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

Docket No. 2601	Date of Decision: 09/09/08
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DLLR Request for Proposals DLLR-2007-4	
Appellant/Respondent: PSI Services, LLC Dept. of Labor Licensing & Regulation	

Decision Summary:

Bid Protests - Bidders must be treated equally.

Bid Protests - Weight to be afforded price as an evaluation factor is not affected by pass-through pricing.

Bid Protests - When RFP requires superior weight to be afforded to technical rather pricing factors, the agency must follow the dictates of its RFP.

Changes - When BAFO is limited to price modifications, no substantive modification other than price is permitted.

Changes - Intervening enactment of legislation affecting obligations of bidders must be adhered to whether or not contained in a procurement solicitation.

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BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of PSI Services,)
LLC)
)
) Docket No. MSBCA 2601
Under DLLR Request for)
Proposals)
DLLR-2007-4)

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OPINION BY BOARD MEMBER DEMBROW

Appellant PSI, LLC (PSI) timely appeals the rejection of its bid for real estate licensing examination services sought by the Department of Labor, Licensing and Regulation (DLLR). Based upon the evidence adduced and because the vendors that submitted bids for this contract were not treated by DLLR equally, the Maryland State Board of Contract Appeals (Board) grants this appeal for the specific reasons more fully set forth as follows.

Findings of Fact

1. On May 24, 2007 the DLLR issued a certain request for proposals (RFP) known as RFP No. DLLR-2007-4 to procure from a private vendor licensing examination services needed by

the Maryland Real Estate Commission.

2. The subject RFP contained the following provisions:

"1.15 Revisions to the RFP

If it becomes necessary to revise any part of this RFP, amendments will be provided to all prospective Offerors that were sent this RFP or otherwise are known by the Procurement Officer to have obtained this RFP...

2.16 Candidate Pre-processing...

2.16.7 Qualified evaluators shall be fully trained in the pertinent application requirements for all programs and related categories of licensure as well as follow up protocols and referrals to the Commission as may be required. The contractor shall employ evaluators to assure that application reviews are completed within three (3) business days of the receipt of the application...

2.16.16 The Contractor shall provide sufficient staff to personally answer all other candidates' inquiries within 48 hours of receipt or contact.

2.20 Examination Site Personnel

2.20.1 The Contractor shall employ an adequate number of trained personnel to administer the examinations...

2.37 Sub-contracting: Joint Ventures

All services shall be performed by the Contractor, the contractor's employees, or by subcontractors approved by the Department...
(Emphasis supplied.)

3. DLLR's intent in drafting its RFP using the foregoing language was in part to require that vendors use their own employees to perform some or all of the necessary functions needed to conduct and evaluate real estate licensing examinations, and not employees of any subcontractors, unless approved by DLLR.
4. An offered reason for requiring vendors to use only direct employees rather than subcontractors is to achieve better supervision and control over employees in order to prevent

or minimize the potential of compromising the examination.

5. The RFP also contained the following provision:

"SECTION IV - EVALUATION CRITERIA

The Contract resulting from this RFP will be awarded to the Offeror presenting the most advantageous offer to the State based on the technical evaluation criteria set forth below. Selection of a firm will be based upon both the Technical factors and the Price. The Technical factors will have greater weight than the price." (Emphasis supplied.)

6. Of the six (6) factors identified in the RFP to be considered as criteria for proposal evaluation, "staffing and personnel" was designated as the second most important technical factor in DLLR evaluation.
7. The subject RFP did not contain any reference to §18-101 of the State Finance and Procurement Article of the Maryland Annotated Code, also known as Maryland's new Living Wage Law, nor did the RFP contain any reference to the requirement that bidders would need to pay certain minimum wages to their employees.
8. At no time during the course of this procurement process did DLLR ever amend its RFP to make reference to Maryland's new Living Wage Law.
9. DLLR is the lead state agency responsible for statewide implementation of and compliance with Maryland's new Living Wage Law.
10. Maryland's new Living Wage Law requirement mandates that certain minimum wages be paid by certain employers receiving state contracts to employees working on state contracts.
11. The Living Wage Law does not apply to employees of subcontractors working on state contracts.
12. The Code of Maryland Regulations (COMAR) 21.11.10.09, promulgated and adopted as emergency regulations governing implementation of Maryland's Living Wage Law, provides as

