mr. Kimmel returned the telephone call and spoke to Ms. Rolandelli (Ms. Quinn did not participate in the conversation). Ms. Rolandelli testified that, among other things, she told Mr. Kimmel that the

Economic Benefit category "was not an in-state preference,"³ that the evaluation criteria were listed in order of importance and Economic Benefit to the State was listed last, and that out-of-state firms could address that factor by dealing with aspects such as maximizing enrollment. She also told Mr. Kimmel that pursuant to his request, she would extend the technical proposal due date to April 22nd so that Grey Direct could prepare a response.

When she spoke with Mr. Kimmel, Ms. Rolandelli had Ms. Quinn's draft of RFP Addendum #3 in her possession. In order to document her phone call with Mr. Kimmel and to share the information given to Grey Direct during that telephone conversation with the other vendors, she revised RFP Addendum #3 to include the information given to Grey Direct and added the extension of time to April 22' 2004. She sent the revised addendum to Ms. Quinn for issuance the following day.

Eisner ascribes enormous importance to an email statement of Mr. Kimmel which was sent on April 14, 2004 to Sharon Quinn concerning the April 13, 2004 telephone conversation between Mr. Kimmel and Ms. Rolandelli. In that email, Mr. Kimmel stated that:

Based on the information that she [Rolandelli] provided - that the deadline is now April 22nd and that the "Economic Benefit" is not a key selection criteria - we will participate in the process.

Based on this one sentence, Eisner has deduced a host of appealable grounds in this case.

For the reasons that follow, the Board finds Eisner's arguments and assertions concerning the April 13, 2004 telephone call, the April 14, 2004 email, and other related assertions without merit.

Eisner's views the April 13, 2004 telephone call between

³ The Board of Public Works defines a Maryland business as one with a Maryland office. BPW Advisory No. P-003-95 (3rd revision).

Rolandelli and Kimmel as an improper *ex parte* communication. The Board does not agree. Ms. Quinn was named as the Procurement Officer in the RFP. Ms. Quinn's authority as a procurement officer derives from a delegation of authority from Ms. Rolandelli, who supervises her work. As Ms. Rolandelli testified, she could delegate authority, but not responsibility and accountability, and it was her responsibility to ensure that this procurement was done correctly.

Indeed, throughout this procurement, the record indicates that Ms. Rolandelli and Ms. Quinn worked together to manage the RFP process and stood in for each other as the needs of the procurement required. The offerors, including Eisner, understood this and exchanged numerous communications concerning this procurement to both Ms. Quinn and Ms. Rolandelli. See, e.g., UMUC Second Supplemental Agency Report, Exhibit 3 (6/10/04 email from Sara Eisner, sent to both Ms. Rolandelli's and Ms. Quinn's email addresses, and beginning, "Dear Sharon and Val"); UMUC Second Supplemental Agency Report, Exhibit 9 (6/15/04 email from Sara Eisner, sent to both Ms. Rolandelli's and Ms. Quinn's email addresses, and beginning, "Dear Sharon and Val"); and, UMUC Second Supplemental Agency Report, Exhibit 11 (6/24/04 email from Sara Eisner, sent to both Ms. Rolandelli's and Ms. Quinn's email addresses, and beginning, "Dear Sharon and Val"). Given these facts, Eisner has little room to complain that it was inappropriate for Grey Direct to communicate directly with Ms. Rolandelli.

Likewise, it is clear that Eisner engaged in its own "ex parte" communications with UMUC regarding this procurement. See, UMUC Second Supplemental Agency Report, Exhibits. Nos. 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, and 16. Neither Grey Direct nor other offerors were directly privy to these conversations. Such communications are, however, common in a competitive negotiation process and are normal, appropriate, and legal during such a

process.

UMUC is required to seek broad based competition for its procurement contracts. USM PP&P § III. *See also, State Finance and Procurement Article, Annotated Code of Maryland, §11-201(a)(4)*. On April 13, 2004, Grey Direct sent Ms. Quinn an email stating that it would not be responding to the procurement solicitation because it felt disadvantaged since it did "not have an operation in Maryland." Appellant's Exhibit 25. Ms. Rolandelli's testified that, "it's my job as a procurement official for the State to make sure that we have not disadvantaged anyone, and that we have conducted an open procurement." Pursuant thereto, she and Ms. Quinn placed a telephone call to Grey Direct. A message was left for Grey Direct's representative to return the call.

There was there nothing improper or unusual in this communication between the UMUC and Grey Direct. Quinn and Rolandelli were acting appropriately - in accordance, for example, with UMUC Procurement Policies which focus on increasing competition.

In doing so, Ms. Rolandelli also followed a Board of Public Works' (BPW) directive that Maryland law *does not* support a preference for Maryland-based companies, and which *requires* State agencies to procure goods and services in a way that ensures the broadest competition. If Grey Direct did not respond because it believed an operation in Maryland was required, it would narrow the competition on a basis that was arguably contradicted by Maryland law. See BPW Advisory P-004-96 (UMUC Agency Report, Exhibit T) ("The economic-benefits evaluation factor is NOT a resident business preference. This factor may NOT be used to provide competitive advantages to one business over another based upon the business' location. Preferences based on residency are not authorized by law, regulation or policy.") (emphasis in original).

