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

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| Docket No. 2474 | Date of Decision: 07/28/05 |
| Appeal Type: <input checked="" type="checkbox"/> Bid Protest | <input type="checkbox"/> Contract Claim |
| Procurement Identification: Under DHMH RFP No. DHMH-OCPMP-8679-05 | |
| Appellant/Respondent: ACS State Healthcare, LLC Department of Health and Mental Hygiene | |

Decision Summary:

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.

THESE HEADNOTES ARE PRODUCED FOR ADMINISTRATIVE REFERENCE AND OPERATIONAL USE ONLY AND SHOULD NOT BE CONSIDERED "OFFICIAL TEXT" OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS, NOR SHOULD IT BE REFERENCED OR GIVEN ANY LEGAL STATUS. A COPY OF THE FULL AND COMPLETE DECISION SHOULD BE CONSULTED AND REFERENCED. FOR FURTHER INFORMATION, CONTACT THE BOARD OF CONTRACT APPEALS.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of ACS State)
Healthcare, LLC)
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Under DHMH RFP No. DHMH-OCPMP-)
8679-05)

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OPINION BY BOARD MEMBER BURNS

Appellant timely appeals the denial of its protest raising various issues regarding the proposed award of a contract under a competitive sealed proposal process involving a solicitation to provide enrollment broker/benefit consultant services assisting eligible

recipients with Maryland's HealthChoice Managed Care Program and assisting those recipients in choosing a Primary Care Provider.

FINDINGS OF FACT

1. Respondent, the Maryland Department of Health and Mental Hygiene (Department) is a State agency which deals with the physical, mental and social health of Marylanders.
2. The Office of Health Services is a unit of the Department.
3. On November 30, 2004, the Department issued a Request for Proposals (RFP) entitled HealthChoice Enrollment Broker Services DHMH-OCPMP-8679-05.
4. This RFP sought a qualified offeror to provide the Department with enrollment broker/benefit consultant services which would "outreach, educate and enroll eligible recipients into Maryland's HealthChoice Managed Care Program and assist eligibles in choosing a Primary Care Provider (PCP)."
5. The scope of work to be performed was, according to the RFP:

The Contractor shall provide the Department with comprehensive enrollment broker services which shall outreach to and educate HealthChoice enrollees about his/her managed care options, assist HealthChoice enrollees to enroll into managed care organizations, assist HealthChoice enrollees to choose a Primary Care Provider, and maintain/increase the rate of voluntary enrollments rather than State initiated auto-assignments.

RFP Part I, 4.0, at p. 14.

6. The contract term was to be three years, beginning July 1, 2005, with three one-year renewal options to be exercised at the Department's sole discretion.
7. The RFP utilized the Competitive Sealed Proposal procurement selection method (COMAR 21.05.03).
8. As noted in the RFP, the Department implemented an 1115 Medicaid Managed Care Waiver Program known as HealthChoice on June 1, 1997. The contract was designated under the authority of Section 1115 of the Social Security Act effective January 2, 1997. Subsequently, the Enrollment Services contract was awarded via the competitive sealed proposal process in 1997. As of November 30, 2004, approximately 3.8 million cumulative enrollments had been completed, and as of July 1, 2004, 461,428 members were enrolled in the seven Managed Care Organizations participating in Maryland's HealthChoice Program. All HealthChoice voluntary enrollments and essential enrollment broker/benefit consultant services have been performed by a contracted enrollment broker.
9. Appellant, ACS State Healthcare LLC (ACS), is the incumbent contractor, having provided services to the Department, either itself or through a predecessor company, since 1997.
10. The RFP was drafted, with some minor assistance, by Patricia Rutley-Johnson (Rutley-Johnson). Rutley-Johnson is an employee of the State of Maryland and serves as the Division Chief of the Office of Operations, Eligibility and Pharmacy, Beneficiary Services Administration, Department of Health and

Mental Hygiene. Rutley-Johnson also has administrative oversight for the enrollment broker contracts for the HealthChoice Program.

11. The Procurement Officer listed on the RFP was Sharon Gimbrill, an employee of the State of Maryland.
12. The Procurement Officer who actually evaluated the proposals, made the recommendation for contract award, and handled the debriefing of ACS was Trudy Brown (Brown). At the time of this RFP process Brown was Deputy Director for the Division of Contracts, Policy Management and Procurement, Department of Health and Mental Hygiene. Brown retired from State service on April 1, 2005.
13. Brown was employed by the State of Maryland for approximately 35 years. Brown spent approximately 25 years "in a contracting position".
14. Prospective RFP offerors were required to respond to the RFP in a two-part submission: separately sealed technical and financial proposals.
15. The RFP provided that proposals would be reviewed for meeting RFP requirements (RFP Part I, 4.0) and then would be subsequently evaluated by an Evaluation Committee established by the Department. RFP Part III, 1.0, at p.60.
16. The Evaluation Committee was chaired by Patricia Rutley-Johnson. Rutley-Johnson had also co-chaired the Evaluation Committee for a 1999 RFP for the HealthChoice enrollment broker contract.
17. The Evaluation Committee was not to receive the financial proposals until the technical evaluation was completed. RFP Part III, 1.0, at p.60.

