

**STATE OF MARYLAND  
BOARD OF CONTRACT APPEALS  
6 St. Paul Street  
Suite 601  
Baltimore, Maryland 21202-1608  
Telephone: (410) 767-8228  
Toll Free Telephone: 1-800-827-1135**

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

Docket No. 2485	Date of Decision: 09/01/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification:	Under MdTA Contract No. MA 549-000-006
Appellant/Respondent:	TransCore, LP Maryland Transportation Authority

Decision Summary:

Negotiated Contracts - Acceptance of Proposals - If an offeror submits a proposal containing language that constitutes a condition upon or exception to the terms of a Request for Proposals, the proposal may not be accepted.

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.



popularly known as the E-ZPass<sup>SM</sup> system. The contractor will provide the software and hardware for the ETC system, handle all financial transactions and maintain customer accounts, perform program marketing, and provide maintenance and service for the system. The new system will replace the six-year-old system currently in operation. Although the current contract is in effect until April, 2007, this procurement is being presently conducted because the Authority expects that it will take two years to develop and install the new software and hardware, and make the transition to the new system.

2. The procurement is being conducted using the competitive sealed proposal method set forth in COMAR 21.05.03. The Procurement Officer for the solicitation is Mr. Keith A. Duerling, Director of Engineering for the Authority. In February, 2004, the Authority issued the RFP for the project. The RFP solicited proposals for a potential 12-year contract period: a two-year build and transition period, a six-year operations period, and two two-year optional extensions to the operations period. The RFP required the submission of separate Technical Proposals and Price Proposals.

3. The RFP contains several provisions that are relevant to the issue in this appeal. Section 2.12.1, page 14 states:

By submitting an offer in response to this RFP, an Offeror, if selected for award, shall be deemed to have agreed to and accepted all of the terms, conditions and requirements set forth in this RFP.... Any exceptions to this RFP or the Contract must be clearly identified in the executive summary of the Offeror's Technical Proposal. A Proposal that takes exception(s) to these terms may be rejected.

Section 2.12.2, page 14 states:

In the event of a conflict between provisions of the Contract, the RFP, the General Provisions or General Conditions or any other document incorporated by reference into the Contract, the following order of precedence shall determine

the prevailing provisions:

- a. The Contract;
- b. The Request for Proposals, including any addenda;
- c. The MDOT, SHA "Standard Specifications of Construction Materials", January 2001, as herein amended, or, where appropriate, the MDOT General Conditions for Service Contracts - Revised, July 5, 2002, as herein amended;
- d. The Contractor's Proposal, including any amendments.
- e. The approved detailed design document(s) and other submittals.

Section 2.16 is entitled "Liquidated Damages." That section, as revised by Amendment No. 1, which is attached as Exhibit A and incorporated herein by reference, sets forth a detailed and specific description of the damages for which the contractor will be responsible in a variety of situations, including delay in completing the new system, delay in making the new customer service center operational, failure to meet reporting and performance requirements, and transaction errors during the operational period of the contract.

4. Initial Technical and Price proposals were submitted on June 10, 2004. Two companies submitted proposals, Appellant and ACS, the incumbent contractor for the system.
5. ACS's initial Technical Proposal contained a section titled "Terms and Conditions," which it described as "Proposed changed/clarifications to MdTA Electronic Toll System Replacement and Operation...." In that section of its proposal ACS stated:

In accordance with the provisions of Article 2.12.1 of Section 2 of Volume I of the RFP, ACS is submitting, for the Authority's consideration, the following recommendations for rewording and/or clarification as to certain

provisions that should not be considered to be exceptions. ACS considers all of the issues raised or changes suggested below to be subject to negotiation and mutual acceptance. ACS welcomes the opportunity to work with the MdTA to ensure language mutually satisfactory to both parties.

Item 6 of ACS's "Terms and Conditions" section contained proposed changes to the Liquidated Damages provisions of the RFP.

Appellant did not indicate in its initial Technical Proposal that it was taking any exceptions to the RFP or the contract.

