

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
L-1 Secure Credentialing, Inc.)
)
) Docket No. MSBCA 2793
)
Under)
MVA RFP No. V-HQ-11016-s)

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OPINION BY BOARD MEMBER DEMBROW

This appeal is sustained because at least one of the key findings made during the process of evaluation of competing proposals was clearly erroneous and also because the State failed to adduce evidence at hearing that a legally sufficient cost-benefit analysis was performed to support recommendation of contract award to the highest priced offeror.

Findings of Fact

1. The Motor Vehicle Administration (MVA) is a division of the

Maryland Department of Transportation (MDOT) and carries responsibility for the issuance of drivers' licenses and identification cards. Historically, these cards have been produced by and issued directly from various MVA offices located around the State.

2. On or about August 13, 2010, MVA promulgated a Request for Proposals (RFP) known as MVA RFP No. V-HQ-11016-s, the principal purpose of which is to identify and outsource to a private entity the manufacture of Maryland drivers' licenses with improved security features as required to comply with federal statute specified by Title II of the REAL ID Act of 2005, Pub.L. 109-13, 119 Stat. 302, and implementing regulations by the Department of Homeland Security including 6 CFR §37.15(b), which states in pertinent part as follows:

REAL ID driver's licenses and identification cards must contain at least three levels of integrated security features that provide the maximum resistance to persons' efforts to---

- (1) Counterfeit, alter, simulate, or reproduce a genuine document;
- (2) Alter, delete, modify, mask, or tamper with data concerning the original or lawful card holder;
- (3) Substitute or alter the original or lawful card holder's photograph and/or signature by any means; and
- (4) Create a fraudulent document using components from legitimate driver's licenses or identification cards.

(App. Ex. 1; Vol. 3, Tab 1; Vol. 5, Tab 2; Tr. I-45, IV-121.)

Another principal purpose of the RFP here at issue is to transition the State to a model of central issuance (CI) of drivers' licenses by mail, rather than local issuance of drivers' licenses out of numerous MVA office locations. (Tr. IV-9, IV-16.)

3. Except for certain basic minimum standards, the RFP defers to offerors the responsibility of proposing for MVA's selection a variety of materials, security measures, and manufacturing

processes available for mass production of drivers' licenses at a central location to render Maryland licenses more resistant to counterfeit. (Vol. 3, Tab 1, pg. 30.) Section 2.9.1 of the RFP generally discusses card requirements stating only, "The MVA...requires the Offeror to place a high degree of emphasis on the design of the integrated security features, to create a card with a high degree of security that earns a high level of trust and shall consider security of the proposed cards with the highest scrutiny." (Vol. 3, Tab 1, pg. 28; Tr. IV-18.) Maryland law requires by statute certain minimum components of its drivers' licenses, including a color photograph of the card holder. (Maryland Annotated Code, Transportation Article, Sec. 12-301(g)(2)(v); Tr. IV-35.)

4. The instant Order does not disclose the particular card security components proposed by individual offerors to enhance Maryland drivers' licenses, because the unique design specifications proposed by each offeror are submitted to the State confidentially and represent each offeror's proprietary business solution to the State's stated service needs, elements of which include the application of patented technologies developed or held by competitors within the security identification industry. In addition, precise disclosure of the particular security design elements of identification cards offered for production by a certain vendor would constitute a useful blueprint for counterfeiters to employ to perfect unlawful simulation of legitimate cards, so the specific combinations of design elements proposed by each offeror responding to this RFP will not be publicly recited herein.
5. Notwithstanding the foregoing, a general understanding of some of the common methods used to construct security cards and combat card counterfeiting is essential to any thoughtful analysis of the instant procurement. Therefore the following

discussion is intended to summarize some prospective features available for incorporation into secure identification cards without disclosing which particular design elements are incorporated into any given proposal. Most security cards may be classified into one of three (3) categories: PVC, teslin, or polycarbonate. The least secure and least durable card is of the poly-vinyl chloride (PVC) variety, for which identifying information is printed on the surface of the card. PVC cards are the most commonly counterfeited because they are easiest to duplicate and may be vulnerable to attack or data modification without the necessity of sophisticated engineering methods or tools.

6. Much more tamper-proof than PVC cards are cards made of a polyolefin or teslin inner core encapsulated between layers of lamination composed of a coextruded clear surface plastic facing material known as polyethelene terephthalate (PET), which is bonded to the core. Teslin cards may be imprinted using laser xerography or engraving technology to ascribe personalized data. Teslin core cards are also receptive to other print technologies. Both the teslin card material and laser printer capability are readily available in the commercial marketplace, but various security components more fully described below can add many features to teslin cards or to monolithic polycarbonates to render counterfeiting extremely difficult and therefore cost-prohibitive. (Vol. 2, Tab 1, pg. 20; Tr. III-137-139.)
7. Like teslin cards, polycarbonate cards consist of an opaque central core which is laminated by several clear surfacing materials, for a total of between four and seven layers of polycarbonate. (Tr. II-64, II-81.) Instead of using a teslin core surfaced by clear plastic PET material, all of the layers of a monolithic polycarbonate are made from polycarbonates, which are fused together during the manufacturing process using controlled heat and high

pressure, rendering superior adhesion of the various polycarbonate layers so that all of the materials within the card are very highly resistant to being pulled apart. Upon fusion, the polycarbonate card becomes a monolithic composite. Personalized data may be burned into the card body by laser engraving of various layers of the clear polycarbonate which have been treated by carbon doping to be receptive to black and white laser imprint. (Tr. I-205, II-81, IV-78.) Monolithic polycarbonate cards may be differentiated from teslin cards by the sound that is made when they are dropped onto a hard surface in such a manner as to strike the edge of the card, because only polycarbonate cards make a distinctive 'ping' sound, a high-pitched audible tonal resonance, rather than a dull 'thud.' (Interested Party Ex. 6; Tr. IV-211.)