18. The Evaluation Committee reviewed and evaluated both the technical and the financial proposals submitted by the prospective offerors.
19. After determining that an offer met the requirements specified in the RFP the Evaluation Committee was to evaluate the technical proposals using seven evaluation criteria set forth in the RFP. RFP Part III, 1.1, at pp.60-62.
20. The seven evaluation criteria, in descending order of importance, were:
 1. Proposed Work Plan
 2. Experience and Qualifications of the Proposed Staff
 3. Corporate Qualifications
 4. Statement of Problem
 5. Organizational Structure
 6. Systems Interface Plan
 7. Economic Benefit to the State of Maryland

RFP Part III, 1.1, at pp.60-62.
21. Following the completion of the technical evaluation of all offerors, the Evaluation Committee was to rank each qualified offeror's proposal. RFP Part III, 1.2, at p.62.
22. Following the technical evaluation, the Evaluation Committee was to rank each offeror's financial proposal from lowest to highest cost to the State of Maryland. RFP Part III, 1.2, p.63.
23. If it was determined to be in the best interests of the State, the Procurement Officer could invite offerors to make final revisions to their technical and/or financial proposals through submission of a Best and Final Offer. RFP Part III, 1.2, p.63; RFP Part III, 1.4, at p.63.

24. The RFP specified that: "The Committee will recommend the offeror whose overall proposal provides the most advantageous offer to the State considering price and the evaluation criteria set forth in the RFP." RFP Part III, 1.2, at p. 63.
25. In arriving at a recommendation, the Evaluation Committee was to afford more weight to the technical proposal over the financial proposal. RFP Part III, 1.2, at p.63.
26. The RFP specifically noted that, if the technical ranking was essentially equal for two or more offerors, the cost as described in the financial proposal could become the primary determinant of contract award. RFP Part III, 1.2 at p. 63.
27. Citing COMAR 21.05.03.03A. (6), the RFP specifically noted that the Procurement Officer and the agency head could "accept or decline any or all recommendations" from the Evaluation Committee. RFP Part III, 1.2, at p. 63.
28. After issuing the RFP on November 30, 2004, the Department held a pre-proposal conference on December 9, 2004. At this conference - and later on December 22, 2004, December 29, 2004, and January 4, 2005 - the Department responded to questions from offerors.
29. The Department received timely proposals from two offerors, ACS and the interested party herein, Policy Studies, Inc. (PSI) on January 21, 2005.
30. The Evaluation Committee sent a list of questions and concerns regarding the technical proposals to each vendor on January 31, 2005. The vendors responded in a timely fashion by February 2, 2005.

31. The Evaluation Committee reviewed the technical proposals, including the advantages and disadvantages of each proposal with respect to the 7 evaluation criteria established in the RFP.
32. After evaluating the technical proposals and selecting the best technical proposal (in their judgment), the Evaluation Committee began evaluating the submitted Financial Proposals. As occurred with the technical proposals, the Evaluation Committee developed a list of questions and concerns for each vendor. A request for clarifications and for a best and final offer (BAFO) was sent to each proposed vendor on February 4, 2005. Responses were timely received by February 9, 2005.
33. On February 11, 2005, after reviewing the BAFO/Clarifications responses of both potential vendors, the Evaluation Committee submitted a recommendation that ACS be awarded the contract.
34. Subsequent to that recommendation, Procurement Officer Brown performed a detailed review of the findings and recommendations of the Evaluation Committee. Brown's conclusions were that the Evaluation Committee regarded both PSI's and ACS's proposals as being of the highest quality and that either vendor could provide the services described within the RFP effectively and efficiently.
35. By a memorandum dated February 15, 2005, Brown notified her supervisor, Robert Rucker, that she had determined that she could not "honor the recommendation of the evaluation committee to award the contract to the incumbent [ACS] due to the best value criteria for the State."

