

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
The Active Network, Inc.)
) Docket No. MSBCA 2781
)
Under Department of Human)
Resources Request for Proposals)
DHR/CALL 11-001-S)

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OPINION BY BOARD MEMBER DEMBROW

This appeal is sustained because several flaws in the evaluation of competing proposals resulted in conclusions that were unsupported and unreasonable. Specifically, certain rankings were clearly erroneous and the arithmetic formula used to calculate best value was defective. In addition, the State failed to evaluate competing proposals in strict accordance with the evaluation criteria specifications established by the RFP.

Findings of Fact

1. On December 9, 2010 the Department of Human Resources (DHR) issued a certain Request for Proposals (RFP) known as DHR/CALL 11-001-S, the central purpose of which is to identify a private entity to provide on behalf of DHR a toll-free call center to route to its various social workers and other agents the numerous inquiries it receives concerning a variety of programs it administers, such as public assistance, child support enforcement, foster care, adult protective services, child abuse and neglect, energy assistance, aid to the homeless, and other programs for vulnerable or needy persons. (Ex. 1; Tr. 29.)
2. The offeror selected to operate the DHR call center is charged with the responsibility of setting up and maintaining an automated Interactive Voice Response System (IVR) as the initial point of answering the phone, enabling callers to transfer their call to the appropriate representative by executing a series of tiered telephony numeric keypad strokes (e.g., caller hears first: "Thank you for calling the Department of Human Resources. Press '1' for English," followed by, "If you only need to speak to a representative about DHR child support, please press '1.' Please listen carefully because our options have changed. Please select from the following 9 options...", etc.) For this aspect of the solicitation, namely, the automated IVR service function, the offeror is compensated on the basis of a set monthly fee regardless of the number of incoming calls received and processed automatically through the IVR. This is a change from DHR's present contract for the operation of its call center, by which the current vendor is paid a per call rate of \$.25 for each IVR call received. (Tr. 70, 633.)

3. The more labor intensive aspect of the contract work consists of live operator availability and follow-up to the IVR messaging, instruction, and transfer system, for which the RFP requires staffing hours of operation from 8:00 a.m. until 5:00 p.m. Monday through Friday, except on State holidays. For this primary call center function, the solicitation provides that the successful contractor be paid on the basis of a per-call charge, thereby establishing this portion of contract pricing as fixed-fee with indefinite quantity. The Evaluation Committee did not consider the impact of IVR efficacy on the frequency of necessity of live operator assistance for those calls that are not handled by IVR. (Tr. 425, 546.)
4. In addition to routing incoming phone calls, the contractor selected by this procurement is also responsible to receive some facsimile (fax) and e-mail communications, as well as for updating information in the Department's case action logs, and for mailing out form applications for certain DHR services, also referred to as "fulfillments." Other obligations are also set forth in the RFP, including computer connectivity to DHR databases and regular reporting requirements on such factors as volume and length of calls. (Ex. 1, RFP §3.5, Bates 36, *et seq.*)
5. The RFP also establishes certain customer service performance standards; for example, that the IVR answer all incoming calls (i.e., no busy signal) and that at least 90% of all calls requesting a live customer service representative (CSR) get through to a CSR within 60 seconds of that request. (Ex. 1, RFP §3.5F, Bates 42; Tr. 67, 664.) In addition, under the terms of the RFP, the contractor is not paid for any call that is abandoned after more than three (3) minutes of hold time. (*Id.*)
6. In order to be eligible to submit an offer, the RFP

stipulates, "Offerors shall possess a minimum of five (5) years previous experience working with local, State and/or federal agencies implementing and delivering Customer Call Center services of a similar scope and size." (Ex. 1, RFP §3.4, Bates 35; Tr. 202-207.) This section of the RFP was drafted prior to the involvement of the procurement officer ultimately assigned responsibility for the procurement. (Tr. 398.) Furthermore, the technical submission portion of the RFP requires under the "Qualifications" heading the following submittal to DHR: "A description of the Offeror's qualifications that shall clearly include a description of any related experience providing services of a similar nature." (Ex. 1, RFP §4.2E, Bates 56.)

7. Though the RFP mandates a couple of particular employee positions, namely, a Contract Manager and an IT Specialist, on the primary performance element of call center staffing, determination of the appropriate number of employees is left to the offeror; the RFP stating only, "The Contractor must provide sufficient qualified staff...to fulfill the requirements of this solicitation and it must adjust staff levels to service the actual volume of calls or such volume as is anticipated from time to time by the Department" and "the contractor shall assure that the Center operates with sufficient staff to respond to customer calls and comply with contractual requirements at all times including peak business hours and high volume periods during the year." (Ex. 1, RFP §3.5J-3.5K, Bates 46-48; Tr. 659-662.) As the incumbent operator of DHR's call center, appellant currently employs a work force of 38 full-time personnel to staff the DHR call center. (Tr. 41, 49.)
8. Some prospective offerors attempted to secure from DHR disclosure of current staffing levels, but DHR demurred to such inquiries, claiming at the pre-proposal conference,

"any comparison between the services that are currently being provided and those services that are going to be provided under this new contract, really there's no comparison, there's no relevancy here to previous performance." (Ex. 2, Bates 143, 144.) Later, during the Question and Answer phase of the procurement process, prior to the proposal due date, DHR similarly declined to offer other details or guidance to offerors inquiring as to minimum staffing needs, stating only, "The scope of services has changed under this solicitation; therefore Offerors must propose staffing levels they feel are adequate to meet the requirements of the RFP." (Ex. 3, Bates 162, 182.) In response to the question, "How many call center agents are expected to be utilized?" DHR answered, "That is at the discretion of the Offeror. The Offeror should propose staffing they feel will be sufficient to meet the requirements of the RFP." (Ex. 3, Bates 194.) In response to the question, "Can you share with us how many customer service representatives are currently employed?" DHR replied, "This is a completely new contract not based on a previous service that we at DHR have offered before. So any comparison between the services that currently being provided and those services that are going to be provided under this new contract are not relevant." (Ex. 3, Bates 201.) In fact, while there are differences between the old and new solicitations to operate DHR's call center, such as the transfer of telecommunications expenses to the offeror, DHR has outsourced its call center function for many years, so the similarities between current and future call center contracts far outweigh the differences. (Tr. 37, 188.) The primary distinction drawn between DHR's next call center and the one in operation for the past decade is simply that DHR did not conduct the prior procurement, which was a

combination of call center needs that included other agencies. (Tr. 711.)

9. Estimating an average talk time of two and a half to four minutes per call, the RFP also set forth a chart to project anticipated future incoming call volume based upon an alleged 2009 fiscal year volume of Customer Call Center activity of 11,569,230 calls annually received by the IVR and 310,500 such calls per month. (Ex. 1, Bates 34.) 11,569,230 divided by 12 equals 964,103, and not 310,500 as asserted, but there is no evidence that anyone noticed this discrepancy until Amendment #3 was issued a month after the error was first included in the original RFP. (Tr. 418.) According to the initial estimates set forth in the RFP, of the supposed annual figure of nearly 12 million incoming calls, only 488,160 per year or 40,680 per month were said to have required live operator response. (Ex. 1, Bates 34; Tr. 420.) Had those numbers been correct, less than 5% of calls received by the IVR would have been projected to require follow-up service by a live CSR. In addition, DHR estimated receipt of 46,800 e-mail inquiries annually, as well as 60,416 "fulfillments" (i.e., mailing of an application directly from the call center), and 208,800 outbound calls, all supposedly based on actual figures from FY (fiscal year) -'09. (*Id.*) Printed below the chart setting forth the above projection is the following: "NOTE: These figures are only for informational purposes to be used for Proposal preparation and cannot be guaranteed. The Department will only pay for actual Customer Call Center activity." The numbers set forth on the chart were provided to the procurement officer by DHR program staff as annual figures, from which the procurement officer interpolated daily and monthly numbers. (Tr. 191, 337, 408, 419, 723.)
10. Precise call volumes to the DHR Call Center are readily

available for more than the past ten years. (Tr. 61, 86, 625.) Inexplicably unknown to the members of the DHR Evaluation Committee, the actual volume of answered calls received by the DHR Call Center in FY-'09 was 738,642, which included 590,710 inquiries concerning child support and 147,932 concerning other DHR constituent services. For FY-'10, the total number of answered calls was 817,051, consisting of 577,511 calls concerning child support and 239,540 calls concerning matters other than child support. (App. Ex. 1, Tr. 193.) The monthly operator assisted call volume to the DHR Call Center for the latest two fiscal years for which call volume figures are available, therefore, is 61,553 and 68,088, or around 65,000 per month. This is about 60% more than the 40,680 monthly estimate initially stated by DHR in the RFP, a number DHR understood offerors to be relying upon to determine and propose adequate staffing, equipment, and facilities to perform the contract. (Tr. 705, 736.)