Concerning the telephone call itself, Eisner claims that Ms. Rolandelli must have told Mr. Kimmel that Economic Benefit to the State was not "a key selection criteria" because Mr. Kimmel's email of April 14, 2004 says that is what she said. Ms. Rolandelli's sworn testimony, however, disputes Mr. Kimmel's assertion and is consistent with the revised addendum she drafted immediately following the conversation. Moreover, it is not hard to conclude that when Ms. Rolandelli told Mr. Kimmel that the evaluation criteria were listed in order of importance and that Economic Benefit was listed last, Mr. Kimmel could conclude, on his own, that Economic Benefit was not a "key" evaluation criteria.

The Oxford Dictionary defines "key" as "of crucial importance." Mr. Kimmel was entitled to conclude, and - importantly - it does not undercut Ms. Rolandelli's credibility, that if a factor was listed as fourth out of four criteria in importance, it was not "of crucial importance."

This Board will not require this procurement to be redone because of a potential offeror's misinterpretation of something that he was told by Ms. Rolandelli during a telephone conversation.

In addition, the Board finds that Grey Direct was given no information that was not immediately shared with other vendors by UMUC.⁴

The Board finds that Eisner has failed to prove: that Ms. Rolandelli's conversation with Grey Direct was in any way improper, or was prejudicial to Eisner - or to any other offeror for that matter; that any improper disclosure of evaluation criteria and other information occurred during the telephone conversation between Grey Direct's representative Mr. Kimmel and Ms. Rolandelli on April 13, 2004; that UMUC took any actions

⁴ Since Ms. Rolandelli and Mr. Kimmel's conversation took place after business hours, Ms. Rolandelli placed the information in the addendum which was to be, and was in fact, circulated the next day to all vendors.

favoring Grey Direct - in particular giving Grey Direct favorable treatment in the evaluation of the Economic Benefit and MBE Participation category; that the evaluation method was changed by UMUC to conform to what Grey Direct had been told during this telephone conversation; and, that any information concerning the alleged altering of the evaluation method was not shared with any of the other offerors.

We reiterate: the contest of an 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. Bias will not be attributed to procurement officials or those engaged in a procurement process based on inference or supposition. Bias must be demonstrated to exist by substantive hard facts or evidence. The existence of actual bias for or against an offeror must be shown to be present in a procurement.

In regard to the April 13, 2004 telephone conversation between Ms. Rolandelli and Mr. Kimmel, Eisner has not met its burden and its appeals regarding this telephone call and related issues and claims are denied.

IV. The Grey Direct BAFO

Eisner next claims that UMUC improperly decided to receive Best and Final Price Proposals/Best and Final Offers (BAFO).⁵ Eisner alleges that this was done "for the stated purpose of inducing Grey Direct to lower its price, so that Grey Direct, which had submitted a slightly higher-ranked technical proposal, would win the overall evaluation."

This assertion is supported by conjecture and by one statement from a hand-written document of notes taken by Ms.

Quinn at a meeting (Appellant's Exhibit 47) that a goal of the Best and Final Price Proposals was to "induce Grey price to come down."

Without belaboring the obvious, the Board must point out that one goal of any Best and Final Price Proposal round is to induce bidders to lower the price they are bidding. That lowers the bid price and saves the State money. Such is clearly not an impermissible goal. See, e.g., *State Finance and Procurement Article, Annotated Code of Maryland, §11-201(a)(7)*.

The Board must also point out that not only did Grey Direct reduce its price in the Best and Final Proposal round, Eisner did as well - and Eisner, therefore, remained the lowest-priced offeror. In the process the taxpayers of Maryland saved money.

As the Board has noted throughout this opinion, the procurement officer here enjoyed substantial discretion as to the recommendation of award of the contract. Frankly, Eisner's dark hints that UMUC had already decided on awarding the contract to Grey Direct and that the Best and Final Price Proposal Round was held solely to benefit Grey Direct ignores important facts, including the fact that Grey Direct had already submitted a higher-ranked technical proposal than Eisner, and that the procurement officer had, in any case, the discretion to award the contract to Grey Direct with or without a round of Best and Final Price Proposals.

The Procurement Officer, Ms. Quinn, testified that in addition to inducing Grey Direct's price to come down, the Best and Final Price Proposal round was needed because "Eisner's price was not complete" and "did not include everything in it". An opportunity was, therefore, needed to allow Eisner an opportunity to clarify its final price.

⁵ Authorization for requesting Best and Final Price Proposals was in the RFP. RFP §4.4 3. at p. 25. Authorization for requesting Best and Final Offers was similarly located within the RFP. RFP §4.5. at p. 25. Authorization for Best and Final Offers also rests in statute. *State Finance and Procurement Article, Annotated Code of Maryland, §13-104(d)(2)(iv) and (v)*.

The fact that UMUC went to the BAFO process, therefore, benefited not just Grey Direct, but Eisner itself as well.