8. According to the testimony of experts in security card manufacturing processes employed by L-1 and CBN-STI, both teslin and polycarbonate cards are receptive to a number of security components, several of which are noted below. For one example of a common feature to combat counterfeiting, a card may contain a layer of ultraviolet (UV) or infrared ink that appears only when the angle of view of the card is shifted or the card is subjected to a UV light, a security component already a part of current Maryland drivers' licenses. The option of including a more sophisticated three-dimensional digitally mastered metallic diffraction holographic image is said to be a similar but more advanced card feature included in state-of-the-art cards now in production in Germany and California. Cards may be laser perforated with miniscule holes that cannot be easily seen or felt, but when held up to an ordinary light, a letter, word, symbol or code may readily appear from the light showing through the tiny transparent perforations that are laser-drilled through the card. By adjusting imprint settings to

effect laser ablation, portions of tactile print can be burned onto the outer surface of a card to afford ready ability to detect forgery by feeling the card, without even the necessity of visual examination. Cards may contain multiple photographs of the card holder layered over top of one another or in different or repeated sizes or forms, including color, black and white, and gray scale or ghost image. Offsetting photos may be printed partially over top of other personalized data, including signatures. This compels a forger who changes one image to be forced also to modify overlapping images. A clear shape like an oval or circle may be cut into the opaque card core so that a gray scale image of the card holder imprinted within that shape may be visible through a clear "window" from both the front and back of the card. Guilloche or fine-line printing is beyond the capability of ordinary printers, so it cannot be readily duplicated except by professionals with access to very costly high-tech printers. Such fiduciary level lithographic processes may include complex and shifting colors and designs in high resolution fine line bank note grade blends of ink imprinted onto inner layers of a card, including microprint, which appears to the naked eye as a mere line, but under magnification reveals that it actually consists of a stream of letters or words. Those micro-letters may also include deliberate detectable errors, or they may repeat personalized data. Printed information may be duplicated in a wave pattern or using varying print type and size. All of these and other design elements result in improved card security as each successive component renders the card more difficult and costly to duplicate. (Vol. 2, Tab 1, pg. 23; Interested Party Ex. 7, 8; Tr. II-81-97, III-126-187, IV-165-217.)

9. Both teslin and monolithic polycarbonate cards can be made extraordinarily resistant to counterfeit using innumerable

combinations of some or all of the above security features. In this procurement both L-1 and CBN-STI proposed cards with a variety of design elements to render each of them extremely resistant to tampering or counterfeit. L-1 proposed a teslin card while CBN-STI proposed a monolithic polycarbonate. Both proposed cards include some components requiring laser engraving and some requiring laser printing.

10. Laser printing, also referred to as laser xerography, is different than laser engraving, though either or both methods can result in print or other images imbedded within a security card. (Tr. I-215.) Laser engraving activates carbon molecules in those specially formulated card layers manufactured to receive laser imprint, resulting in black and white but not color images, including print or photo. (Tr. II-89, IV-178.) Laser xerography, by comparison, is more widely available and therefore more easily replicated than laser engraving, and can produce black and white or color reproduction. Offerors are free to propose laser printing and/or laser engraving, and the two offers here in contest offered both. One was believed by the Evaluation Committee to propose 100% laser engraving of the card's central core, however, it actually is the upper third of the card layers on top of the core that are receptive to laser engraved or laser printed images, even though the images imbedded in an adjacent clear layer may leave traces of the laser imprint on the core. (Vol. 1, Tab 5, pgs. 22, 25; Vol. 2, Tab 1, pg. 17; Vol. 5, Tab 5, pg. 5; Tr. III-201, IV-194-195.) The procurement officer stated in her memorandum recommending award of the contract to CBN-STI, "Personalization data is laser engraved into the inner core of the card and cannot be mechanically or chemically removed without some surface damage to the card, thereby providing an extremely effective tamper-resistant barrier." (Vol. 5, Tab 5, pg. 5.)
11. The photographic image of the cardholder is an element of the

personalization field which cannot be printed by laser engraving unless only a black and white and not a color image is allowed, which is not the case in Maryland. (Tr. I-122, III-160.) Therefore, notwithstanding the repeated assertions by the procurement officer as well as counsel to MVA that only CBN-STI proposes 100% laser engraving, both proposals include the use of at least some print technology other than laser engraving, such as inkjet or laser xerography. (Vol. 3, Tab 1, pg. 31; Vol. 3, Tab 5, pg. 60; Tr. IV-123-125; IV-156.)

12. The modalities of counterfeiting secure credentials may be classified into four separate categories: simulation, alteration, photo substitution, and cannibalization. (Tr. III-148, IV-206.) Simulation refers to the unauthorized production of a newly manufactured fraudulent card. The vast majority of counterfeit cards are created by simulation, rather than tampering with a single legitimate card to falsify some of the information included in it. (Tr. I-148.) The other three threats may be collectively referred to as forms of tampering with a card. The security design characteristics of identification credentials are principally intended to thwart both methods of counterfeit risks, tampering and simulation. Tampering refers to the unauthorized modification of data in the personalization fields of a lawfully manufactured card, generally done for the purpose of fraudulent presentation of a card showing a false age or identity of the holder, for example. Both forms of counterfeit cards constitute potential security risks on several fronts, including preventing identity theft, verifying correct personage for law and traffic enforcement, restricting authorized access to commercial aircraft, assuring the authority of legitimate retail and banking transactions, and related other threats to public safety and welfare. No card is completely secure from counterfeit, but

a good one is difficult to create or modify and is therefore expensive to counterfeit by simulation or tampering. (Tr. I-207, IV-126-130.)