11. The RFP requires that technical factors be given greater weight than financial. (Ex. 1, RFP §5.9, Bates 63.) The DHR procurement officer in charge of this procurement assumed responsibility for this procurement from another procurement officer who had earlier been in charge of the procurement. (Tr. 185.) Ultimately, the procurement officer elected to attribute the relative weight of technical factors to constitute 70% of the award determination, with financial factors weighed at 30%. (Tr. 391, 605.) Written information is preferred to be relied upon by the procurement officer as compared to assertions made orally. (Tr. 326.)
12. The only liquidated damages allowed in accordance with the terms of the RFP are for failure to meet the requisite operating hours, though the RFP also contains a standard

payment withholding provision, stating, "The Department reserves the right to reduce or withhold Contract payment in the event the Contractor does not provide the Department with all required deliverables within the time frame specified in the contract or in the event that the Contractor otherwise materially breaches the terms and conditions of the contract." (Ex. 1, RFP §2.24, Bates 20.) According to the RFP, however, contract "deliverables" include various plans and reports, but not operation of the call center in accordance with the requisite performance standards. (Ex. 1, RFP §3.6, Bates 52-53; Tr. 350-358.)

13. With six DHR representatives in attendance, including four who had been involved in the drafting of the RFP, a pre-proposal conference was conducted December 29, 2010, following which, by releases dated January 12 and 20, 2011, DHR posted and answered over three hundred (300) questions from prospective offerors concerning the procurement. (Ex. 2, Bates 91, *et seq.*; Ex. 3, Bates 157, *et seq.*; Tr. 658.) At least one of the questions concerns the accuracy of the stated call volumes, but in response DHR simply claimed that its numbers were correct. (Ex. 3, Bates 212.)
14. Several subsequent amendments modified the RFP. The first, issued December 13, 2011, corrected the due date for proposals from "Friday, January 11, 2011" to "Friday, January 14, 2011." (Ex. 1, Bates 66; Tr. 415.) Between January 6 and January 24, 2011, four additional amendments were issued. Amendment #2, dated January 6, 2011, delayed the proposal due date by a week, added the statutory living wage minimums, and reduced the quality control rate of required call monitoring from 10% to 5% of all calls handled by CSRs. (Ex. 1, Bates 67-70; Tr. 416.) Issued January 19, 2011, Amendment #3 delayed the proposal due date again to afford DHR additional time to respond to all of the

questions it received from interested prospective offerors. (Tr. 451.) Based upon the stated total annual intake volume of nearly 12 million calls, Amendment #3 also corrected the erroneous arithmetic calculation of the total monthly number of incoming calls handled by the IVR from 310,500 to 964,100. (Tr. 419.) The same amendment also added call volumes for certain work not included in the original chart, namely, for fax verifications, abandoned calls, calls in Spanish, and external transfer of calls to local offices, also referred to as "hot calls." (Ex. 1, Bates 71-75.) Amendment #4, dated January 20, 2011, is intended to assure that the work of the private contractor appears for all purposes to be the work of DHR employees. (Ex. 1, Bates 76; Tr. 459.) Amendment #5, dated January 24, 2011, specifies a newly required third staffing position of CSR Supervisor/Trainer. (Ex. 1, Bates 78; Tr. 464.)

15. On or before the postponed final proposal due date of February 7, 2011, eleven proposals were received in response to the RFP, including one from appellant, The Active Network, Inc. (Active), as well as one from the interested party, Calls Plus/Attiva Soft, Joint Venture, LLC (Calls Plus). Both Active and Calls Plus committed to fulfill all contract requirements. (Ex. 4, Bates 330; Ex. 5, Bates 557.)
16. The RFP provides, "Qualifying Proposals are those Proposals received from responsible Offerors that are initially classified by the Procurement Officer as reasonably susceptible of being selected for award." (Ex. 1, RFP §5.3, Bates 60.) None of the proposals were initially rejected by the procurement officer as not reasonably susceptible for award. (Tr. 226, 291, 469.) In order to foster robust competition, DHR has a policy not to dispose of proposals promptly and readily by rejection prior to the

- opportunity of providing clarifications. (Tr. 604.)
17. An Evaluation Committee consisting of four DHR employees commenced evaluation of the proposals, which ultimately included an examination of the written submissions, requests for clarification of proposals, and consideration of oral presentations from each proposer. (Ex. 22, Bates 799; Tr. 495, 499.)
 18. To guide their evaluation, the Procurement Officer provided each member of the Evaluation Committee with a 27-page form Evaluation Sheet which lists each of the required elements of proposals with an adjacent column in which the Evaluation Committee members were instructed to check "yes" or "no" to indicate whether each particular required element was included in that offeror's submission. (Tr. 204, 362, 471.) Next to that column is space for each evaluator to make individual notations on that point of proposal review. None of the evaluators understood the procurement officer's instructions in this regard, and used the "yes/no" column not to indicate whether a particular element was included in a proposal, but instead, checked "yes" if, in their view, that element was addressed in a satisfactory manner, and "no" if it was not. (Tr. 211, 264, 283.)
 19. Promptly upon final completion of proposal evaluation, the procurement officer requested each of the members of the Evaluation Committee to return the completed Evaluation Sheets and any related notes for inclusion in the procurement file. (Ex. 22, Bates 796.) Three of the four evaluation members did so. There is no explanation for the missing evaluation sheets and notes from one evaluator. (Tr. 224, 237.) The Evaluation Sheet completed by the procurement officer himself, or his designee filling in during his absence on vacation, is also included in the procurement file. (Tr. 223.)

20. As the incumbent vendor of DHR's call center services, the technical proposal submitted by Active recites its 10 years of experience directly with DHR. In addition, Active boasts 14 years of experience with other Maryland agencies, and 35 years of experience with federal agencies; with current call processing capacity in Frostburg, Maryland in excess of 5 million calls per year servicing over 15 government programs, and a total of 10 million calls handled annually by Active in all 8 of its interconnected call centers. Active also claims in its proposal that its partner, Contact Solutions, which manages the IVR component of Active's call centers, successfully answers over a billion calls per year. (Ex. 4, Bates 245-246.)
21. Calls Plus is a joint venture specifically created for the purpose of proposing and operating the DHR call center that is the subject of this procurement. (Tr. 653.) It leases call center space in Columbia, Maryland and consists of three separate corporations, namely: (1) New Orleans Teleport, Inc., (2) AttivaSoft, LLC (formerly Rigid Systems, LLC), and (3) Toulson Enterprises, Inc. Of course, the newly created Calls Plus joint venture as a combined business entity has no prior history at all, but the experience of its three members is substantial. The Calls Plus proposal states that its collective experience spans 25 years in more than 30 states and localities. (Ex. 5, Bates 534, 543.)
22. With respect to its references documenting compliance with minimum qualifications to submit a proposal, Calls Plus cites its work operating the Massachusetts Disabled Persons Protection Commission Hotline, a call center of similar scope of services as DHR's call center, but one which receives only about 8,500 inbound reports per year, a small fraction of the calls projected to be received by DHR. (Ex.

5, Bates 578; Tr. 535.) In addition, Calls Plus provides five other references, but none of the others pertain to social service needs, the closest in scope being the California Department of Correction & Rehabilitation, for which the total volume of calls received and made by Call Plus is about one quarter of a million calls per year, including answering 185,000 inbound calls. (Ex. 5, Bates 580.) The combined experience of the member companies of Calls Plus is not the same size and scope as the DHR contract. (Tr. 300-325.) Calls Plus argues that its past experience is similar to DHR needs; Active argues that its competitor's experience is not similar to the size and scope of the DHR Call Center needs. (Ex. 5, Bates 677-679.)

