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SUMMARY ABSTRACT  
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2502	Date of Decision: 04/07/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: DHMH RFP No. DHMH-OCPMP-06-8739	
Appellant/Respondent: Clifton Gunderson, LLP Department of Health and Mental Hygiene	

Decision Summary:

Negotiated Procurements - Discussions - Under COMAR 21.05.03.03C(3)(a) the procurement officer has full authority to establish procedures and schedules for conducting discussions, but he or she may not disclose to a competing offeror any information derived from a proposal of, or discussion with, another offeror.

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**BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of Clifton )  
Gunderson, LLP )  
 )  
 ) Docket No. MSBCA 2502  
 )  
Under DHMH RFP No. DHMH-OCPMP- )  
06-8739 )

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**OPINION BY CHAIRMAN HARRISON**

Appellant timely appeals the denial of its protest that Respondent, the Department of Health and Mental Hygiene (Department) (1) failed to engage in fair and meaningful discussions as required by COMAR and the Respondent's own policy and (2) the Procurement Officer abused her discretion by unreasonably, arbitrarily and capriciously recommending the Interested Party, Myers & Stauffer, LLC (M&S) for award in contravention of the standards set forth in the Request for Proposals (RFP) and the applicable regulations.

## FINDINGS OF FACT

1. Appellant and M&S submitted technical and financial proposals in response to the above captioned RFP dated March 8, 2005 for auditing, accounting and consulting services for the Department.<sup>1</sup> The services had been previously provided state wide by Appellant for many years. However, the RFP provided for the services to be provided in three regions, and the RFP invited a proposal for each region such that more than one offeror could be awarded a contract. The three regions for which proposals were sought were Region I: Central Maryland; Region II: Eastern Maryland; and Region III: Western Maryland.
2. As relevant to the issues in this appeal, the RFP provided:

The committee will recommend the Offeror for each region whose overall proposal for the respective region 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 costs as described in the financial proposal may become the primary determinant for award.

As permitted by COMAR 21.05.03.03A(6), the Procurement Officer and agency head may accept or decline any or all recommendations from the committee. Nevertheless, in each

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<sup>1</sup> Appellant and M&S were the only offerors that responded to the RFP.

case, the criteria set forth in Part III, Section 1.1 will govern decisions.

3. The technical criteria, set forth at length in Part III, Section 1.1 of the RFP – and which are to be given more weight than the financial proposal – fall into the following four categories in descending order of importance: A. Experience of Offeror & Qualifications of Personnel; B. Plan of Operations; C. Economic Benefits to the State of Maryland; and D. Statement of the Problem. Categories A, B and D were broken down further into subcategories.
4. The RFP also provided that discussions may occur, in accordance with COMAR, on both the technical and financial, or “price”, proposals:

The Evaluation Committee may enter into discussions with qualified or potentially qualified Offerors as set forth in COMAR 21.05.03.03.C. Discussions, however, need not occur (see COMAR 21.05.03.02.A(4)). Offerors may be asked to participate in face-to-face discussions with the committee or other State representatives concerning either or both their technical or financial proposals. Discussions may also be conducted via teleconference or may take the form of questions to be answered by the Offerors and conducted by mail, e-mail, or facsimile transmission at the discretion of the Department.

5. An Evaluation Committee was established to assist the Procurement Officer (Ms. Sharon Gambrill) in evaluating the proposals. The Evaluation Committee was made up of individuals from the Department’s Office of Planning and Finance, who were selected because of their expertise and familiarity with this

program. Two other persons also assisted in the procurement process. They were Ms. Dorothy Lisa Hale, the Procurement and MBE Coordinator (Procurement Coordinator) for the Office of Planning and Finance until September of 2005, and Ms. Theresa Ammons, the Agency Procurement Specialist for the Department, and the Contract Officer for this procurement (Contract Officer). Procurement Coordinator Hale and Contract Officer Ammons were not members of the Evaluation Committee, but were present at all Evaluation Committee meetings. Additionally, Contract Officer Ammons participated in all discussions with both Offerors.