6. After oral presentations and evaluation of the Technical Proposals, initial Price Proposals were opened on September 14, 2004. When Appellant's Price Proposal was opened the Procurement Officer learned that Appellant had attached to its Price Proposal a list of 28 "Assumptions Regarding Terms and Conditions." These included references to numerous basic contract provisions such as the bonding requirements, provisions of the Standard Terms and Conditions, warranties, software licenses, progress payments, termination provisions, liquidated damages, and acceptance testing. The list referred to various contract provisions by name or location without explaining what Appellant's assumptions were in regard to each listed provision.
7. Subsequent to the opening of initial Technical and Price Proposals, Authority representatives met with representatives of both companies to discuss their proposals. In late September, 2004, Mr. Duerling and members of the proposal review (evaluating) committee met with Appellant's representatives and discussed the conditions and assumptions in Appellant's Price Proposal form. At the conclusion of that meeting Appellant was told that any changes made by the Authority to the RFP would be reflected in a written amendment, and that, as stated in the RFP, Appellant should identify in its Technical Proposal any

remaining assumptions on which its proposal was based and should not attach any additional information or modifications to its Price Proposal.

8. In early October, 2004 the Authority representatives met with representatives of ACS to discuss ACS's proposed changes and clarifications to the RFP Terms and Conditions, including the proposed changes to the Liquidated Damages provision. As with Appellant, ACS was told that any changes made to the RFP as a result of the discussions would be reflected in a written amendment. ACS followed that meeting with a letter to Mr. Duerling dated October 13, 2005, in which ACS further refined its recommendations for rewording and/or clarification regarding the Liquidated Damages provision. Mr. Duerling did not respond to that letter or conduct additional discussions with ACS about the Liquidated Damages provisions, assuming that the final offers of both companies regarding their terms and conditions would be in their BAFOs, which would be developed in response to the Authority's amendments to the RFP.
9. On November 24, 2004, the Authority sent each offeror a letter requesting the submission of Best and Final Offers (BAFOs). That letter stated in relevant part that "[s]ections, or pages, should not be added to the price proposal...." Included with the request for BAFOs was Amendment No. 1 to the RFP, which set forth revisions to the terms of the contract made by the Authority, in part as a result of its meetings with Appellant and ACS. These included revisions to the Liquidated Damages provision, which had been requested by both offerors. The revised Liquidated Damages section added headings to each section which describe the circumstances in which each type of liquidated damages will be assessed, put a daily cap on performance damages, and added a provision that damages will only be assessed if due to the contractor's negligence or fault.

10. BAFOs were received from both Appellant and ACS on December 17, 2004. The transmittal letter from the Senior Vice President of ACS stated in relevant part: "ACS has carefully considered Addenda No. 1 and 2 and we have accommodated the revised terms and conditions and technical requirements without exception." ACS included a "Summary of Changes" made to its original Technical Proposal, including the following description of changes to its section titled "Terms and Condition," which had included its comments regarding the Liquidated Damages provision of the RFP:

Modified to reflect changes made to RFP Section 2. General Information and Contract Provisions. With one minor suggestion, ACS has removed all of the suggested language modifications to the contract provisions.

11. ACS's BAFO Technical Proposal read as follows in regard to the Liquidated Damages provision:

Proposed changed/clarifications to MdTA Electronic Toll System Replacement and Operation, contract MA-549-000-006, as amended.

. . . In accordance with the provisions of Article 2.12.1 of Section 2 of Volume I of the RFP, ACS is submitting, for the Authority's consideration, the following recommendations for rewording and/or clarification as to certain provisions that should not be considered to be exceptions. ACS considers all of the issues raised or changes suggested below to be subject to negotiation and mutual acceptance. ACS welcomes the opportunity to work with the MdTA to ensure language mutually satisfactory to both parties.

1. Volume 1, Section 2, Article 2.16, pages 34 and 35, "Liquidated Damages" and Volume III "Price Proposal"

The ACS Proposal assumes the following change to this provision.

a. The following will be added to the second paragraph of Volume I, Section 2, Article 2.16 on page 34:

"Contractor shall not be liable for any consequential, indirect, incidental, special or punitive damages arising from Contractor's performance of this Contract. This limitation in no way limits Contractor's liability for liquidated damages."

12. Appellant's Technical Proposal did not identify any exceptions, assumptions or conditions in regard to the contract terms, nor did the overview of proposed changes or change pages identify any modifications to its Technical Proposal made as a result of the September meeting. However, when the BAFO Price Proposals, received on December 17, 2004, were opened in January, 2005, Appellant had attached to its Price Proposal form its list of "Assumptions Regarding Terms and Conditions" (now grown from 28 to 29 items) (Assumptions). The Price Proposal stated that Appellant's Technical Proposal and Price Proposal were based on the items in the list of Assumptions, "plus some supplemental items." As was the case with its original list of 28 Assumptions, in its initial Price Proposal, Appellant's list referenced sections of the RFP, without any explanation as to what Appellant's Assumptions about those provisions were.
13. The introduction of this material into the process, and even assuming the meaning of the Assumptions could be explained to the Authority, would have required the Authority to either reject Appellant's proposal as being improperly conditioned on acceptance of its Assumptions or to enter into further discussions with Appellant and ACS on the basis of the discerned Assumptions' impact on the RFP.  
Given the need for entering into a contract in sufficient time for the contractor to redesign and transition a new system, the