follows: "[a]n employer may not split or subdivide a contract, pay an employee through a third party, or treat an employee as a subcontractor or independent contractor, or assign work to employees to avoid the imposition of any of the requirements of State Finance and Procurement Article, Title 18, Annotated Code of Maryland, or this Chapter."

13. Uncodified Section 4 of the Living Wage law provides as follows: "This Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any contract awarded before the effective date of this Act."
14. The contract sought by this procurement was not awarded prior to the October 1, 2007 effective date of the Living Wage Law.
15. The reason that the instant RFP did not reference Maryland's Living Wage Law was that DLLR initially anticipated that the procurement would be completed and awarded prior to the October 1, 2007 effective date of the Living Wage Law.
16. A Pre-bid conference was held on June 5, 2007 and was attended by four (4) potential bidders, including PSI Services, LLC (PSI) and Applied Measurement Professionals, Inc. (AMP).
17. PSI is the current vendor of real estate licensing exams in Maryland and has assumed various professional testing responsibilities in Maryland for the past 15 years.
18. The current fee for taking the Maryland real estate licensing examination is \$65.00.
19. PSI is an acronym for Psychological Services, Inc., which is a firm that has been in business since 1946, with 180 owned and operated testing centers in 27 states, and is regarded as one of four (4) leading firms in the nation in the vocational testing industry with particular experience in the administration of state real estate licensing exams.
20. PSI owns and operates six (6) testing centers in Maryland,

employing 23 Maryland employees as part-time proctors.

21. The subject RFP was amended to extend the deadline for submitting proposals from June 26, 2007 to July 6, 2007 and to modify the period of contract performance from three (3) years with two (2) one-year renewal options to five (5) years with no renewal options.
22. Four (4) offerors submitted proposals in response to the RFP, of which three (3) were determined by DLLR to be susceptible to award, namely, PSI, AMP and Promissor, Inc.
23. Due to the presence of an Order of Confidentiality entered in this proceeding, the firms that submitted bids in response to DLLR's RFP are unaware of their competitors' offered pricing, which is known to DLLR as well as counsel in these proceedings, but which will remain protected from public disclosure and disclosure to competing vendors in the context of the instant Order and Opinion.
24. Although DLLR expends and is expected to continue to expend millions of dollars to conduct real estate licensing examinations over the course of the five-year contract here at issue, persons who take the examination are charged a fee from which DLLR is paid ten dollars (\$10.00) per exam as reimbursement for departmental administrative overhead, with the balance of the fee being retained by the private vendor which conducts and evaluates the state's examination under the terms of their contract with the State, as a result of which the conduct of real estate licensing examinations in Maryland is intended to be cost and revenue neutral to DLLR by passing along the entire cost of exam administration to the persons who take the exam as a part of their professional licensing obligation requirement.
25. PSI owns and operates its own testing centers using its own employees to administer different types of testing examinations simultaneously at any given site, which is claimed by PSI to reduce the likelihood and opportunity for

persons taking an exam to cheat by surreptitious observation of another's test answers and also because PSI is solely responsible for hiring and controlling its direct employees who serve as long-term proctors for various professional licensing examinations.