13. On or before the submission due date of September 30, 2010, a total of six proposals were received by MVA in response to the RFP, including one from appellant, L-1 Secure Credentialing, Inc. (L-1) a/k/a L-1 Identity Solutions® and one from interested party CBN-Secure Technologies, Inc. (CBN-STI), which is a wholly owned subsidiary of its parent company, Canadian Bank Note Company Ltd. (CBN). (Vol. 1, Tab 1, pg. 1; Vol. 1, Tab 2, pg. 1; Tr. IV-18, IV-64.)
14. The business model proposed by CBN-STI is somewhat unusual in the sense that CBN is not only the parent company of the offeror, CBN-STI; CBN is also designated as the offeror's principal subcontractor, responsible for the entire manufacturing process. (Vol. 1, Tab 5, pg. 31; Vol. 1, Tab 6, pgs. 67, 69, 71, 197.) CBN-STI posted performance and payment bonds in its own name. (Vol. 3, Tab 8; Tr. II-97, IV-65.) Though the procurement officer knew the correct identity of CBN-STI as the offeror responding the RFP, various references to "CBN" in the procurement record are mistaken and are actually intended to refer to CBN-STI. (Tr. IV-111-113.)
15. Each of the six proposals contains a unique variety of combined security design elements. All proposals are confidential and proprietary to the offeror. All proposals comply with federal requirements imposed by the REAL ID Act as well as the specifications of the Maryland RFP.
16. Sec. 1.42 of the RFP provides, "The selected Offeror shall be responsible for rendering services as required by this RFP. All subcontractors shall be identified and a complete description of their role relative to the proposal shall be included in the Offeror's proposal...If an Offeror that seeks to perform or provide the services required by this RFP is

the subsidiary of another entity, all information submitted by the Offeror, such as but not limited to, references and financial reports, shall pertain exclusively to the Offeror, unless the parent organization will guarantee the performance of the subsidiary. If applicable, the Offeror's proposal shall contain an explicit statement that the parent organization will guarantee the performance of the subsidiary." (Vol. 3, Tab 1, pg. 14; Tr. I-65.) CBN did not and does not guarantee performance by its subsidiary, CBN-STI.

17. Sec. 2.5 of the RFP is entitled "Offeror's Minimum Qualifications" and provides in Sec. 2.5.1: "The Contractor shall have had experience in the production and delivery of secure cards in at least two programs for the same/similar services as required in the RFP. These cards may be driver's licenses, state ID card, federal ID cards, financial cards or similar secure cards. The Offeror shall have demonstrated three (3) years experience in the production of an annual volume at a minimum of 1.5 million cards per year, per program." (Vol. 3, Tab 2, pg. 23; emphasis in original; Tr. I-44, I-62, I-132.) Sec. 2.5.4 under the same RFP heading further explains, "Where it is stated that a Contractor shall meet certain requirements, it is understood that the requirement applies to the Contractor, its sub-Contractors and any other third-party which the Contractor or its sub-Contractors intend to use in the performance of task." (Vol. 3, Tab 1, pg. 24.) At the August 24, 2010 pre-proposal conference, in response to a question about whether the experience of an offeror's subcontractors could be attributed to experience held by the offeror, MVA's procurement officer on this RFP stated, "if you decide to propose a subcontractor and they meet the requirements, we are going to evaluate them just as we do with the other proposals for the minimum requirements of experience and the qualifications."

(Vol. 3, Tab 17, pg. 22.)

18. CBN has been in business in Canada for 113 years printing bank notes, postage stamps, and other high-value secure documents. Its subsidiary, CBN-STI, was formed in 2005 to enter U.S. markets for security cards. (Tr. II-38.) After the 2008 award of a \$42 million seven-year contract to produce Virginia drivers' licenses, CBN-STI constructed a plant in Danville, Virginia and since July 2009 CBN-STI has manufactured drivers' licenses there, but those licenses do not contain color photographs. (Vol. 1, Tab 7, pg. 207; Vol. 1, Tab 9, pg. 235; Interested Party Ex. 1; Tr. I-90.) In fact, CBN-STI has never manufactured a color identification card and Virginia is the only state in the United States for which it has manufactured drivers' licenses. (Tr. III-8, III-58; IV-109.) Including CBN-STI, CBN has a total of four divisions and over a thousand employees, and has made enormous capital investments in very costly printing equipment. (Tr. II-46, II-51.) Since 1995, CBN, the parent company of and proposed subcontractor to CBN-STI, has produced over 8 million drivers' licenses with color photographs for the Government of Romania. (Vol. 1, Tab 7, pg. 210; Tr. I-73.) CBN also has considerable experience with personalized color photographs included on more than 15 million national identification cards for foreign countries and drivers' licenses in the Canadian provinces of Alberta and Saskatchewan. (Vol. 1, Tab 7.) CBN currently produces over 4 million color identification cards annually, including recent public procurement contract obligations to manufacture state-of-the-art passports for Iceland, New Zealand, and more than a dozen other countries. (Vol. 1, Tab 7, pgs. 206-211; Vol. 1, Tab 9; Tr. II-39.)
19. L-1 is the nation's dominant contractor for manufacture of drivers' licenses, servicing 44 states and the District of Columbia for that function pursuant to the newly imposed

requirements of the Real ID Act of 2005 and its implementing regulations. (Tr. III-130.) 21 of those states already employ a central issuance model of delivering drivers' licenses. L-1 operates production facilities in California, Indiana, Pennsylvania, Massachusetts, Texas, Washington and Mexico. (Tr. III-131, 132.) L-1 is supplier of secure identification solutions to six Canadian provinces and over 25 countries. It currently employs over 2,000 people and has issued hundreds of millions of secure credentials. (Vol. 2, Tab 1, pg. 71-72.)