36. In the February 15, 2005 memorandum to Rucker, Brown noted the total prices submitted by ACS and PSI were \$41,851,945.00 for PSI and \$47,522,084.00 for ACS, a difference of \$5,670,139.00.¹
37. On February 15, 2005, Brown met with the members of the Evaluation Committee. At that meeting, Brown informed the Committee that she disagreed with the recommendation to award the contract to ACS. Brown further inquired at that meeting to determine if the Committee could justify the substantial price differential between the two proposals in light of the fact that both vendors had been ranked closely by the Committee.
38. During the February 15, 2005 meeting between Brown and the Evaluation Committee members, the only specific area brought up to justify the selection of ACS was the fact that there would be no transitioning period required for ACS since ACS was the incumbent contractor.
39. After holding discussions during the meeting on February 15, 2005, the Evaluation Committee agreed

¹ Brown also noted in her memorandum “a discrepancy between the two vendors regarding compliance with the 25% MBE goals as established in the RFP. ACS wants a partial waiver to have the goal reduced and PSI submitted a contractual agreement with an MBE provider to meet a 35% goal, thus exceeding the requirements within the RFP documents.”

This “discrepancy” is not, however, mentioned in Brown’s February 22, 2005 recommendation for award letter to Department Secretary McCann.

It should also be noted that ACS did not file a protest based on MBE.

In any case, COMAR 21.11.03.14 states that a protest may not be filed to challenge a decision whether an entity is or is not a certified MBE or concerning any act or omission by a procurement agency under the COMAR Chapter dealing with MBE policies.

There is, in summary, no protest before this Board regarding MBE in this appeal – nor would there have been jurisdiction for the Board to consider such an appeal had such a protest regarding MBE been filed herein.

MBE issues, therefore, do not enter into the Board’s resolution of this appeal in any fashion.

at that meeting with Brown's determination that PSI should be recommended for award of the contract.

40. At no time between the February 15, 2005 meeting between Brown and the Evaluation Committee and Brown's February 22, 2005 letter of recommendation to Secretary McCann did any members of the Committee approach Brown with additional reasons why ACS should be awarded the contract instead of PSI.
41. On February 22, 2005, Brown, by way of a letter, formally recommended to Department Secretary Anthony McCann that the Evaluation Committee's recommendation of award to ACS be rejected and that PSI be selected for award.
42. Brown found that the evaluation process had been fair and unbiased.
43. Brown found, after reviewing the RFP documents, vendor submissions, review documents, and meeting with the members of the Evaluation Committee that both the proposals of PSI and ACS were of the highest quality and that either vendor could provide the services requested in the RFP effectively and efficiently.
44. Brown found that both PSI and ACS offered excellent programs for the State of Maryland.
45. Brown made express and contemporaneous findings during her consideration of the recommendation for award of the contract under the RFP at issue that the offers of PSI and ACS were essentially equal.
46. Brown made a determination in February, 2005 that the proposal of PSI was the most advantageous to the State of Maryland, considering price and the evaluation factors set forth in the RFP.

47. During the meeting of February 15, 2005, the members of the Evaluation Committee did not articulate any substantial differences between ACS's proposal and PSI's proposal that would justify an additional expenditure of \$5,670,139.00 for ACS's proposal as opposed to PSI's proposal.
48. Rutley-Johnson agreed after meeting with Brown on February 15, 2005 that the Committee could not justify the additional costs associated with ACS's proposal visa-vie PSI's proposal.
49. Secretary McCann approved the recommendation of award to PSI on February 25, 2005.
50. By letter dated February 28, 2005, ACS was notified by Brown that PSI had been awarded the contract at issue.
51. On March 7, 2005, Brown conducted a debriefing for ACS concerning the procurement.
52. ACS protested the award of the contract to PSI by letter dated March 14, 2005.
53. On March 29, 2005 the Department denied ACS's protest, adopting the denial decision of the Procurement Officer, Brown.
54. ACS appealed the denial of its protest to the Maryland State Board of Contract Appeals (Board) on April 8, 2005.
55. The appeal was heard by the Board on June 13-16, 2005.

DECISION

Appellant ACS raised a number of issues during the course of this protest and appeal. In post-hearing briefs, ACS has focused in on three issues:

1. No reasonable basis exists for the determination that PSI met the corporate qualifications requirement of the RFP (specifically, according to ACS's Post-Hearing Reply Brief, that PSI's Proposal did not satisfy the requirement for three references based on experience in similar programs).
2. PSI's staffing plan was deficient and the agency failed to reasonably weigh the defects in the PSI proposal or the clear advantages of the ACS proposal in the award decision.
3. The Procurement Officer improperly made award on the basis of technical quality and low price and failed to reasonably weigh the technical advantages of the ACS proposal against the cost advantages of the PSI proposal (the Procurement Officer recommended award on a basis inconsistent with the RFP).

In addition, ACS raised two other issues on appeal:

4. The Department failed to correctly apply stated evaluation factor weights on a comparative basis.
5. The Department failed to reasonably evaluate price.