6. The Evaluation Committee gathered for the first time at an orientation meeting where they reviewed their roles and responsibilities in connection with this procurement, as well as the evaluation assessment tool to be used in assessing the technical proposals (score sheets).
7. In connection with their roles and responsibilities, the Evaluation Committee members were provided certain written evaluation instructions. Similar to the RFP, the evaluation instructions provided that, "the technical proposal shall be afforded substantially more weight than the financial proposal," and that if both technical rankings are "essentially equal", the financial proposal may become the primary determinant of award.
8. Among its duties, the Evaluation Committee was required to identify deficiencies/problems with each proposal. Further, the Committee was advised that

offerors judged to be reasonably susceptible of being selected for award of the contract would be informed of problem areas identified by the Committee and given an opportunity to resolve them.

In this regard, the evaluation instructions state:

Whenever feasible, vendors should be appraised of those areas of their proposal which are deficient and should then be given the opportunity to strengthen those areas through revision and resubmission of their proposals...

[D]iscussions should be held whenever possible for the following reasons:

1. It maximizes competition by keeping as many vendors as possible in the running.
2. No vendor ever submits a perfect proposal. Even a good proposal can be strengthened and it should be through the discussion process.
3. Even though we think we write perfectly clear RFP's, vendors do not always see it that way. Often, a vendor will interpret an aspect of an RFP differently than it was intended, or they won't fully appreciate the importance attached to certain sections...
4. Frequently, offerors are fully capable of performing the duties of a CSP contract if they are nudged to revise their proposals in certain ways. In other words, they can do B, as well as A, if they had only known that B is what the [(sic)] we (the State) wanted. By simply telling the offeror that we want B and permitting revisions, we can keep viable competitors in the running.

5. The likelihood of a protest being filed should be minimized if meaningful discussions are held. Further, debriefing offerors should be easier since deficiencies should have been noted during discussions (unless an offeror was so bad that it was eliminated before discussions were [(sic)] held.)
9. The Department received and evaluated technical proposals from both Appellant and M&S for all three regions. Overall, the Evaluation Committee found Appellant's technical proposal to be superior to that of M&S - giving Appellant an "Excellent" overall and M&S a "Very Good". The Evaluation Committee rated the two offerors on each of the four major technical criteria as follows:

	Appellant (all 3 regions)	M&S (all 3 regions)
A	Excellent	Very Good
B	Very Good	Very Good
C	Very Good	Very Good
D	Excellent	Very Good

Under the particular evaluation criteria relating to staff mix and classification hours, the Evaluation Committee rated Appellant over M&S. The three relevant criteria are as follows:

- A. Experience of Offeror &  
Qualifications of Personnel

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8. Qualifications of proposed key personnel, including required education and prior experience in health care industry, and a staff mix that is appropriate to satisfactory and timely completion of the work under the contract.

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9. The proportion of experienced auditing staff, e.g., senior, middle, entry level, etc.

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B. Plan of Operations

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6. Classification hours (manager, supervising auditor, senior auditor, junior auditor, entry level auditor and intern level auditor (identified in the Attachments 1 through 5, step 2 and referenced as the staff mix, will be evaluated for adequacy in terms of the task to be performed under the contract.)

For each of these three criteria (A8, A9, B6), the offerors were rated by each of the four evaluators, as follows:

	Appellant	M&S
A8	Excellent, Excellent, Excellent, Very Good	Very Good, Adequate, Adequate, Adequate
A9	Excellent, Very Good Very Good, Very Good	Adequate, Adequate, Adequate, Adequate
B6	Very Good, Very Good Very Good, Very Good	Adequate, Adequate, Adequate, Adequate