20. Although L-1 experienced considerable difficulty commencing its new contract to produce drivers' licenses in California, at its de-briefing conference with MVA, L-1 was informed, "All references checked out ok and spoke highly of the company." (Vol. 3, Tab 12, last page.) By contrast, the procurement officer's letter to the MVA Administrator recommending award of the contract to CBN-STI states, "widely published reports have revealed that the number three (3) ranked firm [L-1] had significant production and quality issues causing up to eight weeks delay in the production and delivery of DL/ID cards under a contract awarded to the firm in October 2010 by the State of California." (Vol. 5, Tab 5, pg. 7.) During the proposal evaluation process the Evaluation Committee became aware of unfavorable newspaper articles about start-up problems experienced by L-1 as the manufacturer of new California drivers' licenses and in follow-up the procurement officer directed an e-mail to evaluators stating, "A telephone call was made to the California DMV and they have confirmed that the delay was due to production quality issues." (Vol. 5, 2d Tab 4, last pg.; Tr. IV-80-86, IV-114-120.) Some design components of the proposal made by L-1 for Maryland drivers' licenses are similar to California driver's licenses, but they do not have all of the same problematic security features as encountered

- by L-1 in the course of setting up its new production facility for California licenses, and the volume of manufacturing California drivers' licenses is significantly greater than Maryland's needs. (Respondent's Ex. 3; Interested Party Ex. 4, 5; Tr. III-209-213, IV-91-92, IV-99-106.)
21. Sec. 1.15 of the RFP states, "Prices quoted in the proposal shall remain valid *for a minimum of 180 days* from the closing date for receipt of proposals, or Best and Final Offer (if requested)." (Vol. 3, Tab 1, pg. 7; emphasis added; Tr. IV-68.) During the pendency of the instant appeal, in response to MVA request, CBN-STI extended its pricing offer. L-1 was not asked by MVA to extend its price beyond 180 days from the due date for the second best and final offer (BAFO) on January 3, 2011. Instead, L-1 neither extended nor withdrew its offer. (Tr. IV-71.)
22. Sec. 1.26 of the RFP prohibits MVA from accepting "multiple or alternate proposals" from any offeror. (Vol. 3, Tab 1, pg. 11.) At the same time, Sec. 2.7.2.4 of the RFP invites each offeror to propose optional add-on features to its card proposal, stating with respect to "General Technical Requirements," "The Contractor shall describe the following features of the proposed DL/ID solution:...its ability to provide additional functionality, and expansion of services that may be added to the Offeror's solution while this contract is in effect, at MVA's option." (Vol. 3, Tab 1, pg. 25; Tr. I-148, I-164-181.) Offerors did propose to MVA a variety of optional security features in addition to their base proposals. L-1 did not provide advance pricing data for its options; CBN-STI offered a slight cost reduction for the option of using a black and white instead of a color photo. (Tr. I-175; III-75-76.)
23. Sec. 5.4.1 of the RFP itemizes all of the criteria allowed and required by MVA to be considered during the course of

proposal evaluation in "descending order of importance" as follows:

1. Card Design and Security
2. Overall Experience and Technical Competence
3. Project work plan and Schedule
4. Facility Security
5. Qualifications of Key Personnel
6. Quality Assurance
7. Continuity of Services, Management Plan
8. Overall Clarity of Response and Comprehension of State requirement
9. Offeror Business References
10. Past State of Maryland Contract Experience
11. Demonstrated Financial Capability
12. Economic Benefit to State

(Vol. 3, Tab 1, pg. 49.)

21. Section 5.1 of the RFP also provides, "the technical and price proposals will be separately evaluated for conformance with the requirements of this RFP. Selection of a firm will be based on evaluations of both Technical and Price Proposals (including oral presentations) with technical and financial factors given equal consideration in the overall award determination." (Vol. 3, Tab 1, pg. 48; Tr. III-101, 103; IV-47.) The requirement to afford equal weight to the financial as to the technical components of bid evaluation is mandated by the Department of Budget Management (DBM). (I-103, 104.)
22. Proposal evaluation must be based on the evaluation factors set forth in the RFP. (COMAR 21.05.03.03(A)(1).)
23. An Evaluation Committee was appointed consisting of eight MVA employees representing different professional perspectives and expertise on issues related to drivers' licenses. (Tr. I-36; IV-19-20.) None of the members of the Evaluation Committee were expert in the manufacture of secure identification credentials. (Tr. IV-14.) After discussing confidentiality requirements, each member of the Evaluation

Committee was furnished with a copy of each proposal as well as form guidelines and checklists to aid in the Committee's review of proposals. (Tr. III-17.) That initiated the proposal review process, which included oral presentations from all offerors during the course of about ten meetings of the Evaluation Committee. (Tr. IV-21-27.)