23. With respect to staffing, the proposal submitted by Calls Plus states, "The Team uses a tried and true set of formulas and forecasting tools to ensure that the appropriate number and type of contact center personnel are in place on a daily basis to meet the ever changing needs of this contract." (Ex. 5, Bates 562; Tr. 331.) Its proposal also states, "Upon contract award, we are prepared to dedicate a team of 35 employees to setup and maintain this project" with a total of 20 employees identified as CSRs in its project organizational chart, the same number set forth in its staffing table, and 20 CSR work stations shown on its floor plan. (Ex. 5, Bates 563, 566, 613; Tr. 336.) The number of CSRs listed by Calls Plus in its staffing table includes an asterisk (*) next to that number followed by: "*CSR levels will be proportionate to call volumes and service levels." (Ex. 13, Bates 566, 731.)
24. Notes made by members of the Evaluation Committee concerning the written proposal submitted by Active are scant in comparison to notes on the evaluation sheets for Calls Plus, but for Active they include one technical omission, namely,

"no FEIN [federal employer identification number] #," and other general statements of praise, including: "very detailed" and "knowledge based system" on the subject of "Call Management" and "yes!!" on the subject of "Financial Responsibility." (Ex. 23, Bates 808-915.)

25. By contrast, the independent notes made by members of the Evaluation Committee concerning the written proposal submitted by Calls Plus are highly critical, including: "a little light" and "thin/weak" on the subject of "Understanding the Problem;" "not the same call volume scope," "no-not scope or size," and "weakness: not volume we need" on "Offeror Requirements;" "they don't understand," "didn't understand missed it," "weak," "don't understand," and "didn't understand" on aspects of "Technology Requirements;" "only 20 CSR," "only proposed 35 - our community isn't enough," "only proposed 35...this is not even close 20," "missing," and "none" on "Staffing;" "very weak," "weak...not detailed," "very weak not detailed," and "no details" on "Transition Plan;" and "problem with scope and volume not sufficient." (Ex. 24, Bates 916-1030; Tr. 265-288.)
26. In its initial review, the members of the Evaluation Committee were not very impressed with the technical proposal submitted by Calls Plus. (Tr. 781.)
27. On the final page of the form evaluation sheet, two questions appear, one asking if clarifications are needed from that offeror and the second, "Is the Offeror's Technical Proposal deemed reasonably susceptible of being accepted for award?" All four of the four available evaluation sheets completed for Calls Plus and included in the procurement file have a check mark in the space at the end of that second question, indicating, "No". (Ex. 24, Bates 942, 975, 1002, 1030; Tr. 228, 291.) For Active,

three of the evaluation sheets appear to show a check mark in the space indicating, "Yes" in response to the question, "Is the Offeror's Technical Proposal deemed reasonably susceptible of being accepted for award?" The fourth evaluation sheet has no visible check-mark in either of the two available blank spaces provided for a response. (Ex. 23, Bates 834, 861, 888, 915.)

28. According to the final Summary of strengths and weaknesses of the 11 various proposals, the range in number of CSRs proposed to operate the DHR call center as described in the RFP falls between 18 and 44 CSRs. (Ex. 22, Bates 798-807.)
29. With respect to the evaluation factor "Financial Responsibility and Stability," Calls Plus relies solely upon the fiscal standing of only one of the three members of the joint venture, namely, AttivaSoft, LLC (Attiva). Its financial documents reflect a cash balance of about \$180,000 and a bank line of credit in the amount of \$300,000. No financial information whatsoever is provided by Calls Plus to DHR about the other two corporate entities comprising the joint venture. (Ex. 5, Bates 586, 590; Tr. 667.) By contrast, Active submits the required financial documents and explains in part: "The Active Network, Inc. is the world's largest provider of integrated technology solutions, marketing services and online media solutions for the activities and event markets. Founded in 1999, Active currently has over 2500 employees worldwide and processes payments in 30 countries, 9 currencies and 8 languages. Approximately \$1.5 billion was processed through Active's financial systems in 2009...The company has raised over \$300 million in private equity and debt including a 2008 \$90 million equity investment led by Disney's ESPN." (Ex. 4, Bates 351.)
30. By correspondence dated April 12, 2011, DHR solicited from

both Active and Calls Plus certain clarifications to their proposals, to which responses were promptly received. (Tr. 495.) On April 8, 2011, before transmission to the offerors of DHR's requests for clarifications, the contents of the proposed clarification requests were shared by the procurement officer with the members of the Evaluation Committee. (Tr. 293, 478.) No question was posed of Calls Plus concerning its staffing plan even though the members of the Evaluation Committee had questions concerning the adequacy of the staffing plan proposed by Calls Plus, which projected the use of only 20 CSRs. (Ex. 4, Bates 513-515; Ex. 32, 1065-1067; Tr. 297, 504-509, 542, 679.)

31. Active made its oral presentation to the Evaluation Committee on May 4, 2011. (Ex. 4, Bates 516.) Calls Plus made its oral presentation to the Evaluation Committee on May 11, 2011. (Resp. Ex. 1.) Members of the Evaluation Committee made informal notes during the oral presentations. (Ex. 25, Bates 1032-1042.) Those notes include the following positive observations regarding the Active proposal: "10 extra [personnel] cross-trained on DHR," "10 years experience providing these services 35 years govt contract centers," "over 90% of staff have > 5 yrs DHR experience," "advanced tech - above & beyond what is being requested;" and on the critical side, "security concerns w/screen-sweeping." Regarding the Calls Plus proposal, one of the evaluators described the oral presentation as follows: "I like the project manager (Barbara). She seems really smart and reliable. This oral presentation hit a home run. I went from not confident to confident. It just goes to show how you can't judge a book by its cover. They appear to offering [sic] more than stated in their formal proposal as far as extra services go. Their IT proposal including security is crazy awesome and potentially looks to

be the best. I also believe that they will be able to handle social services. Disaster recovery looks more than adequate. SharePoint (portal is a document management system) this is new and a very progressive way to handle the situation." (Tr. 528.) Other evaluators were similarly impressed by the oral presentation from Calls Plus, noting, "multiple screens allow immediate look up," and "owner is very honest, dynamic and believable 15% of calls will be monitored IT offering is strong." One excerpt from the evaluators' notes from oral presentation seems to summarize the prevailing view of the Evaluation Committee at that time, stating, "Active - very good. Calls Plus - great." (Tr. 537.)

32. At the conclusion of the technical phase of considerations on May 23, 2011, one proposal was deemed not reasonably susceptible for award, leaving the remaining ten proposals to be ranked. (Tr. 602.) The six categories of proposal evaluation criteria specified in the RFP were each given an assigned point range for numerical assessment in descending order of importance as follows: "Proposed Services" was afforded a maximum of 40 points, "Qualifications" 36 points, "Understanding the Problem" 30 points, "References" 24 points, "Financial Responsibility and Stability" 20 points, and "Economic Benefits to the State" a maximum of 10 points; for 160 total possible points. Each evaluator scored each proposal using this scale. (Ex. 28-30.)
33. Among the four evaluators, Active received aggregate scores of 116, 138, 156, and 160, reflecting a range of 44 points from lowest to highest, with a total of 570 points from all four evaluators, or an average of 142 points per evaluator. Calls Plus received scores of 130, 133, 137, and 157, a range of 27 points for a total of 557 points, or an average of 139. (Tr. 369.) The other 8 proposals received average

scores ranging from 96 to 137, compared to the scores of 142 and 139 received by Active and Calls Plus, respectively. Of the 6 criteria rated by each of the 4 evaluators, both Active and Calls Plus received 9 perfect scores on individual criteria. Overall, Active was thereby ranked first and Calls Plus was ranked second in the technical phase of proposal evaluation. (Ex. 30, Bates 1054; Tr. 369.)

34. The following table accurately reflects the final technical scores assigned to Active and Calls Plus by the Evaluation Committee:

Criteria #	Category	Calls-Plus	Active
1	Proposed Services	150	145
2	Qualifications	132	128
3	Understanding the Problem	117	110
4	References and Other State of Maryland Contracts	66	84
5	Financial Responsibility and Stability	72	70
6	Economic Benefits to the State	27	33
Total Points		557	570

35. Some arguably questionable conclusions are evident from the above, as well as from the full scoring table including all 10 proposals. For example, on "Financial Responsibility and Stability," relying solely upon the relatively modest financial condition of only one of the three joint venturers, namely, Attiva Soft LLC, Calls Plus scored higher than any other offeror except for Maximus Human Services, Inc., which it tied in scoring on that criterion. (Tr. 383-390.) On the most important criteria category, namely, "Proposed Services," Calls Plus also scored higher than any of its competitors, even though its staffing plan included substantially fewer personnel than other offerors. Further, Calls Plus also scored highest on the second most important criteria, "Qualifications," even though it appears to be

uncontested that Calls Plus presented, at best, evidence of only very limited prior experience with services of a similar size and scope as those needed by the DHR Call Center. The Procurement Officer testified that he would not have given Calls Plus a perfect score on "Qualifications," as members of the Evaluation Committee did. (Tr. 373.)