10. Prior to the opening of the financial proposals, the Evaluation Committee issued a Request for Clarification (RFC) to both Offerors asking them to address various concerns. The RFCs also requested that the Offerors be available by telephone in the event the Evaluation Committee had follow-up questions after receiving the Offerors' written responses.
11. Upon receipt of the written responses, the Evaluation Committee asked follow-up questions of M&S because the Evaluation Committee desired further clarifications. Follow-up questions were not asked of Appellant, because there was no need for clarification of Appellant's answers. With respect to Appellant's written responses, Procurement Coordinator Hale testified, "[t]hey didn't see a need to [ask follow-up questions], because the responses...they received from C.G...[were] sufficient for them." As for M&S's responses, Procurement Coordinator Hale testified that, "some of those responses [Myers & Stauffer] sent in led to other concerns."
12. Once the issues concerning the technical proposals were resolved, the Evaluation Committee turned to the financial proposals. Upon opening the financial proposals, the Evaluation Committee was presented with a significant price difference. Appellant's annual price and total price for each region was significantly higher than M&S's for the three

regions.<sup>2</sup> Notwithstanding the higher price, the initial recommendation of the Committee was to recommend award of all three regions to Appellant based on Appellant's knowledge of the work involved due to its incumbency.

13. This initial recommendation was rejected on the advice of Ms. Ammons, the Contract Officer, due to the Appellant's high price, and the Evaluation Committee then entered into a series of discussions and BAFOs with both Offerors to better understand the price discrepancy. A request for BAFO #1 was issued to both Offerors on the financial proposals, a RFC of BAFOs #1 was sent to both Offerors, and BAFO #2 was issued to both Offerors on their technical and financial proposals; i.e., in issuing BAFO #2, vendors were given the opportunity to revise both their technical proposals and their financial proposals for the regions.
14. Appellant made minor reductions to its financial proposals in response to the BAFOs, and, at the conclusion of the BAFOs, Appellant's price was still significantly higher than that of M&S for all three regions.
15. At the conclusion of the BAFOs, the Evaluation Committee, in its final recommendation, recommended award to M&S for Region I and award to Appellant for Regions II and III.
16. The Evaluation Committee's final recommendation was sent to Ms. Gambrill, the Procurement Officer. Ms.

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<sup>2</sup> The prices are not set forth due to confidentiality requirements. The Board members and counsel are aware of the offerors' pricing which is set forth in the record.

Gambrill was not a member of the Evaluation Committee and was not present at Evaluation Committee meetings. Ms. Gambrill's responsibility as the Procurement Officer for this RFP was to review the Evaluation Committee's recommendation and make her own final recommendation for award to the Secretary of the Department.

17. Upon receipt of the Evaluation Committee's final recommendation for award, Ms. Gambirll reviewed the RFP, each offeror's proposal, and the Evaluation Committee members' score sheets. Upon completion of this review, Ms. Gambrill returned the score sheets to the Evaluation Committee for further clarification because the information as submitted to her did not describe the differences in the two Offerors' proposals in a manner that she believed justified the significant price differential.
18. Ms. Gambrill testified that, "the evaluators ranked Appellant based on knowledge with the current contract and not so much as what was in the RFP, in their proposal." In response to Ms. Gambrill's request for further clarification, the Evaluation Committee provided additional comments on the score sheets to justify their recommended award.
19. After receiving the revised score sheets, Ms. Gambrill met again with the Evaluation Committee because of her belief that the revised score sheets still did not provide a sufficient explanation for their recommendation. At this meeting, Ms. Gambrill asked the Evaluation Committee to explain the distinctions between the Offerors' proposals and why

Appellant was recommended for Regions II and III when, in her opinion, M&S's technical proposal was essentially equal and more economically desirable to the State. The Evaluation Committee was not able to justify to Ms. Gambrill's satisfaction awarding Regions II and III to Appellant.