ACS failed to discuss appeal ground four in its post-hearing briefs, and only mentioned appeal ground five in a footnote in its Post-Hearing Brief. PSI asserts that ACS has, therefore, conceded these two issues and has waived

its right to address these issues. The Board will, however, consider both issues in this decision.

There are, therefore, five issues to be considered in this appeal.

To begin, the Board will, once again, review the standards under which the Board operates in appeals such as the one at issue herein.

This Board has been very clear on its role in reviewing the decisions of procurement officials regarding Requests for Proposals (RFP) in a competitive negotiation²:

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 judgment 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 judgment 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

² The Board has used the terms "competitive negotiation" and "competitive sealed proposal" interchangeably over the years and continues that practice herein.

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.

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., MSBCA 1407 & 1409, 3 MSBCA ¶201 (1989) 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. That is not this Board's legal charge and such a process would, in our view, seriously undermine the procurement system and process in Maryland.

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. 10.³ This Board has expressed well-founded 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.

³ See also, RAID, Inc., *supra*; B. Paul Blaine Associates, Inc., *supra*; Baltimore Industrial Medical Center, Inc.; *supra*; and, AGS Genasys Corp., *supra*.

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.

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).

As the party seeking to disturb the Procurement Officer's decision, ACS bears the burden of proof in this appeal and we note, for the record, that this is not a burden that is easily met.

ACS's first ground for appeal is its claim that no reasonable basis exists for the determination that PSI met the corporate qualifications requirement of the RFP. In particular, ACS claims that PSI's Proposal did not satisfy the requirement for three references based on experience in similar programs.

ACS asserts that the RFP requires each prospective offeror to provide three references, each of which must involve the operation of a comprehensive managed care enrollment broker program similar to Maryland's HealthChoice Enrollment program.

The Corporate Qualifications reference requirement, RFP Part II, 2.1, 3), states:

3) Corporate Qualifications

The offeror shall describe the overall capabilities of the organization to meet the requirements of the RFP. Include descriptions of selected engagement for other clients involving services similar or equal to those requested by this RFP, as well as the process used to insure that all deliverables met or exceeded the needs of the customer.

The proposal must include a minimum of three references from firms, organizations, etc. for whom similar work was completed. Each reference should identify the name of each organization, a point of contact, and telephone number. The Department retains the right to contact, or not contact, some or all of these or any other references of its choosing as deemed appropriate as part of the evaluation and selection process.

ACS cites another section from the RFP involving the evaluation criteria in support of its position:

3. Corporate Qualifications . . .
- d. Does the proposal meet or exceed the requirement for references supporting the vendor's past and present successful experience in managing and operating a comprehensive managed care enrollment broker program similar to Maryland's HealthChoice Enrollment program.

RFP Part III, 1.1, 3.d.

It is ACS's position that these two RFP provisions combine to expressly require an offeror to have had at least three prior or current contracts in which the company managed and operated a comprehensive managed care enrollment broker program similar to Maryland's HealthChoice Enrollment program.

For the reasons that follow, the Board declines to support ACS's view as to this issue.

The language of the RFP indicates that the requested references in RFP Part II, 2.1, 3) be references for entities for which an offeror has performed "similar work", not references from entities for which an offeror has performed comprehensive managed care enrollment broker programs such as the HealthChoice program. The requirements for references in RFP Part II, 2.1, 3) contains nothing about any requirement that the references must reflect offerors operation of comprehensive managed care enrollment broker programs.

Patricia Rutley-Johnson, the Department official who drafted the RFP and chaired the Evaluation Committee, testified that she did not intend that the RFP impose a mandatory requirement that an offeror has operated three comprehensive Medicaid enrollment broker programs. Rutley-Johnson also testified that she did not intend the language of RFP Part III, 1.1, 3.d. to impose a mandatory requirement that an offeror have experience operating three comprehensive Medicaid enrollment broker programs.

ACS argues that the Board should ignore Rutley-Johnson's testimony: "because it addresses only the agency's unexpressed, subjective intent. The issue before

the Board is the meaning of the actual language in the RFP, not the agency's subjective intent as first revealed in protest proceedings months after proposal submission."

We do not agree with ACS. ACS argues that RFP Part III, 1.1, 3.d. must be read in conjunction with RFP Part II, 2.1, 3) to impose a requirement that offerors must have experience in the operation of at least three comprehensive managed care enrollment broker programs like Maryland's HealthChoice Enrollment program. The State and PSI disagree.

Clearly, ACS itself raises a dispute as to the parameters of the RFP concerning this issue.

For the Board to ignore the testimony of the drafter of the RFP, who also served as Chair of the Evaluation Committee, as to her views concerning the intent of the RFP on this issue would remove a valuable source of evidence concerning the resolution of this issue.