The RFP enumerated an evaluation process involving multiple-step technical proposals, oral presentations, short-listing, and financial proposals, all of which were followed by UMUC. UMUC adhered to the University System's Procurement Policies and Procedures regarding the content of proposals, notice, discussions, clarifications, and evaluation. See USM PP&P § V.C. The Procurement Officer's decision to request a best and final proposal was in accordance with these Procurement Policies (and expressly authorized by the RFP). For example, without such a best and final proposal, the University would have been faced with what appears to have been one complete offer (by Grey Direct) and one incomplete offer (by Eisner), not allowing for the type of broad competition that is the goal of any state procurement. See USM PP&P at § V.C.11 (allowing the University to request best and final offers when the Procurement Officer determines it is in the "best interest of the University").

Once again, Eisner has failed to meet its burden and this protest and appeal ground is denied.

As to the allegations concerning the submission of two different and inconsistent price components by Grey Direct, the Board finds no basis for a sustainable appeal.

After opening the BAFO's, Ms. Quinn and Ms. Rolandelli noticed that the monthly retainer contained in Grey Direct's BAFO did not reflect other reduced rates found in the BAFO. Ms. Rolandelli contacted a Mr. Traino from Grey Direct. Mr. Traino confirmed that the monthly retainer should have been reduced to reflect the reduced rates, thereby clarifying Grey Direct's final price.

Eisner would have the Board find that this minor clerical error of Grey Direct's renders Grey Direct's BAFO ambiguous and in non-compliance with the RFP. This the Board declines to do.

Ms. Quinn noticed a seeming inconsistency in Grey Direct's BAFO. Rather than reject the BAFO, Ms. Quinn exercised her discretion as the Procurement Officer to contact Grey Direct directly in order to clarify the matter.

Adopting Eisner's view would result in a finding that a minor error or inconsistency in a BAFO should result in that BAFO's rejection by a procurement officer. Such rejections would result in fewer offers and less competition. It is difficult to see how such hyper-technical rejections of otherwise legitimate offers would increase competition in the procurement process, result in savings to the taxpayers from increased competition for state contracts, and otherwise further the goals of state procurement law. See, e.g., *State Finance and Procurement Article, Annotated Code of Maryland, §11-201(a) (1), (2), (6), (7), and (8); Id., §11-201(b)*.

Eisner's view would not foster competition and would mandate the rejection of an offer for a minor, technical mistake in a BAFO. Such an action is inconsistent with the general purposes of procurement law - in particular fostering competition among as many offerors as possible. *Id.*

Such a view would also directly contradict the policy of allowing procurement officers discretion for decisions of this very type during the procurement process.

In this situation, it was Ms. Quinn's call to make. She made her decision and the Board finds no reason to overrule that decision and that exercise of procurement officer discretion.

Eisner further claims that UMUC submitted a best and final price proposal which failed to comply with the RFP. Eisner asserts that its "third protest and appeal hinge on the legal implications of the "incentive compensation plan" included in Grey Direct's best and final price proposal." Eisner submits that Grey Direct's response to UMUC's request for BAFO's was ambiguous and did not comply with the RFP - specifically arguing that Grey

Direct submitted two different and inconsistent fixed price components, and that added a component calling for incentive bonus payments from UMUC to Grey Direct.

This issue involves language included in Grey's cover letter to the BAFO and an attachment to the revised BAFO entitled "Driving Profitable Enrollment" (Appellant's Exhibit 48). The specific language at issue in Grey Direct's cover letter to the BAFO states:

Our revised price plan reflects two key changes:

1. We have reduced the hourly rate by 18%. This has lowered the overall price by more than \$220,000.
2. We would like to work with you to develop a mutually agreed-upon incentive compensation plan.

At Grey Direct, we believe that we should profit only when our client's profit. To demonstrate our commitment to this mission, we are willing to place a portion of our compensation at risk.

Appellant's Exhibit 48.

The document enclosed with the BAFO entitled "Driving Profitable Enrollment" states, in part:

Grey Direct believes that we should profit when our clients profit. In the spirit of this partnership, we are proposing to include an incentive compensation clause in the contract. We are willing to work with you to identify a mutually agreed upon structure that ensures growth for UMUC and an opportunity for Grey Direct to regain reduced fee income.

Id.

The Board does not agree with Eisner's interpretation of these writings and their effect on Grey Direct's BAFO. The Board finds that Grey Direct's statements in the cover letter and in the "Driving Profitable Enrollment" enclosure were mere statements of a desire on the part of Grey Direct of its hope to develop, in the future, some type of incentive plan with UMUC

which would be mutually acceptable to both parties.

The language at issue is vague. The language did not expressly make the incentive compensation plan proposal part of the BAFO. The BAFO of Grey Direct was not contingent upon UMUC accepting the incentive compensation plan proposal and there was and is clearly no obligation on the part of UMUC to include any such compensation plan in the final contract.

As noted by Ms. Quinn during her testimony, no incentive plan of any kind was discussed or considered in this proposal by the procurement officials.