26. By contrast, under the business model ordinarily employed by AMP, AMP leases the facilities and borrows the employees of its business partner, H&R Block, to establish locations and retain proctors to conduct state licensing examinations in a relationship which AMP describes as a "strategic alliance" and which others may fairly characterize as a subcontract agreement.
27. PSI currently has contracts in 16 states for the administration of professional licensing examinations while APM is said to have contracts in 10 states, most but not all of them being smaller states with smaller projected testing volume requirements than in Maryland.
28. According to AMP's 2005 Annual Report, nationwide AMP had a total of 150 AMP assessment centers employing 174 staff; according to AMP's 2006 Annual Report, AMP had a total of 170 assessment centers employing 170 staff; and for 2007 it was reported that AMP had 145 employees. (Appellant's Trial Exhibit Nos. 2 and 3.)
29. In response to the RFP, AMP stated that its strategic alliance with H&R Block "allows H&R Block to retain their best, most professional staff on a year round basis...[and that t]his is important because it also allows us to identify, train and certify qualified, educated professional staff to serve as AMP Assessment Center proctors." (Page 7 of Attachment No. 5 to Joint Trial Exhibit No. 1.) (Emphasis supplied.)
30. Later in response to the RFP, AMP stated that it "will employ an adequate number of trained personnel to administer the examinations." (Section 2.20.1 at Page 24 of Attachment

- No. 5 to Joint Trial Exhibit No. 1.) (Emphasis supplied.)
31. Finally, also in response to the RFP with respect to whether its personnel were employees, AMP assured DLLR that "AMP is a full-service provider and will not use any subcontractors for this project. All services will be performed and/or directed by AMP and AMP employees. We may be using local businesses for peripheral services, such as leasing and staffing, but AMP will be performing all services contained in this proposal." (Emphasis supplied.)
 32. DLLR appointed an Evaluation Committee to review the proposals, but its evaluation was delayed in the summer of 2007 due to an extended illness of a DLLR employee as well as the terminal illness of the spouse of a DLLR employee.
 33. Contributing to the unforeseen delay in completing this procurement was the transition of the responsible Procurement Officer from Ms. Valerie Shaw to Ms. Latesa Thomas, further complicating timely bid evaluation.
 34. DLLR's Evaluation Committee convened and recommended that certain questions be directed to bidders to clarify their proposals.
 35. On October 2, 2008 DLLR's Procurement Officer propounded to AMP a series of questions, including "Question 3: In using H&R Block buildings for your testing facilities, are you intending on using H&R Black employees for staffing of the testing facilities?" to which AMP responded, "Through our contractual relationship, H&R Block staff serve as proctors for AMP Assessment Centers. Proctors are trained by AMP staff and must pass an AMP Proctor Certification Examination before they perform any assessment center duties. This alliance allows H&R Block to retain their best, most professional staff on a year-round basis. This is important because it allows us to employ qualified, educated professional staff to serve as AMP Assessment Center proctors, providing a much higher level of staff person than

- most vendors can afford to provide as proctors. This alliance has been functioning well since 1998 for nearly one million candidates." (Emphasis supplied.)
36. Another question put to AMP at this time was "Question 6: Are you using subcontractors to administer the program?" to which AMP responded, "AMP will not use any subcontractors to perform the services included in the proposal. While we do have a longstanding contractual relationship with H&R Block, they do not serve as a subcontractor for specific services to our clients. All services are performed by AMP and AMP-approved proctors." (Emphasis supplied.)
 37. DLLR's Evaluation Committee ultimately determined to rank PSI's technical proposal as first, AMP's as second, and Promissor's as third.
 38. PSI offered to DLLR superior economic benefits to the State as compared to the proposals offered by its competitors according to the evaluation factors set forth in Paragraph 3.4.8 of the RFP.
 39. After submission of the above described proposals, DLLR requested that vendors submit a best and final offer (BAFO), clarifying in that request for BAFOs that vendors be certain to include in their per exam pricing DLLR's administrative overhead charge of \$10.00 per examination in addition to the vendors' fee.
 40. In response to the first BAFO, PSI confirmed that its per exam pricing included DLLR's \$10.00 administrative overhead charge, while AMP raised its cost to include the \$10.00 share of the exam fee which is paid to DLLR to offset DLLR's administrative expenses beyond the balance of the examination cost which is paid by applicants to cover the private vendors' cost for conducting each exam.
 41. DLLR's Evaluation Committee and Procurement Officer selected PSI as the apparent awardee because PSI achieved the top technical score of the three (3) susceptible vendors and