We doubt that ACS would be advancing its current objections to the consideration of Rutley-Johnson's testimony had she testified that she had indeed intended RFP Part III, 1.1, 3.d) to impose the requirement for references advocated by ACS herein (or that she had held that view as Chair of the Evaluation Committee). In that case, the Board would have also been obligated to consider the testimony of Rutley-Johnson as well.

In order for the Board to resolve ACS's claim fairly, Rutley-Johnson's testimony must be considered.

This is particularly true in that ACS's interpretation of the RFP requirement as to references would have resulted, according to testimony, in only two potential offerors - ACS and MAXIMUS, Inc. (MAXIMUS) - in being able to satisfy a requirement that offerors provide three

references from comprehensive enrollment broker contracts similar to HealthChoice.

According to testimony at the hearing, MAXIMUS, Inc. would have failed to provide an effective alternative to ACS, leaving only one potential vendor - ACS - eligible for the contract.

Again, Rutley-Johnson's testimony is pertinent. She testified that she herself knew, at the time she drafted the RFP, that the only two potential vendors who could fulfill a requirement that offerors provide three references from comprehensive enrollment broker contracts similar to HealthChoice were MAXIMUS and ACS. She testified that she also knew that because of prior state dealings with MAXIMUS in this area that the only vendor likely to be able to successfully bid on the contract was ACS.

Had Rutley-Johnson drafted the RFP as ACS contends, intending the interpretation advanced by ACS, the RFP itself might well be violative of Maryland law and regulations.

COMAR 21.04.01.04 states: "The Procurement Officer or his designee shall be responsible for reviewing the specifications for content, clarity, and completeness and to insure that the specification is nonrestrictive." COMAR 21.04010.02A. states in pertinent part:

A specification is the basis for procuring an item in a cost effective manner. It is the policy of the State that specifications be written so as to permit maximum practical competition without modifying the State's requirements. Specifications may not be drawn in such a manner as to favor a single vendor over other vendors. . . .

ACS's interpretation of the reference issue, had it been shared by Rutley-Johnson, would have been restrictive, anti-competitive, and drawn in such a way as to favor a single vendor, ACS, over other vendors.

The purposes and policies of Maryland Procurement Law itself also appear to clearly contradict the interpretation ACS seeks the Board to take in this matter. *State Finance and Procurement Article, Annotated Code of Maryland, §11-201 (a)(1), (2), (3), (4), and (7)* illustrate that the purposes and policies of the State of Maryland encourage fairness and competition, not RFP specifications which limit competition and favor one vendor over all other potential competitors.

Rutley-Johnson and Procurement Officer Brown did not view the references requirement in this RFP as ACS suggests it must be viewed. As we have explained, had Rutley-Johnson and, in particular, Brown so-viewed the reference requirement, that view might well have violated Maryland Procurement Law and Regulations.

Both the Evaluation Committee and the Procurement Officer found that PSI's references met the corporate qualifications requirements of the RFP.

"Identification of those proposals that are acceptable, or capable of being made acceptable, is a matter within the reasonable discretion of the procurement officer." *APS Healthcare, Inc., MSBCA 2244, 5 MSBCA ¶504*, at p. 9 (2001). This Board "does not second guess an evaluation of a proposal, but merely concerns itself with whether a reasonable basis exists for the conclusions and results reached". *Id.*

The Evaluation Committee and the Procurement Officer herein found that PSI met the corporate qualifications

requirements of the RFP. Nothing indicates that those findings were arbitrary, capricious, or contrary to law. ACS's arguments as to the RFP standard for corporate qualifications concerning references are not persuasive and, in point of fact, would in and of themselves lead to an interpretation that might well be violative of Maryland law and regulations.

ACS's appeal on this ground is denied.

The next area of appeal to be considered is the ACS's assertion that PSI's staffing plan was deficient and that the agency failed to reasonably weigh the defects in the PSI proposal or the clear advantages of the ACS proposal in making the award decision.

ACS specifically contends that PSI failed: to name proposed staff; to propose an adequate staffing plan; and, to identify the subcontractor that would provide the staffing necessary to provide community outreach services. ACS asserts that the Evaluation Committee "found ACS's staffing plan substantially superior to that of PSI". ACS alleges that "the Procurement Officer's award recommendation never weighed the stark differences in the two staffing plans identified by the committee" nor did "the Evaluation Committee or the Procurement Officer place any weight on PSI's failure to identify its outreach and education subcontractor or to propose staffing to perform critical field enrollment services." ACS further contends that the failure of the Department "to weigh these matters in an appropriate way in both the evaluation and award decision was arbitrary and capricious and inconsistent with the evaluation criteria and methodology stated in the RFP."