In a negotiated procurement a proposal that fails to conform to the material terms and conditions of a RFP is unacceptable and cannot form the basis for an award. In this case, however, the Board finds that the Grey Direct BAFO does conform to the material terms and conditions of the RFP (and its addendums), was acceptable to UMUC, and can, therefore, form the basis for an award.

Through RFP Addendum #9, the University invited Grey Direct and Eisner, the two remaining short-listed firms, to submit best and final offers. RFP Addendum Number #9 enclosed a "Best and Final Price Form," and stated explicitly that "no changes, alterations or additions to the Best & Final Price Form are permitted."

Grey Direct's best and final offer complied with the requirements of the RFP and with RFP Addendum #9. Grey Direct's price proposal was completed as specified and signed. Each page was initialed. The chart was completed, a monthly retainer stated, with no qualifying statements or references to any other documents. The signature page was completed by an officer of the company, with the required witness. With no caveats or conditions, it lowered its rates so that its annual cost was reduced by \$220,000. Appellant's Exhibit 48.

Grey Direct completed the price proposal form exactly as

specified in the RFP. An officer of the company signed the signature page and made no changes to the format of the document. It placed no conditions, reserved no rights, and submitted actual rather than average rates. Grey Direct's price proposal form is complete and unconditional.

In its cover letter to the price proposal form, Grey Direct stated that it "would like to work with [UMUC] to develop a mutually agreed-upon incentive compensation plan." It also states that the proposed "mutually agreed upon incentive compensation plan" is a "key change" to Grey Direct's price plan.

To the extent there is any basis for Eisner's protests and appeals of Grey Direct's BAFO, it lies in these statements from the cover letter. Eisner has a legitimate argument that Grey Direct considered the incentive compensation plan a "key change" and that such a key change makes Grey Direct's BAFO a non-conforming proposal which must be considered by UMUC to have been a counter-proposal and should have been rejected.

Testimony made it clear, however, that, to the very limited extent that the language concerning Grey Direct's incentive compensation plan idea that was contained in the BAFO cover letter was even considered by UMUC (and testimony indicates it was largely ignored by the Procurement Officer) any such suggested compensation plan was summarily dismissed by UMUC. Testimony clearly indicates that at no time since the submission of Grey Direct's BAFO have there been any discussions between Grey Direct and UMUC concerning adding an incentive compensation plan to the contract. As for the "Driving Profitable Enrollment" Document, both Ms. Quinn and Ms. Rolandelli testified that they had never even seen the document until after protests and appeals were filed by Eisner.

Importantly, Ms. Quinn also noted that the language of the cover letter concerning this incentive proposal meant nothing to her, stating "[I] didn't even consider it because I only looked

at the price proposal form.”

The statements of the cover letter and the additional marketing materials sent along with the price proposal form by Grey Direct to UMUC represented mere suggestions to possibly discuss with UMUC something that would be “mutually agreeable” at some future time, and did not serve to add a caveat to its complete price proposal form. Rather, the statements reflected a willingness to consider alternatives, if such alternatives were acceptable to Grey Direct and UMUC. UMUC was free to ignore this suggestion (as it did), and use the prices proposed as the basis for a binding contract.

Grey Direct’s offer was not contingent. It filled out the price proposal form without a caveat. Its reduction in price was not contingent upon the acceptance of any type of “incentive compensation plan.” The best and final price proposal form is a complete document, in and of itself.

The cover letter made no reference to a separate document and did not link the completed price proposal form with any other document. Appellant’s Exhibit 48. Simply delivering a separate document along with the price proposal did not, in this case, serve to modify what was and is the legally complete price proposal.

The separate document, entitled “Driving Profitable Enrollment—A Staffing Model for Optimized Marketing” does not indicate that it is anything other than a marketing document, or as Ms. Rolandelli stated, “an executive summary” of Grey Direct’s technical proposal. The document was not attached to the price proposal, merely enclosed. Besides reiterating the notion from the cover letter that Grey Direct was “willing to work with” the University to identify a “mutually agreed upon” incentive compensation program, it provided no further details of how such a program would work. There was no suggestion of what the criteria would be or what measurements would be used to judge

success or failure. There was no discussion of any dollar amount for such a program. Appellant's Exhibit 48.

Instead, the document is full of marketing jargon, discussing how Grey Direct planned to work with the University, including discussing Grey Direct's "brand-building" practice with a "highly strategic approach." *Id.* It discussed the goals of increased enrollment and increased UMUC brand preference. *Id.* For much of its length, the marketing document discussed how it would approach each project or assignment from the University, which was information repeated from Grey Direct's technical proposal. It included a copy of the Price Proposal Form chart, listing employees, job titles, hourly rates, and projected costs. *Id.* It reviewed the names and qualifications of members of a "core team" and a "day-to-day team." It reviewed what was to be included in the agency fee (which it reconfirmed was \$983,070, an 18% reduction from the prior plan) and what was to be excluded. It does not, significantly, state this reduced price excludes a "bonus compensation" plan. Consistent with the Best and Final Price Proposal Form which stated that the retainer would be adjusted to reflect actual expenses incurred, the marketing document states that actual staffing will depend on the University assignments, and that the prices will be revised to reflect the actual work. Its summary makes no mention of any bonus compensation plan, but rather states:

We hope you see that our staffing plan demonstrates how our approach to your business challenge is a reflection of the dedication, commitment and passion that we will bring to the UMUC business every day. We know it will make a difference in your ability to expand market share. Let's go to work today.