- offered reasonable and comparable competitive pricing.
42. By telephone communication on October 31, 2007 DLLR notified PSI that it was the apparent awardee of the contract.
 43. Between October 31 and November 15, 2007, PSI believed for good cause that it would be awarded the subject contract and that its communications with DLLR during this time frame were merely in the nature of completing necessary form paperwork to facilitate approval of the award.
 44. Despite reference to other vendors in DLLR form correspondence, during this time period, PSI did not realize that DLLR was also communicating with AMP, a competing firm.
 45. After DLLR's notification to PSI that PSI was the apparent awardee and in order to facilitate the completion of the contract and its approval by the Maryland Board of Public Works, DLLR provided to PSI a "Living Wage Affidavit" and informed PSI that it would have to comply with Maryland's new Living Wage Law, which took effect October 1, 2007.
 46. The Living Wage Law requires that covered employers pay to their eligible employees "(1) at least \$11.30 per hour if state contract services valued at 50% or more of the total value of the contract are performed in the Tier 1 area [Baltimore City or Montgomery, Prince George's, Howard, Anne Arundel, Baltimore Counties]; or (2) at least \$8.50 per hour, if State contract services valued at 50% or more of the total value of the contract are performed in the Tier 2 area [anywhere else in the State]." §18-103(a) State Finance and Procurement Article of the Maryland Annotated Code.
 47. PSI informed DLLR that its existing wage rate would satisfy Maryland's new living wage requirement of \$8.50 per hour for Tier 2 employees, but in the event that its employees fell within the new wage requirement of \$11.30 per hour for Tier 1 employees, PSI would have to modify its salary structure and therefore its pricing under its contract offer.

48. Ms. Latesa Thomas as DLLR's newly designated Procurement Officer responsible for this contract was instructed by her superiors at the Department of Budget and Management (DBM), and DLLR, and counsel in the Office of the Attorney General, to issue a second BAFO to insure that bidders understood the requirements of Maryland's new Living Wage law.
49. In accordance with the instructions and directions given to her, Ms. Thomas provided notice to vendors of the applicability of Maryland's Living Wage Law, doing so by requesting a BAFO from bidders rather than issuing a formal amendment to the RFP.
50. In other unrelated procurements, DLLR issued an RFP amendment rather than using BAFO to notify vendors of the requirements of Maryland's Living Wage Law.
51. Requesting a BAFO is materially different from issuing an amendment to an RFP in part because a vendor receiving a BAFO has the option only of modifying its price, while a vendor responding to an amendment to an RFP can modify aspects of its technical proposal or its pricing structure, or both.
52. After enactment of Maryland's new Living Wage Law, DBM developed a fact sheet to assist state agencies and vendors in implementing Maryland's Living Wage Law and that fact sheet, entitled "Maryland's Living Wage: Frequently Asked Questions" was posted on DLLR's website, stating in part as follows:

"1. What is the Living Wage?"

...The new law is effective as of October 1, 2007. The Living Wage Law requires certain contractors and subcontractors to pay minimum wage rates to employees working under certain State services contracts... **This law applies prospectively only to contracts awarded after October 1, 2007.**

30. What do we do with bids

conducted without living wage language and which have been publicly opened but contracts will not be awarded until October 1 or after?

A. Allow the low bidder the opportunity to retain the award at the existing low-bid price if it agrees to meet the Living Wage Law requirements within its price. In this case, the agency should amend the contract to include the Living Wage Law language for Sole Source contracts.