As we have noted, it is settled that this Board "will not disturb an Agency's determinations 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., supra.

We find nothing in the record of this case to illustrate any such unreasonable, arbitrary, or legally impermissible determinations in this appeal concerning ACS's claims concerning staffing issues.

To begin, this RFP does not require offerors to name all of their prospective employees. Many RFP's do not do so under the quite sensible ground that until an offeror is awarded a contract it will have no need to hire persons to work under the contract.

For example, the RFP provides that the new vendor will work with the Department and the current contractor to retain as many staff members as possible from the current contractor. It would obviously be difficult to require that new vendor to provide such names in advance of being awarded the contract.

PSI supplied an extensive description of its proposed staffing plan in its proposal. It also responded in detail to follow-up questions regarding staffing and the financial feasibility of its proposal.

The Evaluation Committee, after studying PSI's staffing plan, eventually concluded that PSI could perform the contract under the staffing model which PSI proposed.

The Evaluation Committee also found that PSI's proposal regarding subcontractors satisfied the requirements of the RFP as well.

In sum, both the Evaluation Committee and the Procurement Officer concluded from PSI's submissions

regarding staffing and subcontractors that PSI met the requirements of the RFP.

ACS's contention that these matters were not weighed in an appropriate way in both the evaluation and the award process and that the award decision was, therefore, arbitrary and capricious and inconsistent with the evaluation criteria and methodology stated in the RFP simply is without basis in this record.

The determination of the relative merits of the various proposals in a procurement 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 judgment for that of the agency absent clear and substantial evidence - not supposition - that the determination was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion.

A review of the actions of the Evaluation Committee and - more particularly - the Procurement Officer in this case finds no evidence that determinations of the Evaluation Committee and Procurement Officer Brown regarding staffing issues were in any way contrary to law or regulation or were in any way unreasonable, arbitrary, capricious or an abuse of discretion.

ACS's appeals on the staffing issues are, therefore, denied.

ACS's third briefed appeal ground concerns the allegation that the Procurement Officer improperly made her award of the contract to PSI on the basis of technical quality and low price and failed to reasonably weigh the technical advantages of the ACS proposal against the cost advantages of the PSI proposal (i.e. that the Procurement

Officer recommended award on a basis inconsistent with the RFP).

ACS agrees with the well-established proposition that in a competitive sealed procurement RFP which emphasizes technical proposals over financial proposals, "if selection officials determine that technical proposals are equal they may use price to select the most advantageous proposal for the State." Housing and Development Software, LLC, MSBCA 2247, 5 MSBCA ¶500 (2001) at p. 5.

The RFP itself specifies that:

The Committee will recommend the offeror whose overall proposal provides the most advantageous offer to the State considering price and the evaluation criteria set forth in the RFP. . . . In arriving at this recommendation, the technical proposal will be afforded more weight than the financial proposal. If, however, the technical ranking is essentially equal for two or more offerors, the cost as described in the financial proposal may become the primary determinant of award.

RFP Part III, 1.2, at p. 63.

ACS argues that the evidence is such that the two proposals in this case were not "essentially equal" and were not evaluated as such. ACS terms the evidence of these conclusions "overwhelming".

The Board cannot agree with that assessment.

ACS goes to great lengths in its post-hearing briefs to construct an argument that "there is no evidence in the contemporaneous evaluation record that anyone ever ranked the two proposals as 'essentially equal.'"

ACS's major argument seems to center around the fact that, after reviewing the two offeror's proposals, the Evaluation Committee ranked ACS first and PSI second and recommended that ACS be awarded the contract.

The Procurement Officer concluded after reviewing the RFP documents and the vendor submissions and considering the two proposals, however, that she could not concur with the recommendation for award to ACS.

This review included, according to Procurement Officer Brown's testimony, consideration of various issues - including staffing issues - presented by the two proposals. ACS's contract price of \$47,522,084 was \$5,670,139 more than PSI's contract price of \$41,851,945 and Brown felt that an award to ACS could not be justified by any differences in the two proposals. Brown used the terminology "best value criteria for the State" when describing the result sought for the procurement.

In her testimony, Brown noted that she used the term "best value criteria" as a way of indicating the program that would be the "most advantageous to the State" (as required by the RFP). She testified that the two terms were, to her, interchangeable.

Brown scheduled and held a meeting with the Evaluation Committee to both inform them of her decision and to discuss with the Committee the rationale for its decision. Significantly, Brown noted in her formal recommendation letter to Department Secretary McCann that one purpose of her meeting with the Evaluation Committee was to "ascertain if they could personally defend the substantial price difference between two closely ranked vendors."