36. The pricing spreadsheets provided to offerors were partially completed in advance with DHR's projected estimates of anticipated task volumes, principally among them being the estimated number of incoming calls per month requiring operator assistance. Offerors then completed the pricing form by submitting their offered charge on a per-call basis, and similarly priced other tasks, such as fulfillments, faxes and e-mails, to be billed on a per-unit basis. In addition, all costs associated with the IVR component of the contract were priced with a flat charge on a per-month basis. Some proposals held prices stable during the contract term; others annually adjusted pricing over the course of the contract. Projected cost totals were thereafter determined using each offeror's per unit charge multiplied by the assumed estimated number of tasks anticipated to be performed. (Ex. 10-13.)
37. When the original pricing proposals were opened after the conclusion of the technical evaluation phase of proposal review, the ten cost projections ranged from a low of \$7,537,502 to a high of \$23,204,988. Calls Plus priced its proposal at an amount making it fourth lowest of the 10; compared to Active's price, which was sixth lowest. (Ex. 22, Bates 806.)
38. On May 25, 2011, four months after the last of the first five amendments to the RFP, DHR issued Amendment #6, which modified the contract start and transition dates. (Ex. 1, Bates 82.) On the same date, a request for a Best and Final

Offer (BAFO) was directed to each of the ten offerors with proposals still pending at that time. (Ex. 6-7.) The pricing proposal sheet for the first round of BAFOs repeated the initially stated monthly projected call volume of 40,680 calls needing to be answered by a CSR. BAFOs were due to be submitted by June 2, 2011.

39. Using the pricing sheet provided by DHR, still projecting an estimated monthly average operator assisted call volume of 40,680 and an estimated monthly average of 17,400 outbound calls, on June 2, 2011, the ten offerors submitted their BAFO pricing proposals ranging from a low of \$8,899,353 to a high of \$40,606,820. Both Active and Calls Plus lowered their initial price proposals. Active submitted a BAFO in an amount higher than Calls Plus. (Ex. 8, 9, Bates 700-707.)
40. Besides the arithmetic error corrected by Amendment #3, the first evidence of errors in the estimated call volumes contained in the RFP is an e-mail dated June 6, 2011 in which the procurement officer indicates that the actual number of operator assisted calls is closer to 51,000 than 41,000, as initially stated in the RFP and maintained until that time. (Ex. 31, Bates 1059; Tr. 623.)
41. On June 10, 2011 DHR solicited a second BAFO from each of the offerors. The cover letter transmitting the second BAFO request states in part, "upon receipt and review of all BAFOs, it was determined that the state's budget will be in jeopardy if an award for this contract proceeds as offered." The initially stated deadline for final BAFO submission was June 15, 2011. (Ex. 11, Bates 715.)
42. On June 14, 2011, DHR issued Amendment #7. (Ex. 1, Bates 80.) (Ex. 11, Bates 715; Tr. 689.) Strangely, Amendment #7 revised DHR's recitation of IVR call volume purportedly using more recently available FY-'10 figures to reflect the

total annual number of incoming calls to have been 1,847,944 for that fiscal year, rather than 11,569,230 for the prior fiscal year, as DHR previously asserted, repeated, and affirmed throughout the procurement process until this late date. The best explanation for this gross error that apparently went undetected by anyone at DHR for six months, appears to be that an extra numeral "1" was inadvertently placed at the front of the correct number for fiscal year 2009 calls, which might have actually been intended to be reported correctly 1,569,230 rather than 11,569,230, as stated. (Tr. 426-431.)

43. Amendment #7 also revised the pricing proposal sheet used for the second round of BAFOs, stating a newly estimated monthly CSR call volume of 73,500 instead of 40,680, as had previously been indicated on the pricing sheet used since the RFP was first issued on December 9, 2010 and repeated until May 25, 2011, continuing through the promulgation of the first round of BAFOs. (Ex. 1, Bates 34 *cf.* Ex. 1, Bates 80; Ex. 10, Bates 713; Tr. 423-435, 621.) The revised figure of 73,500 was probably derived on the basis of the figures set forth on June 14, 2011 in Amendment #7 when DHR claimed that it was merely incorporating its latest call figures from FY-'10 instead of FY-'09; but again, a mathematical error distorted DHR's call volume estimate. (Tr. 614.) Using the reported volume of 904,642 calls requiring operator assistance in FY-'10, the procurement officer should have divided by 12 to calculate 75,386 as the estimated monthly volume of calls requiring operator response that year, fairly approximated by the use of the figure 75,300. However, the numerals "5" and "3" were apparently inadvertently transposed, giving rise to the relatively innocuous mistaken 73,500 figure actually used in the final pricing sheet. (Tr. 793.)

44. As more fully described above, besides *decreasing* the estimated total incoming call volume by 10 million calls per year, Amendment #7 *increased* the estimated volume of calls requiring operator assistance from 41,000 per month to 73,500 per month. (Tr. 113.) The same amendment also modified the projected number of outgoing calls from 17,400 per month to 100 per month instead. At the hearing the procurement officer was unable to provide the Board with an example of an outgoing call required to be made from the DHR Call Center. (Tr. 438.) The best explanation for the gross disparity between the need to make 17,400 outgoing calls per month, as originally stated, and a mere 100 outgoing calls per month, as finally corrected by Amendment #7 on June 14, 2011, is that because of a security breach of confidential DHR records, its existing call center operator may have had to make an extraordinary number of outgoing calls in one unusual fiscal year, namely, 2009. (Tr. 441.)
45. Amendment #7 also modified the stated average call length of between 2½ to 4 minutes, changing it instead to "3 minutes." (Ex. 1, Bates 81.) In addition, the estimated monthly volume of fulfillments decreased from 4,200 to 2,700 and the number of fax verifications diminished slightly from 4,000 to 3,500. (*Id.*, Tr. 446.)
46. Because of the last-minute drastic alteration in DHR's call estimates defining the magnitude of services anticipated for contract performance, Amendment #7 assured at this late date in the procurement process, "Due to the numerous changes in the figures for Call Center Activity above, Offerors may choose to revise their proposed staffing levels for the Call Center to reflect these changes. Offerors shall include the revised staffing information with their BAFO submission; and this information will be evaluated accordingly." (Ex. 1, Bates 81.) Notwithstanding this assurance, however, because

the second round of BAFOs was not requested before the close of the technical evaluation of proposals on May 23, 2011, the proposed staffing changes submitted as a component of the second round of BAFOs were not considered as a part of the technical evaluation of proposals and were not suitable for inclusion as a component of financial evaluation of proposals. (Tr. 344, 436, 768.) Instead, no change at all was made to any of the completed technical evaluations as a result of the second submittal of BAFOs and financial rankings were based solely on total cost projections calculated from offered per-unit pricing multiplied by the volume assumptions stated by DHR.

47. In response to DHR's final request for BAFOs, using the revised pricing sheet provided by DHR reflecting new estimated monthly average operator assisted call volume of 73,500 and an estimated monthly average of outbound call volume of 100, as finally stated on June 14, 2011, each of the ten offerors updated their proposal, resulting in new pricing ranging from a low of \$8,973,348 to a high of \$25,725,508. (Ex. 12, 13, Bates 721-731.) Both Calls Plus and Active again decreased their total prices. Active offered a substantial price reduction for IVR capacity adequate to handle fewer than a couple of million incoming calls per year as compared to an IVR system sufficient to answer nearly 12 million calls. For reasons unknown, Calls Plus increased the IVR cost component of its proposal using the new total estimated incoming volume of 1.8 million instead of the earlier estimate of 11.6 million. However, Calls Plus simultaneously dramatically reduced its per-call charge for operator assisted calls. (Tr. 647, 764.) DHR did not question why Calls Plus deemed it more costly to set up and maintain an IVR to handle on an annual basis less than 2 million incoming calls without a busy signal than it

was for an IVR to handle over 10 million calls. The second and final BAFOs resulted in financial standings of Calls Plus being ranked second lowest and Active being ranked sixth lowest. (Ex. 22, Bates 806.)