20. Ms. Gambrill then informed the Evaluation Committee that she was inclined to award the entire contract to M&S because M&S was capable of performing the work, its technical proposal for each region was essentially equal to Appellant's, and because the Evaluation Committee could not justify awarding any region to Appellant.
21. No member of the Evaluation Committee objected to Ms. Gambrill's reasoning that the proposals were essentially equal.
22. The record reflects that, in the exercise of her discretion as Procurement Officer, Ms. Gambrill's conclusion that the technical proposals were essentially equal, permitting price to be the primary determinative factor as set forth in the RFP, was not arbitrary, capricious, or without basis in fact. As a result, Ms. Gambrill fulfilled her statutory duty to obtain the most advantageous offer for the State by awarding the entire contract to M&S.
23. Upon being advised of this award determination, Appellant requested a debriefing.
24. Following the debriefing and Appellant's receipt of post-debriefing answers to certain questions posed

at the debriefing, Appellant filed a timely protest on July 18, 2005.

25. From a Procurement Officer's final decision as approved by the Department on September 14, 2005, Appellant appealed to this Board on September 23, 2005. The appeal was heard in January, 2006, and, upon receipt of post-hearing briefs, this decision follows.

### DECISION

Agency procurement decisions will not be disturbed unless they are arbitrary, capricious, unreasonable, or contrary to law or the bid or proposal documents. In negotiated procurements such as the instant one, a recognition of reasonable discretion attaches to such decisions. Maximus, Inc., MSBCA 2351, 2357, 2370, 6 MSBCA ¶538 (2003) (under the reasonableness standard the Board applies, it does not second guess Agency decisions on technical issues); Housing and Development Software, LLC, MSBCA 2247, 5 MSBCA ¶500 (2001) at p. 8 (the Board recognizes the subjective nature of evaluation and the discretion to be accorded officials engaged in negotiated procurements).

The Procurement Officer has sole discretion after receiving the advice of an evaluation panel, if one is used, to evaluate competing proposals in a negotiated procurement and make a determination recommending award 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 RFP. ACS State Healthcare, LLC, MSBCA 2474, \_\_\_\_\_ MSBCA ¶\_\_\_\_\_ (2005) at p.

14; COMAR 21.05.03.03(F). Accordingly, a party disagreeing with the evaluation of proposals or seeking to disturb the recommended award has the burden of showing that the action was unreasonable, and mere disagreement is not sufficient to meet this heavy burden. *Id.* at p. 15 (citing Delmarva Community Services, Inc., MSBCA 2302, 5 MSBCA ¶523 (2002) at p. 5).

Based on these general principals and the Board's review of the entire record, we decline to find that the Procurement Officer abused her discretion by recommending M&S for award, and we further decline to find that the Department failed to engage in fair and meaningful discussions.

State procurement law requires that proposals be evaluated based on factors set forth in the RFP and developed from both the work statement and price, and further requires that technical and financial proposals be evaluated independently. *Md. Code Ann. State Fin. & Proc. § 13-104(b)* (an RFP must include the factors, including price, that will be used in evaluating proposals); COMAR 21.05.03.03(A)(1),(2). The RFP here requires the Evaluation Committee to evaluate and rank the technical proposals before the financial proposals. RFP, Part III § 1.2. The RFP states that only those technical proposals submitted by offerors found to be reasonably susceptible for award will be reviewed and evaluated by the Evaluation Committee, and the financial proposals of those offerors found not to be reasonably susceptible for award will be returned unopened. Therefore, technical proposals must be reasonably susceptible for award before they can be

evaluated and ranked, and before financial proposals can be opened.

The RFP provides that the technical proposal will be afforded more weight than the financial proposal. However, if 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. The term "essentially equal" is not defined in the procurement law, COMAR or the RFP. However, this Board has observed that, in technical evaluations, whether a given point spread between two competing proposals indicates significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within a procuring agency's discretion. AGS Genasys Corp., MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 12.

Upon completion of all review, investigation, 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." COMAR 21.05.03.03(F). The evaluation of proposals must take into account both work statement and price in every instance to obtain the most advantageous contract for the State. *Md. Code Ann. State Fin. & Proc. § 13-104*; COMAR 21.05.03.03.