B. If the low bidder will not meet the Living Wage law requirements at its existing low-bid price, the agency should:

▶Rebid;

▶If there is not time to re-bid, then the agency may use the Negotiated Award After Unsuccessful Sealed Bidding method. In this case the agency would notify all responsible bidders who submitted responsive bids of the Living Wage Law requirements and allow them to submit a new bid incorporating the Living Wage Law requirements; or

▶In extraordinary circumstances, an agency may even consider making an emergency award. Emergency awards are exempt from the Living Wage Law.

31. What do we do with competitive sealed proposals that have been conducted without the Living Wage Law language and for which proposals have been received?

A. If no selection has been made (i.e., no offeror has been notified that it has been recommended for award), the agency should amend the Request for Proposals to include the Living Wage law requirements and request a Best and Final Offer.

B. If any offeror has been notified that it has been selected for award, regardless of whether prices have been disclosed to any offeror, the selected offeror should be provided an opportunity to agree to meet the Living Wage Law requirements at its current financial offer price.

▶If the selected offeror agrees to meet

the Living Wage Law requirements within its current financial offer, the contract should be amended to include the Living Wage Law language for Sole Source contracts.

►If the selected offeror does not agree to meet the Living Wage Law requirements within its current financial offer, the Request for Proposal should be amended to include the Living Wage Law requirements with a Best and Final Offer requested from all offerors.

32. If a bidder does not submit the required Living Wage affidavit with a bid, is it treated as an issue of responsiveness (not curable) or as an issue of responsibility (is curable)?

Failure to submit a properly completed Living Wage affidavit should be treated as an issue of responsibility, even for a bid. The bidder or offeror [sic] is merely being asked to acknowledge its responsibility to comply with the law. Therefore, an agency may allow a bidder to submit the required affidavit after bid opening as long as it is done within a timely fashion. If a bidder is advised that it omitted the affidavit but still does not provide the affidavit within a reasonable time, as determined by the agency, the bidder may be determined to not be responsible and the agency has the option of collecting on the bid bond.

33. What role do State Agencies have in implementing the Living Wage and how will contractors know whether a State solicitation is subject to the Living Wage Laws?

If the procurement officer determines the Living Wage is applicable, the State agency will include Living Wage requirements in the solicitation including which wage tiers apply. The procurement officer for each State Agency subject to the Living Wage will make a determination if more than 50% of the total value of the contract services will be performed in the Tier 1 area or in the Tier 2 area."

53. By the literal words of the statute, Maryland's Living Wage Law requires that bidders responding to an invitation for bids (IFB) be advised of whether their prospective contract will include the minimum employee salaries mandated by locations in Tier 1 (\$8.50/hour) or Tier 2 (11.30/hour).
54. The instant procurement was facilitated not by the use of an IFB, but by the more commonly used means of facilitating larger procurements, namely, an RFP, so advance notice to bidders of the designation of contract performance area as Tier 1 or Tier 2 applicability does not fall within the category of technical legal requirements mandated by statute for this procurement by RFP rather than IFB.
55. It is unknown to the Maryland State Board of Contract Appeals (Board) why the foregoing notification requirement was statutorily mandated only for an IFB, but not for an RFP, or a procurement facilitated by other means such as by written solicitation.
56. For this procurement, on November 2, 2007 DLLR promulgated a second BAFO to all prospective vendors notifying them of the requirement to pay employees \$11.30 per hour for Tier 1 employees. (Appellant's Trial Exhibit No. 6.)
57. DLLR inquired of bidders whether they desired additional time within which to respond to the BAFO and no bidder requested additional time within which to respond.
58. DLLR's second BAFO was corrected on November 6, 2007 to withdraw an incorrect form and provide vendors instead with the correct financial proposal form by which vendors identified per exam costs per year rather than submitting pricing only in aggregate form.
59. In response to the second BAFO, PSI increased its per exam pricing while AMP notified DLLR that it would not increase its pricing, but instead, maintain its formerly stated offer.
60. After submission of vendors' responses to the second BAFO,

and motivated primarily by pricing disparity between the final prices offered by PSI and AMP, DLLR reversed its earlier decision to award the contract to PSI and instead, elected to award the contract to AMP, and on November 15, 2007 notified PSI and AMP accordingly.