At no point in this marketing document does Grey Direct state that it is amending or withdrawing its price proposal. As Ms. Rolandelli testified, the contract would reference the

technical proposal only for the staff proposed and the MBE commitment. The University would not include the entire proposal because it exists for evaluation purposes only, with plans of action and schedules which have not been discussed with the University. Likewise, the final contract might include the best and final offer by reference, but it would also specifically reiterate the agreed to price terms in the body of the contract. The contract would not include the "Staffing Model for Optimized Marketing" document because it is not part of the price proposal.⁶ UMUC did not agree to a bonus plan and has stated that it does not plan to agree to one in the future, and the resulting contract with Grey will not contain a bonus plan. Grey Direct, through counsel, has agreed with UMUC that Grey Direct's price proposal was not contingent on any hoped-for bonus compensation plan, and that Grey Direct's commitment under the BAFO is unconditional.

Eisner's argument that UMUC would not be able to bind Grey Direct to the price set forth in the price proposal form alone because of the language of the cover letter and the "Staffing Model for Optimized Marketing" document does not persuade the Board.

The fact that Grey proposed to UMUC to attempt to develop a mutually agreed-upon incentive compensation plan did not require the procurement officer to reject Grey's entire proposal.

A case of interest is Baltimore Motor Coach Company, *supra*, where the Board found that an Appellant's offer did not comport with the requirements of an RFP, with the result that the contracting agency could not accept the proposal without amending the RFP to allow all offerors the same opportunity to submit proposals on an equal basis.

⁶ During the appeal of this matter, Ms. Quinn and Ms. Rolandelli both read for the first time the marketing information supplied by both vendors with their best and final offers. Ms. Rolandelli testified that the "Driving Profitable Enrollment" document was not considered in the contract

In reaching this conclusion, the Board noted:

Appellant, in effect, substituted an alternative proposal for consideration by the SAA [State Aviation Administration]. In a negotiated procurement, this is not prohibited unless the RFP specifically excludes such an approach. If a procurement officer determines that an alternate approach would serve the State's needs, he is obligated to amend the RFP to permit all other offerors to compete on an equal basis. Otherwise, he may reject the alternate proposal as unacceptable. A procurement officer's refusal to recognize an alternate proposal or his rejection of that proposal is a matter of discretion which will not be disturbed absent a clear showing that his action was arbitrary or unreasonable.

Baltimore Motor Coach Company, *supra*, at p. 17, Footnote 7

(citations omitted).

In this case, there has been testimony that the proposal to develop an alternate incentive compensation plan was never considered by the procurement officials. As was noted in Baltimore Motor Coach Company, *supra*, there is no requirement that the procurement officer in this case must specifically reject the alternative proposal outright. If, on the other hand, the alternate proposal was going to be considered, then the procurement officer would have had an obligation to amend the RFP to permit Eisner to compete and offer a plan as well. Since the procurement officer did not consider the proposal for an incentive compensation plan, there was clearly no prejudice to Eisner and the procurement officer's failure to specifically reject any such alternate proposal was not improper.

Eisner's arguments concerning Grey Direct's BAFO are not persuasive.

evaluation and award process.

V. The Weighting and Scoring of Economic Benefit and MBE

In this case, the numerical evaluation scores of Grey Direct and Eisner were very close. It is, however, clear from the testimony that based on the entire evaluation process, UMUC reached the conclusion that Grey Direct was better suited to UMUC's needs under this contract and was more advantageous to the state than was Eisner.

A situation similar to the case at hand was the subject of appeal in United Technologies Corp. and Bell Helicopter, Textron, Inc., supra, (Bell Helicopter). In that case, the scoring of contract proposers was also very close.

As noted in the concurring opinion of two Board members in that case, the point difference between the proposers was minimal:

Under such circumstances, selection officials may decide that they cannot determine proposal superiority strictly on the basis of point scores when they are close, given that point scores themselves have a subjective basis. They therefore may use their personal, reasonable business and technical evaluation skills to determine in their judgment the superior proposal. MEHAC [the Maryland Executive Helicopter Advisory Committee] functioning as an evaluation and advisory entity had the reasonable discretion to determine that the Aerospatiale and Bell proposals were technically equivalent even had Bell received a technical point score numerically higher than that of Aerospatiale.

Bell Helicopter, supra, at pp. 61-62 (citation omitted).

In language of note to the case at hand, the concurring Board members found that:

Accordingly, our determination that the State actions were reasonable and not illegal

does not turn on whether MEHAC selected factors within the solicitation and reweighted them and re-evaluated them to resolve the perceived scoring closeness in total points. Our determination turns on the fact that MEHAC essentially looked past the point scores under circumstances where there were equivalent proposals and helicopters and did what the Maryland General Procurement Law and regulations require it to do. It used its business and technical judgment in recommending the most advantageous offer based on price and evaluation factors.