24. All eight members of the Evaluation Committee completed evaluation checklists for both CBN-STI and L-1. (Vol. 5, 3d Tabs 1-8.) Each checklist itemized the requirements of proposal submission established by the RFP specifications with four adjacent columns allowing spaces for evaluators to check, "exceptional," "compliant," "partially compliant," or "non-compliant." For "Overall Experience and Technical Competence" as set forth in Sec. 3.4.1.7 of the RFP evaluation checklist, CBN-STI was credited with a score of "exceptional" by seven of the evaluators, with one evaluator scoring CBN-STI only as "compliant." That evaluator also noted, "did not show this," with respect to the minimum requirements threshold for legitimate offerors to have at least three years experience in a program with an annual production volume of at least 1.5 million cards per year. By contrast, on the same factor of "Overall Experience and Technical Competence," L-1 was given a score of merely "compliant" by seven (7) evaluators, with only one evaluator affording L-1 a score of "exceptional." (*Id.*; Tr. III-23-44.) The procurement officer offered a curious explanation of the evaluation factor of experience held by CBN-STI as having been considered by the Evaluation Committee only in connection with the greater experience of CBN-STI manufacturing the CBN-STI card. (Tr. I-94, I-100, I-111, I-123, III-12-14, III-53.)
25. The Evaluation Committee determined that CBN-STI offered the most secure card. (Tr. I-154, I-158.) In fact, CBN-STI was ranked by the Evaluation Committee as the top offer in all

twelve factors of the technical evaluation. (Tr. III-10.) Miraculously, not a single one of the other five proposals was rated higher than CBN-STI in a single one of the twelve specified evaluation criteria. In part the basis of this decision was the assertion that CBN-STI alone offered a card that was 100% fully laser engraved. (Tr. I-149, I-176, I-198, I-237, I-240, III-31, IV-33-34, IV-58, IV-123, IV-138.) An additional strength of the CBN-STI proposal in the perspective of the Evaluation Committee is that the laser engraving of the CBN-STI card extended to the card core, though that characterization is technically disputed by those with expertise in secure card manufacturing processes, who testified that laser engraving appears on the layers within the top third of a secure card. (I-182, I-192, III-201, IV-219.) Finally, as a result of its efforts physically to manipulate sample cards, the Evaluation Committee also had concerns that the laminate of the L-1 teslin card could be separated or peeled from that card while the layers of the monolithic polycarbonate proposed by CBN-STI could not be separated by hand. (Tr. I-218, I-224, III-88-89, III-97, IV-41-42, IV-143-145, IV-200.) On the other hand, a representative of L-1 who testified at the hearing and indicated thorough and expert familiarity with the technical side of the drivers' license production industry in the United States stated that the adoption of the card proposed to Maryland by L-1 would place the State within the top echelon of states offering the best security cards in the entire country. (Tr. III-231.) Before the financial offers were opened, CBN-STI was ranked first technically while L-1 was ranked third. (Tr. IV-28.)

26. Following multiple meetings of the Evaluation Committee to discuss each proposal, entertain oral presentations, and consider the proposals in order to rank them technically from first to sixth, the procurement officer memorialized the

technical evaluation conclusions to the MVA Administrator in a memorandum of contract award recommendation, stating, "In all areas of the evaluation criteria, CBN-STI was consistently ranked the highest and provided the best technical proposal overall." That memorandum also states, "The members of the Evaluation Committee strongly believe that the card proposed by CBN-STI provides security which is far superior to cards proposed by the other offerors." (Vol. 5, Tab 5, pgs. 3, 5.)

27. After conclusion of the technical evaluations, the offerors' financial proposals were opened and ranked. As earlier indicated, thereafter MVA elected to solicit two BAFOs from each offeror. CBN-STI lowered its price; L-1 did not. (Tr. IV-44.) In the final financial rankings, CBN-STI was ranked last, or most expensive, and L-1 was ranked third, its price presenting millions of dollars in potential cost savings compared to CBN-STI over the initial five-year term of the contract, a price differential of a double-digit percentage between the projected expense of the CBN-STI proposal and the proposal by L-1. (Vol. 1, Tab 20, pg. 2; Vol. 2, Tab 3, pg. 3; Respondent's Ex. 4.) The price difference between the highest and lowest of the six financial proposals is nearly \$5 million. (*Id.*; Vol. 5, Tab 5, pg. 4.)
28. The Evaluation Committee ultimately determined as its final ranking to repeat the same order of preference as it initially determined to be the order of technical ranking for all six of the offerors. Thus, CBN-STI was continued to be ranked first and L-1 third. The procurement officer adopted the conclusion of the Evaluation Committee and on July 11, 2011 directed correspondence to the MVA Administrator recommending award of the contract to CBN-STI. That correspondence incorrectly states, "CBN STI has over 113 years experience printing banknotes, passports, visa, immigration documents, vital event documents, driver's

license and identification cards for federal, states, and provincial government departments in North America and around the world." (Vol. 5, Tab 5, pg. 6; Tr. I-60.) The cited experience actually pertains not to CBN-STI but to its parent company, CBN. (Tr. I-62.) The procurement officer's memorandum of contract award recommendation makes no distinction between CBN-STI and CBN. On August 12, 2011, the MVA Administrator approved the recommendation for contract award to CBN-STI. (*Id.*, final page.)

29. After its de-briefing conference on September 14, 2011, on September 20, 2011, L-1 filed a protest with MVA which was denied on November 10, 2011. (Vol. 4, Tabs 1, 3.) An appeal of that determination was noted before the Maryland State Board of Contract Appeals (Board) in timely fashion on November 18, 2011 and docketed as MSBCA No. 2793 for which hearing commenced March 15, 2012 and concluded March 20, 2012. (Vol. 4, Tab 4.) Initial post-hearing Briefs were submitted to the Board April 20-27, 2012 with responsive Briefs and objection thereto filed May 4-15, 2012.