61. DLLR's reversal of positions at this time came as a surprise to PSI which had reasonably anticipated since October 31, 2007 that it would continue to provide real estate licensing examination services in Maryland subject primarily only to Board of Public Works (BPW) approval of its new contract.
62. On November 21, 2007, PSI filed a timely protest with DLLR's Procurement Officer of the November 15, 2007 decision to award the contract to AMP instead of PSI.
63. On November 30, 2007, subsequent to the filing of PSI's bid protest, DLLR propounded additional questions to AMP concerning the employment status of its proctors, to which AMP responded in contrast to its earlier statements, revising its position by stating "[a]ll individuals working on this contract, including test center personnel, will be AMP employees" and "[i]ndividuals, including test center personnel, performing services for this contract in Maryland will be direct employees of AMP..No contractual relationship exists between AMP and H&R Block with regard to proctors or any other staff in Maryland regarding the testing of real estate candidates."
64. On December 21, 2007, DLLR's Procurement Officer denied PSI's protest. (Appellant's trial exhibit no. 11.)
65. On January 3, 2008, PSI noted timely appeal before the Maryland State Board of Contract Appeals.

Decision

As summarized by appellant in its post-hearing brief, the instant protest and appeal arises because the subject procurement

was unexpectedly delayed during which delay new statutory obligations came into effect which were not disclosed to bidders until after the submission of bids, at which time DLLR in good faith attempted to place bidders on notice of the necessity of complying with Maryland's Living Wage Law, but did so by way of a BAFO rather than an amendment to the subject RFP even though DLLR's actions in this regard were inconsistent with its own advice to other state agencies challenged with implementation of Living Wage Law requirements. In addition, after BAFO submission, DLLR allowed only one of the vendors, namely, AMP, materially to modify its offer while its competitor, PSI, was restricted by DLLR's use of a BAFO rather than RFP Amendment from changing the terms of its offer other than to make corrections to its pricing at the state's specific direction of that particular vendor's obligation to offer a salary structure potentially different from that required of a competitor for the job. As a result of the peculiar circumstances here presented, PSI, the current vendor of real estate licensing examination services to prospective Maryland licensees, was treated by DLLR disparately, unfairly and unlawfully as compared to the agency's treatment of a competing vendor. Therefore, as more specifically discussed below, this Board must sustain the instant appeal.

First, DLLR should be commended for considering so carefully the cost of the licensing examination services solicited by this procurement. Because that cost is not born by the State but transferred in its entirety to persons taking the examination, turning a blind eye to pricing would be cost-free to the agency. But DLLR opted instead to give great weight to that consideration factor even in the face of the closely comparable costs presented by PSI and AMP. This Board offers no criticism that DLLR may have given excessive weight to the bidders' financial proposals. Whether the ultimate cost of the examination is carried by the State or by individual citizens of the State should make no difference in the agency's evaluation of which vendor may serve

the best interest of the State by offering the greatest value at the lowest possible cost. That DLLR would be thrifty in its approval of a contract for licensing examination services even though the cost of those services does not come from DLLR's budget is laudable to the extent that even modest savings can be achieved by individual licensure applicants due to DLLR's diligence.

Notwithstanding the above, this procurement plainly required DLLR to give "greater weight" to technical rather than pricing factors, as the Evaluation Criteria Section of the RFP expressly provided. It is clear to the Board that pricing was given great weight as an evaluation factor, but it is certainly less clear whether DLLR's evaluation of technical factors was afforded equivalent weight, much less superior weight than pricing, as the RFP assured bidders would be the case. See COMAR 21.05.03.03.