48. Active initially proposed a staff of 28 full-time CSRs plus approximately 10 additional part-time CSRs. (Tr. 111.) In the second BAFO submission, Active increased its proposed CSR staffing level required to handle the additional call volume by 11 full-time-equivalent (FTE) personnel, for a total of about 47 estimated CSRs, as calculated by counsel for Active and confirmed by the evidence admitted at hearing. (Ex. 12, Bates 721.) By comparison, Calls Plus initially proposed 20 CSRs and later increased its proposed CSR staff total by only 2 FTE positions as a result of the dramatic changes in call volume estimates contained in Amendment #7. (Ex. 13.) As the basis of its determination to have only 22 or 23 CSRs in place to handle DHR's call center needs, Calls Plus repeated its earlier reference to its "tried and true set of formulas and forecasting tools to ensure that the appropriate number and type of contact center personnel are in place on a daily basis to meet the ever changing needs of this contract," and explained further in its June 17, 2011 Revised Staffing Plan: "Based on the revised information provided in Amendment #7, we have recalculated the numbers of CSRs assigned to answer inbound and outbound calls. Using industry standard Erlang C tools, we estimate the need to recruit and sustain throughout the duration of this contract a staff of 23 CSRs..." (Ex. 13, Bates 730; Tr. 342, 745.) The personnel table provided by Calls Plus as its "preliminary staffing model" increased from 20 to 22 CSRs. (Ex. 13, Bates 731.) Calls Plus also assured DHR that its preliminary staffing plan would be routinely reviewed and revised as needed. (Tr. 655, 797.)

49. Erlang C is a statistical formula devised in 1917 by A. K. Erlang and it remains "the accepted calculation used to determine the number of resources required in queuing situations." (App. Ex. 2, pg. 6; Tr. 45, 144, 157, 172.) Using assumptions like acceptable wait time and crowd volume, Erlang is employed to determine such elements as call center operator staffing needs, rest room capacity, or number of toll facilities to avoid traffic back-ups, among other ordinary examples of its application. The only testimony offered at the hearing by a professional specialist in Erlang calculations was that of Jay Minnucci, President of Service Agility, who explained the basis and conclusion of his determination that 43 FTEs is an appropriate number of staff needed to meet the CSR staffing requirements and performance standards set forth in this procurement, with an absolute mathematical minimum of 33 CSRs. (Tr. 156.)
50. In order to merge the technical and financial evaluations to ascertain the prevailing proposal, the procurement officer used a numeric formula to calculate final rankings by determining 70% of the technical ranking of each proposal, scored from first as number one through last as number ten, and adding 30% of the financial ranking of each proposal, scored from first to tenth in the same fashion. This scoring formula was developed by the procurement officer, who testified that he has not previously used it. (Tr. 392-395.) The final score values determined by its application resulted in Calls Plus being ranked first, with the best low score of 2.0, and Active being ranked second, with the second lowest score of 2.2. The other 8 proposals received overall value scores ranging from 3.9 to 10.0. (Ex. 30, Bates 1055.) Based upon the results of the foregoing formula, the Evaluation Committee and the procurement

officer recommended Calls Plus for award, concluding that its proposal was most advantageous to the State considering technical and financial factors assigned the specified weights as more specifically set forth above.

51. The Evaluation Summary and Recommendation for Award was reduced to a ten-page writing directed to the DHR Secretary with cover memo dated June 21, 2011. (Ex. 22, Bates 797-807.) For Calls Plus, two of the eight enumerated strengths of its proposal are redundant, but the list of its strengths include high points for computer hardware, explaining, "The Proposed IT solution is very detailed and uses new and progressive technology, including use of LINUX Server clusters, 20 drives in the driver array, RAID-10 storage, and DS3 internet technology." The Summary also credits the Calls Plus proposal to use a "SharePoint Portal" as a computer storage repository to enable documents to be quickly and easily accessed by CSRs. Finally, the Summary commends Calls Plus for offering to monitor 15% of all calls, triple the amount required by the RFP. Only two weaknesses are identified for Calls Plus, both having to do with its past experience, specifically, lack of a history handling the volume of calls anticipated in this procurement and lack of much experience at all with a call center to service human services needs. (Ex. 22, Bates 801.)
52. By comparison, the Summary also notes eight points of strength identified from Active's proposal, including its decade of experience operating the DHR call center, its Knowledge Base system used to access call scripts and program information, and its "High retention rate for Maryland Call Center employees, with over 90% of current staff with over 5 years experience with DHR." Weighing against Active, the Summary observed only that "Financial Proposal exceeded the Department's budget." (*Id.*)

53. Active was notified on June 24, 2011 that it was not recommended for award. On the same date, Active requested a debriefing conference. (Tr. 55.) That debriefing occurred on July 14, 2011. On July 20, 2011 Active filed a timely protest which was supplemented on July 29, 2011 by a second protest. On August 8, 2011, both protests were denied by final DHR determination. The instant appeal was docketed on August 19, 2011 as MSBCA No. 2781, for which full evidentiary hearing before the Maryland State Board of Contract Appeals (Board) was conducted from February 14 through 17, 2012. Appellant's Brief was filed March 26, 2012; Briefs on behalf of DHR and the Interested Party were filed April 10, 2012; and Appellant's Reply Brief was filed April 18, 2012.

Decision

This procurement recommendation does not withstand scrutiny. Although DHR may well be correct in determining ultimately that the interested party, Calls Plus, offers best value to the State, the manner by which that decision was reached here is unsupported and unacceptable as more fully explained below.

There is no indication from the pleadings or the evidentiary record in this proceeding that DHR recognizes that this procurement was deeply flawed from the outset. Imagine the challenge of submitting a thoughtful and informed proposal in response to this RFP. The work solicited consists of three essential functions: (1) designing and maintaining an automated answering service as the initial point of receiving incoming phone calls; (2) staffing live operator assistance capability for those callers requesting the same; and (3) handling a smattering of related communication functions including e-mails, faxes, postal mailing of certain forms, and initiating outgoing calls.

First, prospective offerors are told on December 9, 2010 to design their IVR proposals to handle about 12 million total

incoming calls per year, but only 310,500 calls per month, plus over 200,000 outgoing calls per year, or 17,400 per month. The number of calls required to be handled by a live operator is initially claimed to be about half a million per year, or 40,680 per month. Then, a month later, prospective offerors are informed that the actual number of monthly incoming calls required to be handled by the IVR is not 310,500, but instead, nearly a million. Those figures are confirmed on January 19, 2011, when additional estimates of call details are provided. Proposals are submitted by the due date of February 7, 2011. They are thoroughly examined and supplemented by oral presentations before technical evaluations are closed on May 23, 2011, with Active being ranked first and Calls Plus second. BAFOs are solicited May 25, 2011 for which revised charges are submitted to DHR by June 2, 2011. DHR requests a second round of BAFOs on June 10, 2011. Then, on June 14, 2011, prospective offerors are suddenly informed that the IVR proposal must be configured not to handle a million calls per month, but instead, only 154,000. The operator-assisted call volume, however, increases at the same time by nearly double. And the estimated number of outgoing calls diminishes from 17,400 per month to fewer than 1,000 for the entire year.

These multiple inaccurate estimates of task volumes included as a part of this RFP do not constitute any basis of the Board's determination to sustain the instant appeal and reverse DHR's recommendation of Calls Plus for contract award. This is because all offerors were treated equally unfairly by DHR's repeated changes to the magnitude of call center services it is soliciting. But the foregoing modifications must have created a degree of confusion and chaos that led to the issues raised in this appeal, which the Board addresses as follows.

Active argues first that the proposal put forward by Calls Plus should never have been even evaluated by DHR because Calls

Plus fails to comport with minimum eligibility requirements for proposal submission, namely, that offerors have five years previous experience operating a call center of a similar scope and size. Of course, Calls Plus as a newly created joint venture has no prior experience, but its constituent business entities do have prior experience including operating call centers, and that experience is ordinarily fairly attributable to the newly created joint venture. Aquatel Industries, Inc., 1 MICPEL ¶82, MSBCA 1192 (1984); Independent Testing Agency, Inc., 5 MICPEL ¶386, MSBCA 1908 (1995). So the first point of the Board's analysis is to determine whether DHR erred in concluding that the business entities that comprise Calls Plus have five years prior experience operating a call center of a similar scope and size as DHR's call center, as required by the terms of the RFP.