Procurement Officer, Mr. Duerling, did not believe that there was sufficient time to do another round of discussions, followed by new technical and price BAFOs. Moreover, Mr. Duerling believed that ACS's BAFO was complete, complied with the instructions in the RFP, and was acceptable. Mr. Duerling therefore determined that it was in the Authority's best interest to reject Appellant's proposal and award the contract to ACS.

14. Appellant protested this decision to reject its proposal, and Mr. Duerling denied the protest. Appellant appealed the denial to the Board, and, during the course of this first appeal, on May 27, 2005, Appellant obtained a copy of ACS's Best and Final Offer to the Authority.
15. Based on its review of the ACS BAFO, Appellant filed a second (supplemental) protest on June 3, 2005, asserting that ACS's BAFO should have been rejected by the Authority because ACS's statements regarding the RFP's Liquidated Damages provision made the BAFO a conditional offer. Appellant also asserted that it had been treated unfairly because the Authority had rejected its offer as conditional while accepting ACS's. In addition, Appellant asserted that rejecting its proposal meant accepting a higher-priced offer. Appellant asked that the Authority "take corrective action" by requesting another round of BAFO's. Subsequently, on June 17, 2005, Appellant filed a Motion to Withdraw its first appeal to this Board, and, on June 17, 2005, the Board dismissed Appellant's first appeal with prejudice.
16. By letter dated June 22, 2005, Mr. Duerling denied Appellant's second (supplemental) protest. Mr. Duerling disagreed with Appellant's assertion that the language in ACS's BAFO regarding liquidated damages made it a conditional offer, and disagreed with Appellant's assertion that it had been treated unfairly because its BAFO was rejected while ACS's was accepted. Mr.

Duerling pointed out that the content of the two proposals was, in fact, quite different. In regard to the objectionable list of "Assumptions" in Appellant's BAFO, Mr. Duerling stated in his decision that:

There were two reasons for this rejection. One was that the list [of Assumptions] is vague, potentially incomplete, and of indeterminable significance. The second was that the list was inserted into the price proposal, in violation of the instructions in the RFP and the BAFO request letter.

Mr. Duerling explained that the Appellant's Assumptions referred to several dozen important contract provisions, but just listed the provisions by section number and did not say what the assumptions were, and that as a result he and the evaluation committee members could not tell what Appellant's assumptions were, if they were material, or if there were other assumptions not included in the list. Mr. Duerling acknowledged that Appellant's price in its BAFO was lower than ACS's, but pointed out that "because the list of assumptions was attached to the price proposal, we could not tell if TransCore's price was firm or was subject to modification based on its assumptions." As expressed in Mr. Duerling's decision the circumstances and language of the relevant provision in the ACS BAFO was entirely different:

It contains a recommendation for rewording and/or clarification to the RFP's Liquidated Damages provision, and says that the recommendation should not be considered to be an exception....This provision is specific, and located in the technical proposal as directed. As a result, I and the evaluation committee members could tell what ACS was proposing and assess the impact on its proposal.

17. It was thus the judgment of Mr. Duerling and the evaluation committee members that the language in the ACS BAFO regarding

Liquidated Damages was not significant because it stated explicitly that ACS agreed it would be liable for the liquidated damages described in the RFP, and thus was not an exception or condition to the terms of the contract.

18. On July 1, 2005 Appellant appealed Mr. Duerling's June 22, 2005 Procurement Officer's decision to the Board. The essence of Appellant's appeal is its assertion that the statement in ACS's BAFO regarding consequential damages as set forth in Finding of Fact No. 11 above is a condition that modifies the section of the Liquidated Damages provision relating to "Lost Revenue." Appellant argues that the damages in the "Lost Revenue" section of the Liquidated Damages provision constitute consequential damages, and thus that the language in ACS's proposal was not a recommendation but a modification of a material section of the contract; i.e., a condition upon or exception to the terms of the RFP.

### **Decision**

The issue to be determined is whether the Procurement Officer's determination that the language regarding liquidated damages in ACS's proposal was not a condition upon or exception to the terms of the RFP was reasonable and in accord with the law.