Decision

There are three grounds set forth in this appeal arising from the denial of appellant's protest to MVA following the recommendation for award of this contract to CBN-STI. They are: (1) that the offer made by CBN-STI did not include a color photograph and therefore should have been rejected out of hand; (2) that MVA's consideration of proposals was not in accordance with the requirements of the RFP; and (3) that no adequate "best value trade-off" analysis was conducted by MVA to justify the expenditure of the additional costs prospectively to be incurred by awarding the contract to CBN-STI instead of L-1. No supplemental protest or appeal was noted other than the protest of September 20, 2011 and the subsequent appeal of November 18, 2011,

so all evidence and argument incorporated within the above enumerated bases of protest and appeal are fairly addressed herein, but no additional issues are properly before the Board.

The first basis of this appeal may be easily disposed of. Prior to receipt of the Agency Report or any discovery, L-1 assumed that the proposal put forward by CBN-STI did not contain a color image of the card-holder, which is a requirement both of the RFP as well as Maryland State law. This assumption was made at least in part because CBN-STI has never manufactured a driver's license in the United States except for the Commonwealth of Virginia, which permits and uses black and white photos. However, CBN-STI does in fact offer to Maryland a proposal which includes Maryland's color photo requirements, so the factual assertion underlying L-1's first allegation of grounds for reversal of the procurement recommendation is simply inaccurate. While a special modification to its manufacturing process may be required for CBN-STI to produce Maryland licenses at its plant in Virginia, the proposal submitted by CBN-STI does conform to the requirements of the RFP here at issue with respect to the necessity of incorporating a color photograph into Maryland drivers' licenses.

The second basis of the appeal is very broad and encompasses several arguments subsumed within the assertion that MVA failed to evaluate proposals in accordance with the requirements of the RFP. They include: (1) that CBN-STI should have been disqualified for failure to meet the mandatory experience requirements set forth in the RFP, (2) that the proposal submitted by CBN-STI should have been disqualified because it contained an impermissible alternative offer, (3) that MVA wrongfully determined that CBN-STI offered the best technical solution to the State's solicitation for central production and issuance of secure drivers' licenses; and (4) that MVA's conclusion to rate the prior experience of CBN-STI as superior to L-1 was unreasonable and unsupported. Finally, L-1 claims that the State failed to conform to the dictate of the RFP to weigh the technical and financial evaluation components

equally in that no legally sufficient trade-off analysis was conducted to justify the expenditure of the extra cost to be incurred by MVA's proposed award of the contract to CBN-STI instead of L-1. The Board addresses each of these grounds of the appeal *seriatim*.

The first of the above issues presents the question of whether CBN-STI demonstrated "experience in the production and delivery of secure cards in at least two programs for the same/similar services as required in this RFP...[and] three (3) years experience in the production of an annual volume of at a minimum of 1.5 million cards per year, per program" as required by the RFP. It is undisputed that CBN-STI, not CBN, is the correct legal identity of the offeror whose proposal is being considered for contract award. It is also uncontested that CBN-STI does not have the aforesaid requisite level of experience. The only drivers' licenses manufactured so far by CBN-STI are for the Commonwealth of Virginia under a contract which did not begin until July 2009, and so has been in force less than 3 years, though the production volume of that contract is in excess of the stated qualifying threshold for volume of card production, which is the second of the two prongs of requisite prior experience factors qualifying an offeror as eligible to submit a proposal.

MVA argues that the Board has no jurisdiction to consider this seminal issue because it was not specifically raised by L-1 in a timely filed protest to the procurement officer. Although that procedural objection may well be meritorious, because L-1 does contend generally that the evaluation was inconsistent with the requirements of the RFP, the Board will address the question procedurally and on the merits. By either analytical approach, the Board is compelled to reject appellant's assertion and find in favor of MVA as more fully explained below.

L-1 notes that an express provision of the RFP provides that "all information submitted by the Offeror. . .shall pertain exclusively to the Offeror [CBN-STI], unless the parent

organization [CBN] will guarantee the performance of the subsidiary. If applicable, the Offeror's proposal shall contain an explicit statement that the parent organization will guarantee the performance of the subsidiary." Here, no such statement is offered by CBN. As a result, CBN-STI as a subsidiary of CBN is barred from using the imputed experience of CBN as its parent organization. However, the Board determines and rules that this prohibition does not also imply that CBN-STI is prohibited from ascribing to itself the borrowed experience of CBN as its subcontractor.

As previously intimated, CBN-STI offers a somewhat unusual business model in that its parent corporation is also its principal subcontractor. While the terms of this RFP prevent the experience of CBN as a parent corporation of CBN-STI to be vicariously credited to its subsidiary, in the absence of CBN's guarantee of contract performance, the Board has long held that the experience of subcontractors is fairly and ordinarily attributed to a prime contractor as offeror of services to the State, unless expressly disallowed by the terms of the procurement. (*Advanced Fire & Protection Serv.*, MSBCA 2361, ___ MSBCA ¶___ (2003); *Jailcraft, Inc.*, MSBCA 2147, 5 MSBCA ¶475 (1999); *Independent Testing Agency, Inc.*, MSBCA 1908, 5 MSBCA ¶386 (1995); *Aquatel Industries, Inc.*, MSBCA 1192, 1 MSBCA ¶82 (1984).) There is no indication from the aforesaid language of the RFP here at issue that that result was intended to be modified. Therefore CBN-STI may rely upon the past experience of all of its subcontractors, including CBN, to satisfy minimum eligibility standards for submitting a proposal.