Bell Helicopter, *supra*, at p. 64.

The opinion concluded that the protestors had not met their burden of proving: that the award was unreasonable, arbitrary, or an abuse of discretion; that the procurement procedures followed involved clear and prejudicial violations of applicable statutes or regulations; or, that the contract award was clearly illegal as being outside the statutory standard requiring award in a competitively negotiated procurement to the responsible offeror whose proposal, or best and final offer, is determined to be most advantageous to the State considering price and the evaluation factors set forth in the solicitation. Bell Helicopter , *supra*, at pp. 65-66 (citations omitted).

In this case, the scores between Grey Direct and Eisner were also very close. Eisner has spent an enormous amount of time and effort suggesting how the Board should re-score certain factors to give Eisner a few extra points in order to allow Eisner to numerically beat out Grey Direct. Eisner's efforts are extraordinary - efforts that are so far-reaching that Eisner even discusses the thickness and style of the handwriting on one scoring document (Appellant's Exhibit 8) in an effort to support its case for appeal.

The extraordinary lengths Eisner goes to, however, illustrate exactly why deference must be shown to procurement officials. Eisner would not only have the Board rescore one part

- but only one part - of the technical evaluation, they would have the Board investigate handwriting style and thickness in order to justify such a decision.

There may well be situations where the exhaustive investigation suggested by Eisner is necessary in reviewing a procurement - but this case clearly is not one of them.

Even if we adopted Eisner's tortured point methodology - and, notably, also ignored evidence adduced at the hearing that Eisner's own technical score might well need reconsideration and lowering - and the resulting re-scored point totals gave Eisner a point or two margin over Grey Direct such a result, in and of itself, would not sustain Eisner's appeals.

That is the case because such points and such scores were merely advisory in nature in this procurement, not binding. As pointed out by Ms. Rolandelli:

[W]e don't use the points per se. We look at all of the weaknesses and strengths through the entire evaluation. We just use them as guidelines. And when we stepped away from those scores and with the concerns that came out during the price evaluation regarding the technical ability of the firm, we felt that it was in University College's best interest, and that their goals would be achieved more with Gray [sic] Direct than with Eisner.

Both the RFP and Maryland procurement law and regulations do not make numerical ratings determinative. Ms. Rolandelli and Ms. Quinn both testified that they concluded, based on their consideration of the evaluation factors set forth in the RFP and their review of the entire evaluation process, that Grey Direct represented the best value to the State and should be awarded the contract. That process was appropriate. *See, State Finance and Procurement Article, §13-104(f).*

Very tellingly, Eisner would like this Board to re-open the scoring as to one technical evaluation criterion (MBE/Economic

Benefit), but leave the others undisturbed. However, Ms. Quinn and Ms. Rolandelli both testified that after their discussions in June with Eisner, they concluded that Eisner's technical score over-estimated its technical capability. Thus, the Board would be forced to not only re-score Grey Direct but, in all fairness, the Board would have to re-score Eisner as well. Of course, since the Board was not actually involved in the evaluation process, any such re-scoring by the Board would be highly speculative and based on only a partial understanding of the entire evaluation process. This Board will not, therefore, substitute its judgment and adjust the scoring on one factor and conclude that the resulting technical score is somehow fairer and better reflects reality.

This Board recognizes that the scores given by different evaluators are necessarily subjective, and reflect both their technical expertise, as well as their consideration of factors that this Board is not in a position to either know or judge. For example, there was clearly discussion about MBE and Economic Benefit at Grey Direct's two hour oral session which was considered by the evaluation committee when making their ratings. Eisner asks this Board to undertake re-scoring when it is not privy to information such as this that was used by the committee members to reach their scores.

The evidence at the hearing indicated that there was a rational basis for the scores attributed to MBE and Economic Benefit. As to MBE, the UMUC was looking for a commitment of 10 percent, and was willing to score a higher commitment higher. UMUC considered the level of commitment from both Eisner and Grey Direct and insured that their approach to meeting the goal was realistic (both were according to UMUC and both noted that they intended to meet the goal through some of the same types of

subcontractors). Each identified potential subcontractors.⁷ All of Eisner's were MDOT-certified and none of Grey Direct's were MDOT-certified, so UMUC clarified with Grey Direct it understood the 10% subcontracting goal. At the time this RFP was issued, Maryland law did not require any commitment to a particular MBE in a bid or proposal.

Ultimately, Eisner was awarded a near-perfect score and Grey Direct was given a lesser score.

As to Economic Benefit, Grey Direct's score reflected its commitment to raising revenues to the State through increased enrollment. Likewise, Grey Direct and UMUC had discussions at the oral presentation regarding Economic Benefit, such as opening a Maryland office and hiring a local representative.

In sum, Eisner has failed to adequately prove its claim that this scoring was anything other than rationally based. There is not sufficient evidence to permit and require this Board to substitute its judgment for that of the Evaluation Committee. Moreover, there is no basis for this Board to substitute its judgment for that of Ms. Rolandelli and Ms. Quinn, the procurement officer, who determined that Grey Direct's proposal represented the best value to the state.