According to the testimony of both Brown and Rutley-Johnson, the Evaluation Committee did not bring up any

specific areas that were better in ACS's proposal submission which would justify the significant pricing disparity (with the exception that there would be no transitioning period required for incumbent ACS).

The Committee did note, however, that there was a comfort level with the existing contractor ACS.

At the end of the meeting, Brown indicated that the Evaluation Committee members were free to speak with her further if they came up with any reasons justifying the additional expenditure. Significantly, no members of the Committee apparently approached Brown with any such reasons in the week between the meeting and the time of Brown's formal recommendation letter to Secretary McCann.

According to Brown, the Committee simply could not justify the price differential and agreed with Brown's decision regarding the recommendation of award.

Rutley-Johnson confirmed Brown's testimony in her own testimony:

"I mean she made a good argument. We couldn't justify \$5 million so, in essence, when we left the meeting we supported her decision."

Rutley-Johnson is the State official responsible for overseeing the program involved in the RFP. Had she felt that ACS's proposal was markedly superior technically to PSI's it is reasonable to suppose that she would have come to a different conclusion than the one reflected in her testimony and would have said something further to Brown in the week between the time of the meeting and the issuance of the letter of recommendation by Brown to McCann concerning Brown's decision to recommend award to PSI.

This is a clear example of why this Board is reluctant to substitute its judgment for that of an agency - or in this case an agency official such as Rutley-Johnson - since it is the procuring agency - and specifically in our example here, Rutley-Johnson - that will have to "live with the results" of its decision. Klein's of Aberdeen, *supra*.

In point of fact, Rutley-Johnson, the Evaluation Committee Chair and the person who has to administer the contract at issue, testified that she believed that either vendor can provide the services efficiently and effectively as described within the RFP.

Brown submitted her recommendation for award letter to Department Secretary McCann one week after her meeting with the Evaluation Committee. In that letter Brown noted that, after having reviewed materials and meeting with the Evaluation Committee members, it was clear to her "that both ACS and PSI's proposals were considered of highest quality and that either vendor could provide the services effectively and efficiently" and that, after discussions, the Evaluation Committee agreed with her decision regarding the recommendation for award.

Brown also noted in her letter that:

It was clear during the process that both of these offerors presented excellent programs for the State. It is therefore my recommendation that the most advantageous offer for the State is PSI based on price and their technical proposal. Therefore, as the Procurement Officer, I am recommending that the contract be awarded to PSI, which constitutes the most advantageous offer for the State.

ACS claims that Brown recommended this award on a basis inconsistent with the RFP, claiming that the two

technical proposals at issue were not evaluated as "essentially equal" and, if they were, that such a finding was arbitrary and capricious.

We find ACS claims here completely without merit. Brown retired from the State after 35 years of service in April of 2005, shortly after the conclusion of the RFP process herein. Of those 35 years, Brown testified that she had spent 25 years "in a contracting position." Her final assignment with the State was as Deputy Director for the Division of Contracts, Policy Management and Procurement, Department of Health and Mental Hygiene.

Brown was no novice procurement officer.

After reviewing the materials submitted by the Evaluation Committee, Brown had a duty to determine whether or not to accept the Committee's recommendation that ACS receive the contract under the RFP. The RFP specifically states that the Procurement Officer and the agency head could "accept or decline any or all recommendations" from the Evaluation Committee. RFP Part III, 1.2.

Under COMAR 21.05.03.03F.:

Upon completion of all discussions and negotiations, the procurement officer shall make a determination recommending award of the contract to the responsible offeror whose proposal is determined to be the most advantageous to the State, considering price and the evaluation factors set forth in the request for proposals.

That is precisely what Brown did in this case. She utilized and reviewed the research and evaluations of the Evaluation Committee, but came to a different conclusion concerning the award of the contract. As Brown noted: "I did not

accept their finding; I accepted their evaluation documents.”

Brown’s determination that ACS and PSI submitted “essentially equal” proposals was reasonable and rational – it was clearly not arbitrary, capricious or contrary to law or regulations.

Brown was required to award the contract based on which offeror provided the most advantageous offer to the State considering price and the evaluation criteria set forth in the RFP. Based on her evaluation of the two proposals, Brown awarded the contract to PSI.

A case of interest illustrating these points is Housing and Development Software, *supra*. In that case, the Board considered an appeal with a similar RFP requirement. In that case, the RFP required that the technical proposal be given greater weight than the price proposal and that the Evaluation Committee should recommend to the Procurement Officer the award of the contract to the responsible offeror whose combined technical and price proposal was determined to be most advantageous to DHCD [Department of Housing and Community Development] and the State. After evaluation of both the technical and financial proposals, recommendation for award was made to the offeror whose proposal was higher-priced, but whose technical proposal was slightly superior.