The size and scope of the call center here at issue is subject to significant confusion on the part of DHR. The initial RFP claims an IVR volume of over 10 million calls per year, while the correct figure is closer to 1 million. In addition, the estimates set forth in the original RFP reasonably caused offerors to anticipate the need for CSR-assisted calls at a volume of nearly half a million calls annually, though the correct figure finally disclosed in June 2011 is close to double that amount.

One of the only prior call centers operated by Calls Plus undisputedly handling a similar scope of services as DHR's needs, namely, social services, is the Massachusetts Disabled Persons Protection Commission. However, the size of that contract is a trifling 8,500 calls per year, a small fraction of the volume of calls received by DHR, regardless of whether one employs for comparison DHR's first estimated volumes, or the corrected volumes posited late in the procurement process, namely, slightly less than 2 million total calls, about half of which require transfer to CSR for response.

Similarly, Calls Plus operates a hotline for the San Francisco Housing Authority, which is somewhat akin to social services, but the volume of that contract is even smaller, only about 3,500 inbound calls per year. The Welfare Fraud Hotline it operates for San Diego County for services dissimilar to DHR needs accounts for fewer than 3,000 calls annually. Indeed, the only call center experience of any of the joint venturers comprising Calls Plus even remotely approximating the size of the DHR contract is a contract with the California Department of Correction and Rehabilitation, which reportedly has a volume of about 185,000 inbound calls per year. The past work experience of Attiva Soft for the U.S. Census and Social Security Administration is large in size but appears principally to involve the maintenance of computer software to support information technology needs, rather than the operation of a call center similar to DHR's.

Constituting only a tenth of the magnitude of the volume of DHR call center needs, the number of incoming calls answered by Calls Plus for the California Corrections Department is comparatively modest. DHR concedes that it is quite a stretch to argue that the Calls Plus California Corrections contract is "similar" in size to the 1.8 million incoming calls projected annually for Maryland DHR. Surely it would not have been erroneous for DHR to have concluded that Calls Plus failed to satisfy the minimum requirements of the RFP, as was apparently the unanimous initial determination of the members of the Evaluation Committee. But notwithstanding the evident weakness in the past work experience presented by Calls Plus, the Board does not conclude as a matter of law that its proposal was required to be rejected by DHR for failure to meet the standards established for offerors' minimum qualifications. That determination is a fairly subjective one within the exercise of legitimate discretion by the Evaluation Committee. Moreover, the

ultimate decision to evaluate the Calls Plus proposal was not arbitrary or capricious. It was not an abuse of discretion for DHR to conclude that Calls Plus is minimally qualified to be eligible to submit a proposal in response to this RFP. Instead, DHR was simply generous to that proposer in order to promote overall competition. How many fewer calls than 1.8 million per year would qualify as "similar" in size? The answer to this question is deliberately imprecise, allowing for the application of differing perspectives by the members of DHR's Evaluation Committee. Their judgment will not be disturbed by the Board.

Beyond the question of size or amount of prior experience, the second prong of minimum eligibility standards prescribed for proposers is the scope or type of call center services previously provided. Is a call center for prisons "similar" in scope to a call center for social services? Again, this is a judgment call properly made by DHR and not by the Board. At least the Board may not conclude that it was clearly erroneous, arbitrary, or capricious for DHR to view the prior work experience of Calls Plus as sufficient to qualify the joint venture to submit a proposal. This is especially true given that DHR has a policy, as discussed by the procurement officer during his testimony, not to disqualify offerors who are borderline but arguably eligible to participate in a procurement competition.

In this regard the RFP might have specified that in order to be eligible to submit a proposal an entity had to have at least five years of prior experience operating a call center providing social services. The RFP might also have required prior experience operating a call center handling a precise number of incoming calls. But this RFP did neither. Instead, it provided as minimum qualifications only that a proposer had to have experience of a *similar* size and scope as DHR's call center.

Competition is vital for the State to secure best pricing and technical proposals in response to an RFP and the Board will

not nullify or discourage DHR from accepting and considering an offer from an entity presenting prior work experience that the agency reasonably determines to be sufficiently similar to the RFP demands to render the offeror eligible to submit a proposal. DHR's use of the word, "similar," permits that discretion and the Board will not interfere with DHR's conclusion under the particular circumstances present here. It is also important to note that while Calls Plus may have been treated generously by DHR in this regard, every one of the eleven competing proposals was evaluated before a single one was finally rejected; so it appears that offerors were treated equally, with a deliberate policy preference in favor of maximizing competition.

Turning away from the Board's foregoing evaluation of whether the Calls Plus proposal should have been considered at all, and taking up next the question of whether the qualifications criterion of the top two offerors was fairly evaluated by DHR, it is plain to the Board that a more definitive standard applies. On the evaluation criterion of "Qualifications," the second most important factor to be considered according to the RFP, Active received scores of 26, 30, 36 and 36, out of a maximum total of 36 points for this factor, for a total of 128 points. Calls Plus received scores of 25, 30, 36 and 36, for a total that should have been recorded as 127, one point less than Active's score. However, due to a typographical or arithmetic error, the point total of Calls Plus shown on the final evaluation tally sheets is reported as 132, making it mistakenly superior to the qualifications ranking achieved by Active. This was clearly erroneous until corrected.

Further, the procurement officer conceded during testimony that he would not have given Calls Plus a perfect score on this heavily weighted criterion, as two of the four evaluators did. The Board also finds those ratings without support and impossible to understand. The minimal qualifications presented by Calls

Plus do not justify the conclusion to rate Calls Plus ahead of or even near Active on this important criteria factor. As more specifically set forth above, Calls Plus barely met the minimum qualifications to be eligible to submit a proposal, giving Calls Plus the benefit of the doubt as to whether Calls Plus met the minimum eligibility requirements at all. By contrast, Active has actually operated the DHR call center for the past decade. Its partner in charge of IVR receives over a billion calls a year. To sum, Calls Plus should not have been ranked close to Active on the category of "Qualifications." The excessive rating given to Calls Plus on this factor arises not only from a simple mistake in arithmetic; it is also objectively unjustifiable by the evidence presented even after correction of the faulty addition of numeric points attributed to these offerors on this criterion.

The comparative scoring of the Evaluation Committee is similarly defective and plainly erroneous in scoring of another evaluation factor as well, namely, "Financial Responsibility and Stability." On that category, though it ranked only fifth most important of the six evaluation criteria stated in the RFP, Calls Plus is given a score of 72 total points, compared to only 70 points for Active. Indeed, on "Financial Responsibility and Stability," Calls Plus, using only the financial information provided by Attiva Soft, is ranked ahead of every other proposer except for MAXIMUS Human Services, Inc., which it ties in total points scored. Calls Plus is ranked ahead of Verizon Business Services, Inc., which is a subsidiary of another massive company, Verizon Corporation.

Looking only at the financial differences between Attiva Soft and Active, it appears undisputed that Calls Plus relies solely upon the financial wherewithal of a relatively small business with annual revenue of around \$8 million supporting a \$300,000 line of credit with \$180,000 cash on hand. Active, by contrast, is a global, publicly traded company with thousands of

employees, a superlative Dun & Bradstreet credit rating, market capitalization in excess of \$750 million, and annual revenue of some \$1.5 billion. Under these circumstances, how in the world can DHR justify ranking Calls Plus ahead of Active on "Financial Responsibility and Stability?" The Board is mystified at this determination, which is contradicted by the undisputed evidence provided to DHR by which appellant and the interested party self-describe their own respective financial conditions. Here again, though the finding goes to an aspect of the evaluation given less weight than other factors, the Board must conclude not only that DHR's conclusion is not supported by the evidence, but indeed, that its rating of Calls Plus ahead of Active is wrong.

In its Brief on this point, the Interested Party asserts accurately that the RFP does not mandate that a proposer be a large, publicly traded company, nor that financial information is required beyond what Calls Plus provided for Attiva. That is true. But it is also beside the point. Surely Attiva has sound finances proven by the fiscal documents it submitted. But that is not to say that Attiva is superior to Active on this evaluation factor. There simply is no evidentiary basis in the record upon which reasonable persons may fairly conclude that Calls Plus is superior to Active on the criteria factor of "Financial Responsibility and Stability." The Board suspects that the cause of this error is simply that proposals were examined individually on different dates of review and the Evaluation Committee never reconvened at the end of the evaluation process for the purpose of comparing final rankings to assure their accuracy and guard against the possibility of accidental selective inflation of an evaluation of a particular proposal on any particular day during the long evaluation process.