The record reflects that this is what happened here. The Evaluation Committee evaluated the technical proposals before the financial proposals. After review and investigation, the Procurement Officer determined, and the

Evaluation Committee agreed, that M&S's and Appellant's technical proposals were both "essentially equal." Because the Evaluation Committee could not justify awarding any region to Appellant, the Procurement Officer recommended award to M&S because it was capable of doing the same work for substantially less money.

More specifically, Appellant's assertion that Ms. Gambrill abused her discretion by utilizing an improper standard is not borne out by the record. Appellant argues that Ms. Gambrill, the Procurement Officer, arrived at her decision by using a "new and incorrect standard for award;" namely, that price became the sole determinant because Ms. Gambrill acknowledged that both offerors' technical proposals were "technically acceptable."<sup>3</sup> However, such acknowledgement does not support Appellant's assertion that Ms. Gambrill created a new and incorrect standard. The determination that a technical proposal is "technically acceptable" must be made before a proposal can be evaluated, and before a financial proposal can be opened. COMAR 21.05.03.03(C)(1) ("The term 'qualified offerors' includes only those responsible offerors that submitted proposals initially classified by the procurement officer as reasonably susceptible of being selected for award.") Technical proposals must be "technically acceptable" before they may be ranked or deemed "essentially equal."

Appellant argues that because it received the highest technical ranking from the Evaluation Committee it must be

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<sup>3</sup> Appellant also asserts that Contract Officer Ammons abused her discretion when she incorrectly instructed the Evaluation Committee that if the two offerors were both able to perform (rather than presenting essentially equal proposals) then price could be the primary determinant of award.

The record reflects, however, that Ms. Ammons applied the correct standard because she determined price to be the primary determinant factor only after concluding that the two proposals were "essentially equal."



awarded the contract. Of primary importance, however, is the determination of the Procurement Officer. Procurement law does not require the use of evaluation committees and, when such committees are used, their recommendations do not constitute final determinations warranting deference. COMAR 21.05.03.03(A)(6). Rather, evaluation of the recommendation of an evaluation committee shall be performed by the procurement officer. *Id.* The purpose of an evaluation committee's findings is thus to provide guidance to the Procurement Officer in performing her own evaluation and investigation to present a recommended award to the agency head. Here, the RFP required the evaluation committee to recommend to the Procurement Officer the offeror "whose overall proposal for the respective region provides the most advantageous offer to the State considering price and the evaluation criteria set forth in the RFP." RFP, Part III § 1.2.

As noted, Appellant posits its "number 1" ranking from the Evaluation Committee as the basis for arguing it was the proper recipient for award in all three Regions. However, the law does not require that an award be made to an offeror solely because it is rated technically superior. This Board has upheld an award to an offeror with a lower rated technical proposal where that proposal was determined to be in the best interest of the State. Housing and Development Software, LLC, supra. Herein, the RFP requires that, as long as technical proposals are "reasonably susceptible for award," financial proposals must be considered in every instance, regardless of whether technical proposals are to be afforded more weight. The record in this appeal reflects that Ms. Gambrill

recommended award of the entire contract (all three regions) to M&S because (1) both Offerors were capable of performing; (2) Appellant's higher ranking did not reflect significant technical superiority independent of its incumbent status but that, in fact, the proposals were "essentially equal;" and (3) Appellant's higher ranking did not warrant the significant additional cost to the State.

To cast doubt on the reasonableness of this determination, Appellant refers to a memorandum reflecting the Evaluation Committee's deliberations that discusses eight separate reasons as the basis for its "superior" ranking. However, placed in appropriate perspective it appears that all eight reasons speak to Appellant's status as the incumbent (for over twenty years) and the Committee's belief that there would thus be no need for a transition period. The record reflects, however, that Ms. Gambrill reasonably disagreed with the Evaluation Committee's analysis that incumbency alone justified the additional cost to the State.