The Board sustained the appeal, finding that Maryland law and regulations “do not permit, where two companies are capable of performing, award to be made on the basis of a technical proposal that receives only a few more points than its competitor’s proposal.” Housing and Development Software, *supra*, at p. 6. See also, *State Finance and*

Procurement Article §11-201(a)(7), Annotated Code of Maryland; COMAR 21.01.01.03E., 21.05.03.03F.

In that case, the two proposals differed by nearly 300% in cost. In this appeal the percentage difference is much less. In raw numbers, however, the amount at issue in the instant case is more than 5 times as great as the amount of difference between the offers in *Housing and Development Software, supra*.

In this case, Brown did exactly what Maryland law and regulations require, and also what the Board required in *Housing and Development Software, supra*.

ACS has raised several points, including staffing considerations, as reasons why ACS's higher costs were justified.

Such judgments are entrusted to procurement officials, however, not to offerors. Such judgments are also not entrusted to this Board unless such judgments of procurement officials are clearly proven to be arbitrary, capricious or contrary to law.

There is no evidence that the evaluation, conclusions and results reached by procurement officials in this case were in any manner arbitrary, capricious or contrary to law.

ACS's appeals on the third set of issues raised in their post-hearing briefs are denied.

As previously noted, ACS raised two other issues in their appeal that have not been pursued in its post-hearing briefs. The Board will, however, discuss both of those issues as well.

Issue four alleges that the Department failed to correctly apply stated evaluation factor weights on a comparative basis. In summary, ACS alleges that the

Department failed to properly weight the evaluation criteria, failed to assess the overall importance of the respective evaluation factors, and failed to evaluate the proposals with an "overall rating" as to each proposal.

Quite simply, the documentary and testimony evidence adduced at the hearing of this case illustrate that these contentions are without merit. The evaluation forms were designed to reflect the criteria of the RFP. The Evaluation Committee clearly followed an acceptable process in weighting and evaluating the evaluation criteria listed in the RFP. The members of the Evaluation Committee assessed an "overall rating" for each proposal and did so by weighing the criteria required by the RFP.

The Board finds that the evidence is clear that the Department weighed the evaluation factors as the RFP contemplated.

ACS's fourth appeal ground is, therefore, denied.

ACS's fifth and final argument is that the Department failed to reasonably evaluate price. ACS contends that the Department improperly failed to consider ACS's plans for pricing below the 80 percent voluntary enrollment rate (VER) level.

ACS points out in footnote 8 of its Post-Hearing Brief its contention that the Department "did not even consider that PSI's price was lower than ACS's price only at the 80% VER level."

The RFP clearly indicates that the Department would award the contract at the 80% VER level. The contract award was to be at the 80% VER level. The only contract price to be submitted to the Board of Public Works for approval is the price at the 80% VER level.

The fact that different prices were offered for different VER levels cannot change the fact that this contract was and is for award at the 80% VER level. The Procurement Officer made the recommendation for award at a contract price for the 80% VER level, which is as it should be.

ACS's fifth appeal ground concerning the 80% VER level and related issues is denied.

In summary, ACS has asked this Board to re-evaluate the evaluation and recommendation for award of the Procurement Officer in this appeal. ACS has raised a number of issues on appeal, but its appeal boils down to a simple request that the Board review the entire evaluation process, with emphasis on the subjects raised by ACS and find, as a matter of fact and/or law, that the evaluation and/or the recommendation process of the procurement officer and the Department in this case was arbitrary, capricious, or contrary to law to such an extent so as to result in the sustaining of ACS's appeal.

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

The Evaluation Committee herein recommended award to ACS. The Procurement Officer, however, reached a different conclusion, as did the Department. Their conclusion is that PSI, not ACS, represents the offeror most advantageous to the State of Maryland.

ACS's reaction to this finding is understandable, but not actionable.

As discussed at length within this opinion, the Board, after consideration of ACS's claims, finds that the actions and judgments of the Procurement Officer and the Department officials responsible for the award of the contract herein have clearly not been proven by ACS to have been arbitrary, capricious, irrational, or contrary to law and that there are, after reviewing the facts and evidence, no bases for sustaining ACS's appeal.

ACS's appeal is, therefore, denied.

In The Appeals of ACS State
Healthcare, LLC)
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)
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Under DHMH RFP No. DHMH-OCPMP-)
8679-05)

Docket No. MSBCA 2474

ORDER

Wherefore, it is Ordered this day of
July, 2005 that the appeal of ACS State Healthcare, LLC in
the above captioned matter is 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 2474, appeal of ACS State Healthcare, LLC under DHMH RFP No. DHMH-OCMP-8679-05.

Dated:

Michael L. Carnahan
Deputy Recorder