CBN does have prior experience with more than 2 government programs and more than 3 years experience producing in excess of 1.5 million secure cards per year. In fact, CBN has over a century of experience manufacturing a variety of secure printing needs, including millions of national identification cards, passports, and drivers' licenses for foreign sovereigns and

Canadian provinces. The considerable past experience of CBN as subcontractor is assignable to CBN-STI. Consequently, CBN-STI is undoubtedly qualified to submit a proposal in response to the RFP despite the limited experience possessed by CBN-STI exclusive of this subcontractor. Finally, for L-1 to prevail in this appeal on this ground alone and thereby disqualify CBN-STI in its entirety, it would have been incumbent for L-1 first to have raised this specific complaint in its initial protest to the procurement officer. (COMAR 21.10.07.02(A); Visions America Community Dev. Corp., MSBCA 2701, ___ MSBCA ¶___ (2010); Williamsport Cabinetry, MSBCA 2666, ___ MSBCA ¶___ (2009); Chesapeake System Solutions, Inc., MSBCA 2308, 5 MSBCA ¶525 (2002), Initial Healthcare, MSBCA 2267, 5 MSBCA ¶512 (2002).) But L-1 failed to note this protest ground in timely fashion.

Having thus established CBN-STI to be an eligible offeror, the Board turns next to the question of whether the particular offer here extended should be disqualified for violating the RFP's prohibition against multiple or alternate proposals. While this determination is ordinarily a simple one to decide, in this instance the express terms of the RFP not only allow, but require that each offeror, "Describe its ability to provide additional functionality, and expansion of services that may be added to the Offeror's solutions while this contract is in effect, at MVA's option." Both L-1 and CBN-STI complied with this provision of the RFP by setting forth in their proposals available alternative security features which could potentially modify the base card design proposal, at the option of MVA.

Generally solicitations may and do expressly forbid multiple or alternative proposals under the authority set forth in the COMAR §21.05.03.02(A)(7). But in this RFP, it is clear that MVA did not seek to impose upon offerors the specific design elements of suitably secure drivers' licenses but instead, wished to solicit from private vendors their expertise and recommendations regarding what characteristics should be included in the next

generation of Maryland drivers' licenses. That is why this solicitation expressly permits and indeed, mandates the proposal of optional alternative features.

Significantly, in contrast to the CBN-STI proposal, L-1's card alternatives include a description of options without predetermined pricing variability, while the alternative proposal submitted by CBN-STI offers a secondary option of a card with a prohibited black and white photo that would be slightly cheaper than its primary offer. It is difficult for CBN-STI to argue in good faith that the option of drivers' licenses with only black and white instead of color photographs constitutes "additional functionality." By strict construction, adding functionality is the only optional proposal expressly acceptable under the precise terms of the RFP. One school of thought expressed at the hearing supports the notion that a black and white portrait photo is actually better than a color one because color may distract from face recognition depicted without reliance upon more fungible qualities like hair color. Therefore at least arguably, a black and white photo instead of a color one may add "functionality" to a driver's license.

Of course, the Board notes that production of drivers' licenses bearing only black and white rather than color photographs of the bearers would not be in compliance with the terms of the RFP and would also be in violation of state law mandating color photos. In the totality of these circumstances, the Board determines that the unacceptable alternate proposal offered by CBN-STI does not mandate MVA's rejection of its principal proposal. This is because it is not contradicted that MVA reasonably sought innovative proposals to advance security and toward that end specifically instructed offerors to submit alternative designs. CBN-STI should not suffer the ultimate consequence of being eliminated from competition by disqualification of its entire proposal for its *bona fide* response to the State's express allowance and direction in this regard.

The Board turns next to the question of whether MVA is correct in determining that the particular design of drivers' licenses proposed by CBN-STI constitutes the best technical solution to the State's intention to upgrade its secure cards and come into compliance with federal requirements. On this point, the members of the Board are divided over the question of whether CBN-STI or L-1 proposes the most secure card. Certainly the Board members are skeptical of MVA's assertions that the CBN-STI card "without a doubt" is "far superior," as characterized by the State. But the individual perspectives of the members of the Board are irrelevant. The true issue presented for the Board to review is whether the MVA procurement officer's adoption of the Evaluation Committee's conclusion may be fairly and accurately judged by the Board to be arbitrary, capricious, unsupported, or contrary to the weight of the evidence.

It is impossible within the instant Opinion for the Board to compare and contrast the various design components of the two competing cards without discussing those design components, and the Board has previously noted that it will not disclose that confidential information here. Therefore the Board will note simply that reasonable persons may differ with respect to an individual conclusion whether L-1 or CBN-STI offers the most secure card. Assuming only that that determination is reasonably made based upon reliable evidence, the decision of whether teslin or polycarbonate cards are preferable in Maryland is to be made by MVA, and only MVA.

With respect to the analysis conducted by the Evaluation Committee, it appears that one of the decisive factors persuading members to recommend the CBN-STI card over the L-1 card is that it may be possible to peel the clear plastic surface layer of the L-1 card from the teslin core. By contrast, separation of card layers is much more problematic and unlikely with the monolithic polycarbonate card construction proposed by CBN-STI. However, the testimony at the hearing reflects that the Evaluation Committee

may have afforded excessive weight to this aspect of card comparisons. That is because, while separation of the layers of a teslin card is indeed more easily facilitated than separation of the layers of a polycarbonate card, attempting to alter either card in that fashion is readily discernible, making the card obviously damaged and unusable.