If the foregoing had been the only deficiency in this procurement, this Board would not set aside DLLR's determination because the agency is entitled to substantial discretion in deciding to whom it may award a contract over which the agency and not this Board will bear the subsequent responsibility of oversight and management. But in this procurement the cumulative effect of several innocent faults compels reversal of the agency's determination.

In this instance the current vendor of services was induced by DLLR reasonably to believe that it had won a renewed award. It was notified as much. Afterwards, DLLR presented PSI with some forms necessary for the vendor to complete in order to finalize approval of the award. The initial Living Wage Law compliance form provided to PSI at this time was not even a correct, complete or final version, as PSI readily recognized. Moreover, the communications between representatives of DLLR and PSI in this post-notice phase of contract completion were fairly understood by PSI as the agency's directive to the vendor that it had to offer certain enhanced salary benefits to its employees

and that a reasonable pricing adjustment to provide that accommodation was desired by the State. PSI complied with that direction from DLLR in every respect, only to be informed that as a result of its response DLLR had changed its mind and decided to award the contract to a competitor.

The unfairness of this shortfall is compounded because the problems inherent in this procurement process were created by DLLR in part because DLLR did not heed its own advice. It used a BAFO rather than an amendment to the RFP to insure vendors' compliance with living wage requirements. At the time of the vendors' response to the second BAFO it is entirely possible that PSI was placed at an unintended competitive disadvantage because PSI believed that it had to comply with Maryland's newly enacted Living Wage Law while AMP may have believed that it did not have to comply with the same law due to its original and ordinary plan to rely upon subcontractors for performance of various testing functions. Had DLLR simply offered an Amendment to its RFP instead of a BAFO, as DLLR's own website recommends and as the RFP assured bidders would be done, it is likely that PSI would not have been prejudiced in the agency's completion of this procurement. Or if DLLR had made clear to PSI that it had not yet made a contract award determination but was still negotiating with competing vendors, it is entirely possible that PSI might have offered more favorable pricing than AMP. But instead, DLLR's actions induced PSI to act precisely as it did. It is unconscionable that in the course of violating the terms of its RFP as well as its directive to other agencies to amend an RFP rather than to use a BAFO to notify vendors of living wage requirements, DLLR in the final post-notice pre-award status of this procurement would demand that only PSI increase its salary structure and advise the State of the resulting effect on contract cost, and then change its mind about the contract awardee for doing exactly what the agency requested to be done.

To compound this untenable situation even further, it may

certainly be effectively argued that the initial proposal submitted by AMP was non-responsive to the RFP. At multiple locations within the RFP it appears to be evident that DLLR demanded that responsive vendors would be required to use their own employees to perform the obligations of the contract, and not borrowed servants or subcontractors' employees. Two (2) separate provisions in the RFP state expressly, "[t]he Contractor shall employ..." Another clause mandates that "[a]ll services shall be performed by the Contractor, the contractor's employees, or by subcontractors approved by the Department," though the RFP does not otherwise establish for what tasks subcontractors might be acceptable nor how they are to be approved.

As pointed out by the testimony of PSI's chief witness at the hearing, this is not a matter of slim consequence. The attainment of licensure lawfully to engage oneself in the State as a professional realtor is a matter of considerable importance to many Marylanders and is of particularly high value to persons seeking licensure in order to conduct their livelihood. The potential of graft, cheating or other corruption of integrity in the administration of the licensing examination is of grave concern. Surely the procurement and contract management specialists at DLLR understood this when they participated in the drafting of the RFP, even though the RFP could have been somewhat more definitive about the obligations of the contractor to use and take responsibility for supervision and conduct of only direct employees as compared to employees of subcontractors.