Appellant also focuses on the fact that its overall technical proposal was ranked "excellent" and that it received two "excellent" rankings and two "very good" rankings, while M&S's overall ranking was "very good" and M&S received four "very good" rankings as determined from the Evaluation Committee members' score sheets. However, as we have noted, the rankings by Evaluation Committee members are not dispositive. After review and discussion by the Evaluation Committee and Ms. Gambrill, neither agreed that Appellant's technical proposal for each region was sufficiently superior to those of M&S that it would justify the cost difference.

Indeed, the record reflects that the Procurement Officer, Contract Officer, and Evaluation Committee members all agreed that M&S's technical proposal was essentially equal to Appellant's prior to the Procurement Officer's recommended final decision to the Department. The Board finds, based on the record, that the Procurement Officer's determination that the technical proposals of the offerors were essentially equal as communicated to the Department Secretary was neither arbitrary nor capricious and that it had a basis in fact.

When Ms. Gambrill received the Evaluation Committee's preliminary recommendation to award all three Regions to Appellant, Ms. Gambrill met with the Evaluation Committee to see if they could explain to her the justification for their conclusion. No sufficient justification other than comfort with incumbency and avoidance of a transition period was provided.

The record also reflects that Ms. Gambrill properly performed her duties upon receipt of the Evaluation Committee's final memorandum recommending award of Region I to M&S and Regions II and III to Appellant.

Ms. Gambrill did not merely adopt or reject the Evaluation Committee's second recommendation. Instead, she conducted an independent review and investigation before making her own recommendation to the Department Secretary. Ms. Gambrill conducted a review of the RFP, the proposals, and the Evaluation Committee's score sheets, and also re-checked the Offerors' references. As part of her investigation into the soundness of the Evaluation Committee's recommendations, Ms. Gambrill confirmed that the Evaluation Committee considered the financial proposals

only after it evaluated and ranked the technical proposals. To ensure that both work statement and price were properly considered, Ms. Gambrill reviewed the Evaluation Committee members' score sheets and returned the score sheets to the Evaluation Committee members to provide further detailed comments to determine how the members made their determination.

Ms. Gambrill then met with the Evaluation Committee for a second time to give them an opportunity to justify their recommendation. At this meeting, the Evaluation Committee agreed that, while Appellant's technical proposals ranked higher in some regards, the technical superiority could not justify Appellant's higher prices. The only reasons the Evaluation Committee could offer Ms. Gambrill for awarding Regions II and III to Appellant were based on reduced transition efforts by retaining the incumbent.

As a result of her independent review and investigation, Ms. Gambrill reasonably found, and the Contract Officer and Evaluation Committee agreed, that Appellant's incumbency was not sufficient justification for the higher price. Ms. Gambrill's review and investigation led her to determine that Appellant's technical proposals did not provide a clearly technically superior solution to M&S's. The record supports Ms. Gambrill's findings that, not only were both offerors' offers "technically acceptable" and "reasonably susceptible for award," but that the two offerors' technical proposals were "excellent" and "essentially equal." Upon the reasonable conclusion that the technical proposals were essentially equal, Ms. Gambrill properly executed her duties as Procurement

Officer and, as permitted by the RFP, focused on the financial proposal as the primary determinant for award.

Accordingly, M&S was awarded the contract in all three regions, and we find that the record reflects that Ms. Gambrill reasonably exercised her discretion in determining that M&S's proposals were most advantageous to the State. Appellant has failed to satisfy its burden of showing that Ms. Gambrill abused her discretion. Ms. Gambrill's recommendation is entitled to deference from this Board.

Appellant next argues that the Department treated it unfairly by denying it the opportunity to improve its financial proposal. Appellant suggests it should have been told that its bid price was too high, and that the reason behind its high price was the total hours bid. Had it been so advised, it argues it would have reduced its total hours to make its proposals as competitive as M&S's. The record reflects, however, that the Evaluation Committee and Procurement Officer provided fair and equal treatment to the offerors, giving each appropriate opportunity for discussions, negotiations, and clarification of proposals as required by COMAR 21.05.03.03(C)3(a).