The RFP states that if there is a conflict between the terms of the RFP and the contractor's proposal, the terms of the RFP prevail. Thus, if ACS's language in its BAFO Technical Proposal is either a suggested rewording of the RFP language, or a request for a change, the terms of the RFP would supercede ACS's requests or suggestions, and ACS's requests or suggestions would have no significance for the procurement or for the contract that would be subsequently entered into.

Appellant is correct in asserting that if ACS's language constitutes a condition upon or exception to the terms of the RFP, it

cannot be accepted by the Authority. See, e.g., Eisner Communications, Inc., MSBCA 2438, 3442, 2445, \_\_\_\_\_ MSBCA ¶ \_\_\_\_\_ (March 11, 2005) at p. 32 ("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.") The Procurement Officer made the determination that ACS's language was a suggestion for rewording of the contract language, not a condition or exception to the terms of the RFP.

This Board has held that if an offeror in a negotiated procurement challenges the procurement officer's determination of award, that offeror bears the burden of proving that the procurement officer's decision was contrary to law or regulation, or otherwise unreasonable, arbitrary, capricious or an abuse of discretion. AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 10. The issue before this Board, then, is whether Mr. Duerling's determination that ACS's language was not an unlawful condition or exception to the terms of the RFP was reasonable.

Maryland follows the objective law of contract interpretation, and under this test a court construing an agreement must determine from the language of the agreement what a reasonable person in the position of the parties would have meant. General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 261 (1985). In construing a contract, Maryland courts have repeatedly emphasized that the words of a contract should be given their ordinary and usual meaning, in light of the context in which they are employed. Wells v. Chevy Chase Bank, 363 Md. 232, 251 (2002). Moreover, in Maryland it is a recognized rule of construction that a contract must be construed in its entirety, and effect given to all of its language. Sagner v. Glenangus Farms, Inc., 234 Md. 156, 167 (1964). Language in a contract may not be read alone without reference to other language on the same subject. Marsh v. Loffler Housing Corp., 102 Md. App. 116, 127 (1994); Cam Construction Company, MSBCA 1088, 1 MSBCA ¶62 (1983).

These rules of construction apply here because both the RFP and ACS's proposal would become part of the contract for the ETC services.

Consideration of the actual language of the RFP and the ACS proposal, in their entirety, demonstrates that the procurement officer's decision was reasonable.

The explicit words of the ACS BAFO Technical Proposal make it clear that its language regarding the Liquidated Damages was not an exception to or condition upon the terms of the RFP. It says: "[w]e have accommodated the revised Terms and Conditions without exception," and that its suggested language is "recommendations for rewording and/or clarification...that should not be considered to be exceptions." All of the damages that the RFP imposes on the contractor are described in the Liquidated Damages section of the RFP, and ACS's proposal states that its proposed change in language "in no way limits Contractor's liability for liquidated damages." Furthermore, ACS's suggested rewording or request for change is in its Technical Proposal, as directed by the Authority, not its Price Proposal, which is not conditioned or limited in any way.

Nevertheless, Appellant argues that ACS's language must be read as an exception or condition to the terms of the RFP. Appellant, however, does not explain how it would be reasonable for the Procurement Officer to read ACS's language as an "exception" or as a "condition."

ACS and the State argued that the language may not be construed as an exception or condition when ACS states that the language is a "minor suggestion" or "recommendation for rewording and/or clarification;" and the proposal states that ACS's BAFO has "accommodated the revised terms and conditions . . . . without exception." In this regard, we note that this blanket statement by ACS accepting all of the terms and conditions of the RFP "without exception" is new language that was not in ACS's initial Technical Proposal but was added to its BAFO.

Appellant's argument as to why ACS's language constitutes an exception relies on its legal interpretation of the phrase "consequential and indirect damages." Appellant asserts that because the damages described in the "Lost Revenue" section of the Liquidated Damages provision may, under a legal definition, be described as consequential damages, ACS's proposed rewording must be seen as an exception to paying the Lost Revenue damages specified in the RFP. Specifically, Appellant argues that the Liquidated Damages section of the RFP (Section 2.16) provides for both liquidated damages and actual consequential damages depending on the situation. According to Appellant's argument, liquidated damages were contemplated for situations involving transition delay, customer service, and performance, and conversely actual consequential and incidental damages are contemplated in situations involving lost revenue.