As in Bell Helicopter, the decision makers in Eisner did what Maryland General Procurement Law and regulations required them to do - they used their technical and business judgment in recommending the most advantageous offer to the state.

The Board will not substitute its judgment for the judgment of the procurement officials and evaluators in this procurement because there is no compelling evidence showing that the judgment of these persons was arbitrary, capricious, irrational, or contrary to law.

⁷ At the time this RFP was issued, Maryland law did not require any commitment to a particular MBE in a bid or proposal. State Finance and Procurement Article, Annotated Code of Maryland, § 14-302(a)(5)(2004 Supp.). Subsequently, the law was amended to require an up-front commitment to particular MBE firms in any bid or proposal.

In fact, the procurement officials herein did precisely what the RFP, the Board of Public Works, and State law and regulations require. As the RFP itself noted: "[T]he Evaluation and Selection Committee will choose from among the highest rated proposals that one, which will best serve the interests of the University ..."

RFP §4.6 at p. 25.

The RFP specifically states that the recommendation for award shall come "from among the highest rated proposals", not from the highest rated proposal.

The RFP also specifically states that the evaluation committee, after considering the factors set forth in the RFP, will make recommendations for the award of the contract to the vendor(s) whose proposal(s) is/are determined to be the most advantageous to UMUC. RFP §5.5 at p. 26. Contract Award was to be made to the offeror(s) whose proposal best met the needs of the UMUC as determined by the Procurement Officer. In fact, had the procurement officer in this procurement awarded this contract to the offeror who scored the highest number of points based on the subjective judgments of evaluators, even though the procurement officer actually believed that another offeror's proposal was, in her judgment, more advantageous to the state, such an award might well have been considered to have been arbitrary, capricious, irrational, or contrary to law. *See, State Finance and Procurement Article, Annotated Code of Maryland, §13-104(f)*.

An Advisory of the Board of Public Works (BPW) provides valuable insight as to this matter. BPW Advisory No.: P-004-96, October 15, 1996 deals specifically with using economic benefits as a factor in evaluating competitive sealed proposals - exactly the situation at issue in this case. In discussing the evaluation of proposals when an economic benefit is a factor considered in a competitive sealed proposal solicitation, the BPW stated:

Proposals are evaluated to determine which

proposal is most advantageous to the State. The process involves applying the evaluation criteria contained in the RFP, comparing the proposals to each other, and ranking them from most to least advantageous. When used in the evaluation process, numerical point scores can be useful guides but should not be the sole factor in determining award. The key to sound decision-making is not the raw scores themselves, but the strengths, weaknesses, advantages, and deficiencies that the scores represent. Similar to any other evaluation factor, the economics-benefits factor must be evaluated on the overall merit of that aspect of the proposal, rather than on strict application of numerical evaluation points assigned to the subfactors.

BPW Advisory No.: P-004-96 §IV (underlining added)

Eisner reaches a different conclusion than the BPW. Eisner relies on A&R/Bowie Limited Partnership, MSBCA 1690, 4 MSBCA ¶316 (1992), for asserting that when numerical scores are utilized they are binding in determining which proposal represents what is the best value for the State.

Other Board cases, however, reach a different conclusion. For example, in the case of Systems Associates, Inc., *supra*, this Board found:

[U]nless a solicitation sets forth a precise numerical formula, with the price included as a factor, and provides that award will be made to the offeror whose proposal receives the highest number of points, award need not be made on that basis. In this regard, point scores, based on the use of an informal formula that compares technical evaluation and price, are merely guides for intelligent decision making by the selecting official. Where such a formula is not mandated by the RFP itself, the procurement officer clearly retains discretion to select the higher quality proposal as being the most advantageous to the State, even at a higher price. . . .

Id. at p. 15 (citations omitted). Likewise, in United

Technologies Corp. and Bell Helicopter, Textron, Inc., *supra*, this Board observed that “technical point ratings are useful as guides for intelligent decision making in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency.” *Id.* at pp. 42-43.

In addition, the already-discussed BPW Advisory No.: P-004 96 clearly states that, at least in proposals when economic benefit is utilized as an evaluation factor (as occurred herein), any point system utilized is not binding on a procurement officer.

Therefore, this Board expressly finds that the language - which is clearly dicta in any case - from A&R/Bowie Limited Partnership, *supra*, which asserts that when numerical scores are utilized in a procurement they are binding in determining which proposal represents what is the best value for the State is hereby overruled.

Eisner's reliance on that case is, therefore, no longer operative.

The use of numerical scores is, unless made binding on evaluators and procurement officials in an RFP, simply an attempt to quantify what is actually a subjective judgment by evaluators and procurement officials. As pointed out in Fox and Co., *Comp. Gen. Dec. B-197272*, 80-2 CPD ¶ 340 (1980) at p.17:

Numerical point scores, when used for proposal evaluation, are useful guides to intelligent decision making, but are not themselves controlling in determining award, since these scores can only reflect the disparate, subjective and objective judgments of the evaluators. Whether a given point spread between competing offers indicates the significant superiority of one proposal over another depends on the facts and circumstances of each procurement, and while

technical scores must of course be considered by source selection officials, such officials are not bound thereby.