The ultimate method employed here to determine the winning proposal by calculating as a multiplier the weighted percentages

for the order of technical and financial rankings, 70% vs. 30% respectively, is also unsound and impermissible. This is because this mode of measurement selected by the procurement officer ignores consideration of the relative differences between the rankings of competing offerors. Instead of using the ranking order of competing proposals, it would have been fair and accurate to use actual scores assigned to proposals and reducing them in accordance with the differential weight values assigned to the technical as compared to the financial evaluation of proposals. But using only the rank order number, in this case one through ten, is totally misleading. Is the second ranked technical proposal very close to the top ranked proposal? Is the third ranked technical proposal considerably inferior to the second? Is the cheapest proposal less expensive than the next cheapest by a difference of a penny, or by ten million dollars? Using only rankings, rather than actual amounts or scored values, eliminates the ability to evaluate distinctions of degrees of separation between the rankings, which prevents full and fair analysis of best value to the State.

An examination of a series of hypothetical scores may best illustrate the dynamic of this criticism. Consider the table that follows:

<u>Technical Evaluation</u>			
<u>Proposer</u>	<u>Grade</u>		<u>Rank</u>
A	A+	(4.0)	1
B	A	(4.0)	2
C	A-	(3.8)	3
D	B	(3.0)	4
E	C	(2.0)	5

Taking merely the rank and not the grade score of each proposal, and multiplying by 70% as the assigned weight of the technical evaluation above, the following expression of weighted technical

scores results, with the lowest score reflecting the best offer.

<u>Technical Evaluation (weighted)</u>				
<u>Proposer</u>	<u>Grade</u>		<u>Rank</u>	<u>Weighted Score (70%)</u>
A	A+	(4.0)	1	0.7
B	A	(4.0)	2	1.4
C	A-	(3.8)	3	2.1
D	B	(3.0)	4	2.8
E	C	(2.0)	5	3.5

Turning next to the financial component of the same hypothetical, consider the following price ranking for the same five proposers, A through E, the top rank representing the lowest cost:

<u>Financial Evaluation</u>	
<u>Proposer</u>	<u>Financial Rank</u>
A	3
B	4
C	2
D	5
E	1

Again applying the appropriate multiplier to weight the financial offers, in this hypothetical 30% of total value, as is the case in the instant procurement, the following scores are derived:

<u>Financial Evaluation (weighted)</u>		
<u>Proposer</u>	<u>Financial Rank</u>	<u>Weighted Score (30%)</u>
A	3	1.0
B	4	1.3
C	2	0.7
D	5	1.7
E	1	0.3

Combining the identical two charts above to show technical and financial side-by-side:

<u>Technical</u>					<u>Financial</u>		
<u>Proposer</u>	<u>Grade</u>	<u>Rank</u>	<u>Weighted Score (70%)</u>	<u>Proposer</u>	<u>Rank</u>	<u>Weighted Score (30%)</u>	
A	A+ (4.0)	1	0.7	A	3	1.0	
B	A (4.0)	2	1.4	B	4	1.3	
C	A- (3.8)	3	2.1	C	2	0.7	
D	B (3.0)	4	2.8	D	5	1.7	
E	C (2.0)	5	3.5	E	1	0.3	

Finally, combining the two charts by adding the technical weighted rank to the financial weighted rank results in the following combined scores in accordance with a 70/30 division of weight between the technical and financial evaluations:

<u>Technical/Financial Combined</u>				
<u>Proposer</u>	<u>Technical Weighted Score (70%)</u>	<u>Financial Weighted Score (30%)</u>	<u>Combined Score (100%)</u>	<u>Overall Rank</u>
A	0.7	1.0	1.7	1
B	1.4	1.3	2.7	2
C	2.1	0.7	2.8	3
D	2.8	1.7	4.5	5
E	3.5	0.3	3.8	4

As depicted above, using the same calculation process as employed by the procurement officer in this appeal, Proposer "A" appears to present a substantially superior proposal, with a score well below its four competitors. The second best offer is Proposer

"B." But now look finally at the actual dollar amounts of the financial proposals of the same hypothetical:

<u>Financial</u>		
<u>Proposer</u>	<u>Overall Rank</u>	<u>Financial Proposal</u>
A	1	\$30 million
B	2	\$40 million
C	3	\$20 million
D	5	\$50 million
E	4	\$10 million

As illustrated by the foregoing, calculating preferences using only weighted ranking order is not a fair, fitting, or rational method of rendering the final determination of best value to the State. If it were, the procurement officer noting the above would be blindly compelled to conclude that Proposer "A" offers the proposal most advantageous to the State, while Proposer "B" is second best and Proposer "C" is third. But in this instance, Proposer "C" offers to the state a technical proposal almost as good as Proposer "A" or "B" but at a fraction of the cost. Shouldn't the procurement officer be able to recognize the stark price differences shown? Especially in times of severe fiscal austerity, shouldn't the substantial variation in pricing be considered in light of the close technical ranking of the top 3 offers? In this hypothetical the rote formula adopted by the procurement officer in this appeal, using ranking order rather than actual rating scores, would compel an irrational and costly mistaken result.

The Board recognizes that the vastly differing pricing assumed by the above hypothetical is atypical. The financial offers are skewed to make a point, that point being that it is essential for the evaluation committee and procurement officer not to lose sight of the significance of degrees of difference

between rankings, both technical and financial. However, the skewed prices may not be as unrealistic as it may first appear. Recall that the procurement at issue here also presents a wide disparity in pricing, namely, from a low evaluated price of about \$7.5 million to a high of more than \$40 million. In addition, like the hypothetical example above, it is also not uncommon for a couple of offers to be easily subjected to rejection because they are ranked as outliers from the mean in technical or financial components of proposal evaluation, or both, while a handful of offers may be ranked very closely to one another in the technical evaluation and at the same time present significant price differences. So the hypothetical is not as far-fetched as may initially meet the eye.

In the instant case, DHR recommends award of this contract to Calls Plus, which does not offer the lowest price, but does offer a proposal considerably less costly than Active. Ultimately, DHR may fairly and properly determine that Calls Plus does indeed offer best value to the State. But the Board cannot condone the method of calculation by which that determination was rendered here. To do so would allow future procurement officers in other procurements to adopt an evaluation process that is unreasonable, illogical and improper, as demonstrated by the hypothetical above.

Beyond the foregoing faults, the most damaging defect in the instant procurement arises from DHR's Amendment #7, which was not promulgated until June 14, 2011, fully six months after the RFP was issued. By that modification, suddenly and without accurate or adequate explanation, the IVR call volume estimated for contract performance *decreases by 10 million calls per year*. In addition, the projected number of outgoing calls virtually disappears, from 17,400 per month to a mere 100 per month. And at the same time the critical element of CSR-assisted calls *increases*, not decreases, from just over 40,000 per month to

73,500 calls per month instead. In its Brief, the Interested Party describes these late modifications as "a simple adjustment in a certain category of call volume." (Pg. 17.) That characterization is less than fair or accurate, though that incorrect perception may explain why Calls Plus projected only a minute need for additional staffing to accommodate a huge increase in actual estimates of the volume of incoming calls requiring live operator assistance.

Obviously, these gross changes can reasonably be expected to bear substantial impact on offerors' plans for necessary facilities, equipment, and staffing. This degree of error in the amounts of anticipated work, though expressly not determinative of actual indefinite contract performance volume, is inexcusable. The Board is simply at a loss to understand why for six months, no one at DHR evaluating its call center needs realized whether DHR's anticipated call volume was a million calls a year or ten million. Likewise, there is no evidence that anyone paid heed to whether the portion of incoming calls requiring operator assistance was 1 in 20, or 1 out of every 2 calls. The precise numbers of incoming calls both to IVR and CSR should have been well known to DHR from the itemized monthly reports and invoices submitted by appellant as current operator of DHR's call center. If those figures had been in genuine dispute, why did DHR pay for each one of those calls which account for the per-call charges incurred by DHR for the last decade? No explanation is posited by DHR why program staff provided to the procurement officer estimates of call volumes completely outside the range of reasonable projections that could and should have been made much more thoughtfully using the actual precise call figures readily known from the undisputed record of the past ten years.