Regardless as to what the legal definition of "consequential damages" might be outside the context of this Contract, the RFP here defines all of the damages that a contractor may be liable for as liquidated damages. As described above, ACS stated explicitly that its proposed rewording "in no way limits Contractor's liability for liquidated damages." ACS did not say that its language in no way limits Contractor's liability for liquidated damages other than Lost Revenue damages. It did not suggest deleting the Lost Revenue section. Rather, it suggested the addition of a sentence that made it clear that it would not be liable for certain specific categories of damages other than the liquidated damages specified in the contract. This is emphasized by the fact that ACS described its language as a "rewording" or "clarification" of the RFP provisions and not as an exception.

The Procurement Officer understood that ACS wanted to make it clear that it would not be liable for any damages other than those listed as "Liquidated Damages" in the contract. In light of the totality of the language in the ACS proposal, this was a reasonable

interpretation, indeed, the only reasonable conclusion. Because the Authority interprets the contract documents (RFP and Proposal) in the same way, Mr. Duerling did not consider this to be an exception or condition to the contract language.

Appellant asserts in its instant protest and appeal that what ACS did in its BAFO was no different than what Appellant did in its BAFO. However, as Mr. Duerling stated in his Procurement Officer's decision herein, he considered the two to be quite different. There were clear indications that Appellant intended its Assumptions to be conditions, not suggestions. It put them in its Price Proposal, and stated that its Price Proposal was based on the assumptions, and in its BAFO transmittal letter stated that its Price Proposal contained Appellant's "terms and conditions." Most importantly, however, as Mr. Duerling states in his decision, is the fact that it was not possible for the Authority to know what Appellant's assumptions were, or even if its list was complete. As Mr. Duerling stated:

The introduction to TransCore's list of assumptions said that TransCore wanted "...to discuss the following referenced items plus some supplemental items upon which our technical and price proposal have been based,..." The list included references to several dozen RFP and contract provisions, but just listed the provisions by section number and did not say what TransCore's assumptions were. The sections listed included references to material, significant parts of the contract....The result was that I and the evaluation committee members could not tell what TransCore's assumptions were, could not tell if its assumptions were material, and could not tell if there were other assumptions that were not included in the list.

In contrast, as Mr. Duerling stated, ACS's language regarding liquidated damages was:

specific, and located in the technical proposal as directed. As a result, I and the evaluation committee members could tell what ACS was

proposing and assess the impact on its proposal. Our determination was that it was not significant.

For the reasons discussed above, this determination was a reasonable one. While we thus deny the appeal on the issue presented we will discuss another matter raised by these proceedings.

In its second protest Appellant refers to the fact that the bottom line number in Appellant's BAFO Price Proposal was significantly lower than the bottom line number in ACS's Price Proposal. This fact is irrelevant to the issue in this appeal, which is whether ACS took an exception to the terms of the RFP. If ACS's BAFO proposal is acceptable, then the Authority does not automatically have the option to reject it simply because its price was higher than that of Appellant.

First, as Mr. Duerling points out in his Procurement Officer's decision, the Authority had no way of knowing to what extent the list of assumptions in Appellant's Price Proposal affected Appellant's price. Appellant stated that its Price Proposal had been based on its assumptions, and so, as Mr. Duerling noted, the Authority "could not tell if Appellant's price was firm or was subject to modification based on its assumptions."

Secondly, the RFP provides that, in evaluating proposals, technical merit would be given more weight than cost. The Authority's evaluation committee did, in fact, rank ACS higher technically than Appellant.

Because Appellant's BAFO was not acceptable as submitted, no award could have been made based on that BAFO. The best result that Appellant could have obtained would have been a second round of BAFOs, in which both offerors would have had the opportunity to change their Price Proposals. There is simply no way of telling what the relative price positions of the offerors would have been after new BAFOs were submitted.

Even in competitive bid procurements where low price is the only criterion for selection, this Board has not hesitated to apply the

procurement law even when it requires rejecting the lowest bid. This is because the procurement law has numerous purposes other than just obtaining the lowest price for the state in every circumstance. Focusing solely on price should be of less concern here, in a negotiated procurement in which technical considerations are paramount and ACS was ranked technically superior, and where it is uncertain whether Appellant would ultimately offer the lowest price.

In summary we see no defect in the proposed award to ACS.

Wherefore it is Ordered this                    day of September, 2005 that the appeal is denied.

Dated:

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Robert B. Harrison III  
Chairman

I Concur:

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Michael W. Burns  
Board Member

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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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2485, appeal of TransCore, LP under MdTA Contract No. MA 549-000-006.

Dated:

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Michael L. Carnahan  
Deputy Recorder