What a procurement officer is to look to in a competitive sealed proposal situation is which offeror provides the best value to the state, not which offeror received the most evaluation points. See, e.g., *State Finance and Procurement Article, Annotated Code of Maryland, §13-104(f)*.

If the evaluation committee's scoring were binding on the Procurement Officer, as Eisner seems to assert, the role of the Procurement Officer becomes completely ministerial, allowing no room for the exercise of discretion or judgment. Many of this Board's decisions are in fact predicated on the notion that the procurement officer does have and does exercise discretion, which is why there is deference to the decisions of procurement officers. See, e.g., *Baltimore Motor Coach Company, supra*, at p. 10; *United Communities Against Poverty, Inc., supra*, at p. 10. These cases would make little sense if a procurement officer must accept the recommendation of the evaluation committee and maintains no discretion in the award of a contract.

This is not a competitive sealed bid situation. It is a competitive sealed proposal situation. RFP §1.23 at p.8. Such a process fundamentally involves subjective evaluations of proposals. See, generally, *State Finance and Procurement Article, §13-104*. A numerical scoring system can assist in the process of narrowing down the number of potential offerors but, as the Board of Public Works Advisory points out, such a system, in and of itself, cannot be the sole determiner of which offeror in a comparative sealed proposal situation such as the one at issue here receives an award.

The Economic Benefit and MBE participation factors were listed fourth out of four as to the criteria to be considered in evaluating technical proposals and were to receive the least

weight in the evaluation process. RFP 3 2 C. at p. 15. A review of the scoring for all four criteria indicates that Grey Direct clearly outscored Eisner on each of the first three evaluation criteria - 1) approach to the contract/questionnaire; 2) key personnel/staffing requirements/references; and, 3) firm profile/firm experience/financial reports/references. Appellant's Exhibit 63. Only on the criteria of least importance, economic development/minority business enterprise (MBE) participation, did Eisner outscore Grey Direct.

Three out of the four technical proposal criteria - the top three criteria in order of importance - were scored higher for Grey Direct than for Eisner. Such results clearly do not bolster Eisner's case that the evaluation committee and the procurement officer were arbitrary, capricious, irrational, or contrary to law in finding Grey Direct's proposal superior to Eisner's.

Contrary to Eisner's contentions, UMUC did not eliminate Economic Benefit or MBE as an evaluation factor, nor did UMUC ignore those factors in evaluating proposals.

In summary, the Board finds that the weighting, scoring and evaluating of the Economic Benefit/ Minority Business Enterprise criteria used for evaluating proposals by UMUC in this case was not arbitrary, capricious, irrational or contrary to law and that Eisner's appeals in these areas are denied.

VI. Conclusion

Having considered the testimony, the exhibits, and the argument of all parties the Board finds as a matter of fact and law that Eisner has failed to establish that the recommendation to award this contract to Grey Direct was unreasonable. Eisner has failed to prove that the Procurement Officer's decision to recommend award to Grey Direct was arbitrary, capricious, irrational or contrary to law.

The Procurement Officer's determination that Grey Direct represented the best value to the state was not arbitrary or unreasonable. The University sought a marketing partner to help it grow annually by 20 percent, with a "significantly increased" emphasis on out-of-state enrollments. RFP Addendum #3 at p. 4. The University's RFP expressed a preference for a company with a "strong background" in direct response marketing. RFP § 1.1. Eisner's protest does not dispute Grey Direct's strong background in direct response marketing, or even dispute that Grey Direct is the best qualified for the work to be performed.

As noted in Ms. Eisner's testimony, Eisner's protests and appeals result from the fact that Eisner scored very highly on the evaluation, but cannot accept the fact that another offeror, Grey Direct, scored even higher. As Ms. Eisner noted, Eisner felt for a host of reasons that "something doesn't add up here" and that Eisner should have been awarded this contract instead of Grey Direct.

The decision of the procurement officer and of the awarding authorities at UMUC is, however, different from the decision sought by offeror Eisner. After evaluating all factors, the authorities at UMUC have determined that offeror Grey Direct represents the best value to the state and should receive this contract. That is their legal duty. *See, e.g., State Finance and Procurement Article, Annotated Code of Maryland, §13-104(f).*

As discussed in detail in this opinion, the Board, after consideration of all of Eisner's claims, finds that the actions and judgments of the UMUC officials, in particular the procurement officer, involved in this competitive sealed proposal procurement evaluation and award have clearly not been proven by Eisner to have been arbitrary, capricious, irrational, or contrary to law.

That being the case, Eisner's appeals are hereby denied.

Wherefore, it is Ordered this _____ day of March,

2005 that the appeals of Eisner Communications, Inc. in the above captioned matters are denied.

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 2438, 2442 & 2445, appeals of Eisner Communications, Inc. under University of Maryland University College RFP #90615.

Dated:

Michael L. Carnahan
Deputy Recorder