The General Procurement Law, COMAR and the RFP herein permit, but do not require, the State to engage in discussions with offerors. However, the General Procurement Law, COMAR and the RFP herein do not set forth a specific format for the discussions or require that each offeror be asked identical questions. *Md. Code Ann. State Fin. & Proc. §13-104(d)*; COMAR 21.05.03.03(C) & (D); RFP, Part III §§ 1.3 & 1.4.

The Procurement Officer has full authority to "establish procedures and schedules for conducting

discussions," but may not disclose to a competing offeror any information derived from a proposal of, or discussion with, another offeror. COMAR 21.05.03.03(C)(3)(a). The purpose of conducting discussions is to: (1) assure full understanding of the Agency's requirements, and the Offerors' proposals and ability to perform; (2) obtain the best price for the State; and (3) arrive at a contract that is the most advantageous to the State, considering price and other evaluation factors in the RFP. COMAR 21.05.03.03(C)(2).

Appellant argues it was deprived of the opportunity to revise its proposals, and that it would have adjusted its total hours if it had been told that its price was excessive, and that the reason for the higher cost was the total hours bid. Conduct of full and fair discussions, however, did not require the Department to advise Appellant that its total hours bid led to higher costs.

Nevertheless, the record reflects that Appellant had opportunities to amend its proposal. The Evaluation Committee provided both offerors the opportunity to clarify their proposals and submit BAFOs. After ranking the technical proposals, the Evaluation Committee began evaluating the financial proposals, and invited BAFOs on financial proposals from both Offerors. Then, the Evaluation Committee sent a Request for Clarification to both Offerors. Ms. Ammons testified "the evaluation committee had questions for both vendors, letters were sent out to both vendors and questions asked." A second BAFO was then requested from both Offerors on both their technical and financial proposals.

Appellant argues without any basis that M&S alone was afforded an opportunity to lower its price in BAFO #2. However, M&S did not reduce its price in response to BAFO #2, countering Appellant's assertion that M&S received an unfair advantage. The record reflects that Appellant was provided with the exact same opportunities as M&S, but its minimal concessions in response to the BAFOs did not make its price offer competitive.

Appellant also argues that "there cannot be a meaningful opportunity to revise the proposal, even with the issuance of a BAFO request." However, discussions and BAFOs are the approved means by which the State may provide offerors with the opportunity to revise their proposals. To argue the Department should have told Appellant its price was too high because of its total hours imposes a requirement above and beyond what is legally required. The result of Appellant's proposed argument is to require the Department to compare offerors' proposals and reveal each proposal's weaknesses as compared to the other(s). This contravenes COMAR. The Department's obligation here was to let the procurement process reveal the most advantageous proposal to the State through fair and equal opportunities for discussions and BAFOs to both Offerors. The record supports the Procurement Officer's determination that the best proposals here for all three regions were those of M&S. The record reflects that M&S's proposals were legally and fairly deemed to be the most advantageous to the State, considering price and the evaluation factors set forth in the request for proposals, consistent with COMAR 21.05.03.03(F).

Incumbency alone is not sufficient justification for award of a contract. The Procurement Officer was obligated to recommend award to the proposal that is most advantageous to the State. The Evaluation Committee was unable to justify its recommended award to Appellant to the Procurement Officer under the requirements of the General Procurement Law, COMAR and the RFP. Ms. Gambrill's recommendation to award all three Regions to M&S, based on its essentially equal technical proposal and significantly lower cost to the State, was not arbitrary, capricious, unreasonable, or illegal.

Accordingly, the appeal is denied.

Wherefore, it is Ordered this \_\_\_\_\_ day of April, 2006 that the appeal of Clifton Gunderson, LLP in the above captioned matter is denied.

Dated:

\_\_\_\_\_  
Robert B. Harrison III  
Chairman

I Concur:

\_\_\_\_\_  
Michael W. Burns  
Board Member

\_\_\_\_\_  
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 2502, appeal of Clifton Gunderson, LLP under DHMH RFP No. DHMH-OCMP-06-8739.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Recorder