Of course, unbeknownst to DLLR at the time of the initial publication of the RFP, the legal status of the persons providing the services sought by this state contract took on even greater importance as a result of Maryland's intervening passage of the Living Wage Law during the course of this procurement. All qualifying contracts approved by the State since October 1, 2007 require the contractor to bear a new responsibility of offering employees certain wages in excess of the federal minimum wage.

This is an obligation which exists by statute irrespective of whether vendors are specifically notified of that duty as an express provision contained in the RFP, though it certainly makes good sense that every state agency in every procurement provide such notice to prospective vendors. The Living Wage Law itself does require the identification of the applicable salary tier be set forth in an IFB and DBM may be well advised to consider for the benefit of vendors' full and fair notice of contract requirements the propriety of including the Living Wage Law by regulation as a mandatory term and condition in procurements other than by IFB. (See COMAR 21.07.03, 27.01.01, and 21.11.11.)

According to the specific terms of the Living Wage Law, the obligation to pay a living wage extends only to state contractors' direct employees, not employees of subcontractors. See Maryland Annotated Code, State Finance and Procurement Article § 18-103(a). *Expressio unius personae est exclusion alterius*, or in English, the mention of one person is the exclusion of another. Subcontractors are simply not included in Maryland's Living Wage Law, so employees of subcontractors are not mandated by law to be paid a living wage. Newly promulgated regulations contemplate this dilemma and embellish prospective state contractors' responsibilities by prohibiting the use of subcontractors for the purpose of avoiding the obligation to pay a living wage, but that is not the circumstance presented here. See COMAR 21.11.10.09. Here, AMP's potential use of employees of a subcontractor is not to avoid the application of Maryland's to-date unique Living Wage Law, but simply because AMP's use of employees of H&R Block is a part of its ordinary cost-saving national business model. As a result, AMP's initial proposal to use H&R Block employees does not run afoul of the strict requirements of COMAR nor does its initial proposal to use H&R Block employees obligate AMP to pay a living wage to a subcontractor's employees.

The only potential bar to AMP's using in Maryland its "strategic alliance" with H&R Block is the dictate of the RFP. As intimated above, because the RFP appears to require vendors to use their own employees, at least unless others are approved by the Department, AMP's proposal to use H&R Block employees may well have been deemed by DLLR as nonresponsive. Although AMP responded to the RFP by claiming in part that it "will employ" personnel to administer the examination, AMP also stated specifically not that it intended to use AMP employees but only "AMP-approved proctors." AMP initially assured DLLR only that: "All services will be performed and/or directed by AMP and AMP employees. We may be using local businesses for peripheral services, such as leasing and staffing." [Emphasis supplied.] Had DLLR awarded this contract to AMP and incorporated such language in AMP's bid into the contract as is ordinarily done, it is difficult to imagine that DLLR would later have been successful in demanding that AMP use only its own employees to whom it had the statutory obligation to pay a living wage.

But DLLR gave AMP the benefit of the doubt, deeming its bid responsive, and this Board is not called upon to determine whether that decision was correct. The greatest pitfall in this procurement occurred long after bid submission, when AMP and AMP alone was permitted to modify the substantive conditions of the contract award. It was not until November 30, 2007, after the filing of PSI's bid protest, that AMP finally extended to DLLR AMP's unconditional assurance that "[a]ll individuals working on this contract, including test center personnel, will be AMP employees." If DLLR wished to impose this mandate, as appears to have been the case, it should have done so at the beginning of the procurement, with equivalent notice and compliance opportunity afforded every bidder, and not at the end of the procurement, with only a single vendor allowed to modify the substantive terms of its proposal. This constituted a violation of COMAR 21.05.03.03(C)(3)(a) as a result of which the instant

appeal must be and hereby is granted.

Dated:

Dana Dembrow
Board Member

I Concur:

Michael Burns
Board 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 2601, appeal of PSI Services, LLC under DLLR Request for Proposals DLLR-2007-4.

Dated:

Michael L. Carnahan
Deputy Clerk