Of course, it is unknown at present what the actual future number of incoming calls may be, as well as the proportion of calls required to be handled by a CSR. Perhaps that is why DHR

demurred on multiple occasions in response to questions pertaining to assurances of call volume or staffing needs. Though it is not within the purview of the Board to recommend how an RFP ought to be drafted, one may fairly conclude that a poorly designed IVR increases the need for live operator CSR assistance, while a superior IVR self-routing capability may dramatically reduce the necessity of CSR assistance. By decreasing the number of calls requiring operator assistance, for which the State is assessed a per-call charge, therefore, the total cost of contract performance may be dramatically diminished. But there is no indication in the record that DHR recognized that the original RFP projected the necessity of individualized CSR support for fewer than 5% of total calls, while the projected volumes prescribed in the revised RFP ultimately changed that proportion tenfold, to about 50%. Thus, the Board notes that a tangential shortcoming readily observable from DHR's inattention to this point is the likelihood that DHR apparently does not track or monitor the impact of the IVR on CSR-assisted call volume needs.

It is unfortunate that greater attention and analysis was not afforded by DHR on the significance of promoting IVR handling of incoming calls, when feasible. The RFP here at issue would create a contract by which the State establishes a financial disincentive for the selected operator of DHR's call center to implement an efficacious fully automated IVR system to allow callers to transfer their telephone contacts without the necessity of live operator assistance. That is because under the new charging plan established by this contract, the call center operator is paid (beyond the flat fee for the IVR system itself) only for calls requiring CSR response. Thus, increasing the need for CSR handling of calls increases the amount of the bills to be paid by DHR to the call operator. It would have been wise for DHR to have made some attempt in this procurement to minimize the need for callers to reach a CSR, but, whether by design or

omission, IVR handling of calls is not promoted by the terms of the RFP. Indeed, it appears from the evidence that DHR throughout its considerations of this RFP was unconcerned with the percentage of call volume requiring costly CSR handling of calls rather than no-charge automated IVR transfer of calls. There is no indication that DHR recognized the stark difference between the necessity of CSR intervention to service half of its incoming calls, as ultimately estimated, or merely one-twentieth of the total number of calls, as initially projected. This flaw is referenced in *dicta* not because it constitutes any basis upon which the Board may reverse this procurement recommendation, but only because budget limitations imposed upon DHR are said to constitute a principal constraining factor affecting this contract and rendering Active's proposal unacceptable. The RFP includes no cap on the portion of calls requesting CSR transfer, or the amount of payment for an unnecessarily high frequency of operator-assisted calls, as DHR might have provided for by the terms of its call center contract. Drafting the terms of the RFP is not within the legitimate parameters of Board review, and no fault is attributed to DHR for such a prospectively or arguably deficient design specification, but the selection manner and process here applied may give rise to an opportunity for abuse.

The principal ground for sustaining this appeal and the central deficiency of Amendment #7, which severely altered expected contract performance needs very late in the procurement process, is that it assured offerors that staffing changes and other modifications resulting from the amendment would be considered by the evaluation committee. They should have been, but they were not. The highest weighted evaluation factor was supposed to have been "Proposed Services." Here, the services initially proposed by Active included a staff of 28 full-time CSRs plus 8 part-time, ultimately increased by 11 additional personnel for a total of as many as 47 CSRs, based upon the final

revised call figures set forth for the first time on June 14, 2011. By comparison, Calls Plus initially offered only 20 CSRS, increasing that figure by 2 for a total of 22 CSRs based upon the same changes in anticipated call volumes. Because the technical evaluation closed prior to the issuance of Amendment #7, neither the scores nor the rankings of the technical component of evaluation of proposals were modified in the slightest degree. After technical evaluations terminated prior to the opening of financial proposals and subsequent solicitation of two BAFOs, no technical reevaluation was allowed to be conducted even though only the second BAFO was based upon the massive modifications reflected in Amendment #7 just prior to award recommendation. Hence, the final technical modifications including the critical element of staffing changes were not fully considered by the Evaluation Committee, in direct violation of the assurances of Amendment #7, which were incorporated into the RFP. Instead, it seems to the Board that the Evaluation Committee in the final analysis felt it was compelled simply to settle with the best technical proposal that presented an evaluated cost within Departmental funding constraints. Again, the RFP might have provided that financial considerations receive equal weight as technical, or even greater weight. But it did not. The RFP specified that the technical component of proposal evaluation would receive greater weight than the financial component, so that is what is required to be done. In the end, the technical evaluation was deficient and incomplete. As important as this factor may be to the DHR call center, the final staffing plans proposed by Active and Calls Plus were never fairly considered.

That failure is especially prejudicial to Active, which proposed to increase its staffing by an additional 11 personnel to handle the eleventh-hour near-doubling of CSR call volume needs. By contrast, Calls Plus offered to increase its staff by 2 positions. Active was given no credit whatsoever for its

reasonable response to the huge increase in estimated volume of incoming calls to the DHR call center requiring CSR handling, a fundamental disclosure which was not made until the middle of June 2011, after completion of the technical evaluations. Likewise, no fault was attributed to Calls Plus for determining to increase its staff by a mere 2 personnel, claiming that change to be sufficient to handle more than 30,000 extra calls per month compared to the initially stated 40,000 calls per month that Calls Plus proposed to service with 20 CSR employees. Except for somewhat vague references to "tried and true" formulas like Erlang C and an uncontested proffer that Calls Plus did indeed use that formula, there is no precise evidence of how Calls Plus determined that it would take 20 employees to answer 40,000 calls per month, and only 22 employees to answer 70,000, a call increase of 75% unmatched by a staffing increase of 10%.

In this regard, it is also clear to the Board that Calls Plus did not properly calculate its staffing needs in accordance with the accepted Erlang C formula for determining the same. The testimony of the expert witness offered by Active on this point was most professional and persuasive. Indeed, even apart from the expert calculations derived by application of Erlang, notes made by the members of the Evaluation Committee document that DHR promptly and forcefully recognized that Calls Plus proposed inadequate staffing to handle the anticipated call volume expected to be received by DHR's centralized call center. Whatever was said by Calls Plus representatives during the impressive performance it made during its oral presentation, those words did not and do not change the actual staffing numbers proposed.

Despite the stark differences in staffing plans offered by the Calls Plus proposal to employ 22-23 CSRs compared Active's proposal to employ twice that number in order to satisfy the contract performance requirement of answering 90% of CSR calls

within 60 seconds, there is no evidence that the importance of adequate staffing was fully understood or evaluated by DHR. Although notice of the final staffing plans was afforded to members of the Evaluation Committee, it was not done so at a time or in a manner that permitted that information to be incorporated into the final award recommendation. This is exceedingly odd given that the capability to answer the phone in timely fashion should have been central to the Evaluation Committee's considerations, made even more important by the absence of an expressly stated liquidated damages provision available to be assessed by the State in the event of failure of contract performance on this particular vital measurement. Clearly, the critical element of staffing was not fairly or properly considered by the Evaluation Committee, which ultimately rated the Calls Plus proposal for 22-23 CSRs to justify a score of 150 on the principal criteria factor of "Proposed Services," while rendering a lower score of only 145 for Active's proposal to hire 43-47 FTE CSR positions to service this central component of contract performance. While it may be true that some call answering systems may be more efficient than others, and some CSRs may be faster than others; as was pointed out during the hearing, most of the time expended during telephone communications with DHR consist of the caller speaking and the CSR operator listening in order to make proper referral. Despite the benefit of every efficiency possible, there remains a point at which staffing levels may be simply inadequate to handle the job as demanded and promised. DHR did not adequately consider the dueling staffing plans proposed in response to this RFP because DHR completed and closed its technical evaluation before the final staffing proposals were submitted after Amendment #7 and the second BAFO.

To summarize the fatal flaws committed by DHR in this procurement, neither of the top two technical evaluation criteria

factors was fairly and accurately evaluated. Ranking conclusions concerning the fifth heaviest weighted factor were also clearly erroneous. And the arithmetic formula employed to calculate final standings was defective because it failed to incorporate differences of degree between the ranking order of proposals on both technical and financial bases. There is insufficient evidence to support the reversal of the initial unanimous opinion of the members of the Evaluation Committee that Calls Plus is not reasonably susceptible for award, and conclude instead that its offer is superior to the other ten proposals received by DHR in response to its RFP.

For all of the foregoing reasons, this appeal must be SUSTAINED.

Wherefore it is Ordered this _____ day of April, 2012 that this appeal be and hereby is GRANTED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
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 2781, appeal of The Active Network, Inc. under DHR Request for Proposals DHR/CALL 11-001-S.

Dated:

Michael L. Carnahan
Deputy Clerk