It is feasible in theory and in practice to tamper with any card, regardless of the level of security features. Security features affect merely the degree of difficulty of successful alteration or simulation. The purpose of incorporating security features is not to deny the reality that all cards may be susceptible to counterfeit, but instead, to make counterfeiting very difficult, in part by rendering the card unusable in the event of any attempt at modification of personalization data. This is simply to state that it is conceivably possible to peel a surface layer of a card with surface layers such as current Maryland drivers' licenses. But improved card technology makes it ever more difficult to separate card layers that are securely and permanently bonded together without the use of an adhesive. An attempt to modify information contained in a well-designed modern card leaves trace evidence of that action. Because advanced security cards of the next generation are engineered so as to be no longer functional in the event of a tampering attempt, an unauthorized attempt to modify such a card becomes pointless because the card is thereby rendered useless. To sum, a card that is made unusable in the event of an attempt to alter it makes that card secure.

So it doesn't really matter if it is possible to peel a surface layer of plastic away from a card, provided that the card is thereby rendered unusable, which appears to have been the case with respect to the physical damage done to the teslin test cards by the members of the Evaluation Committee. The reason for this long discussion pertaining to the possibility of peeling card layers is simply that the distinction between teslin and

polycarbonate cards in this regard appears to be part of the essence of the competing card proposals here at issue and MVA's determination to prefer a polycarbonate card. But it is not at all clear to the Board that the members of the Evaluation Committee appreciated in their effort to damage the L-1 card that removing a card layer is only half way to the criminal objective of unauthorized card modification. The second half of the process of card tampering may be much more difficult, namely, putting the card back together, which did not appear to be a part of the considerations of the Evaluation Committee.

Further, the Board notes that the far greater concern with respect to card security is not so much the prospect of a single card being modified with inaccurate information or photo substitution, but instead, the potential for unlawful mass production of counterfeit cards available for purchase on the black market. Uncontested testimony adduced at hearing corroborate that the internet-driven business of manufacturing unlawful or novelty identification cards is booming. To combat simulation counterfeit, the design features of both of the cards proposed by L-1 and CBN-STI are extremely difficult to duplicate.

Another important element of the analysis conducted by MVA is similarly flawed, namely, the qualitative difference between and value of laser printing as compared to laser engraving. The procurement officer as well as counsel to MVA claim repeatedly in this proceeding that the card proposed by CBN-STI is 100% laser engraved; however, as noted above, Maryland requires by statute that a color photograph be included on its drivers' licenses. Using the most advanced technology available, laser engraving is incapable of producing a color image, only a black and white one. So in fact, it is impossible to produce a card that is 100% laser engraved and still comply with the requirements of this procurement and Maryland State law. The Board understands that MVA's oft-repeated implied argument in this regard is really intended to emphasize that the CBN-STI is 100% engraved, except

for the photo; but it is a little misleading for their advocacy to place such frequent and heavy reliance on the contention that only the CBN-STI card is 100% laser engraved, while omitting the qualifying phrase, "except for the part of the card that is not laser engraved." The implicit but usually unstated qualifying phrase utterly defeats the opening premise.

In addition, it is also fundamentally questionable why MVA views the use of a single print technology in a card, namely, laser engraving, as somehow offering greater card security than the use of two different types of print technology to create the personalization data in the same card, namely, laser engraving and laser xerography. Laser engraving devices are much more uncommon than laser printers, and therefore harder to mimic, but fine print capability of laser engraving as well as laser printing are said to be beyond the differentiation capacity of detection by the human eye. Furthermore, the use of both laser engraving and laser xerography in the manufacture of a single card requires two separate advanced and costly print modalities, rather than just one.

During oral presentation, the procurement officer also indicated on numerous occasions that the Evaluation Committee was impressed with the perceived assertion made by CBN-STI alone that its proposal included laser engraving of the central card core. But other witnesses, whose testimony was more expert and precise in describing professional manufacturing processes engaged in production of secure credentials, stated to the contrary, namely, that only the outer layers of polycarbonate are actually imprinted with laser engraving, just as is the case with laser xerography of the PET layers of cards made with a teslin core.

Despite these technical points of confusion, the Board does not further criticize nor render null and void MVA's ultimate determination that the CBN-STI proposal offers the most secure identification cards and drivers' licenses. MVA's *bona fide* conclusion in this regard appears to be reasonable and

substantiated, even if it is based in part on some wrongful or exaggerated factual foundations. The Board will not disregard or reverse a determination that was made within the allowable range of discretion reserved to the appropriate agency's decisional authority, nor in this case will the Board overturn a decision which is best suited for MVA to make, not the Board.

As a result, notwithstanding the aforementioned defects in analysis, the Board nonetheless determines that sufficient evidence was available to MVA to justify its conclusion that the card proposed by CBN-STI is superior to the L-1 card. By the same token, assuming hypothetically that MVA had determined that the teslin card proposed by L-1 is superior to the monolithic polycarbonate card offered by CBN-STI, the Board would similarly be without the authority or desire to reverse that subjective judgment. To sum, the Board cannot and does not decide as a matter of law that MVA is incorrect or without satisfactory foundation to support its determination to prefer the CBN-STI card. Here, that decision was fairly made within the exercise of legitimate discretion based upon the analysis conducted by MVA, which was imperfect but not unreasonable.

With respect to L-1's final complaint within the parameters of its second ground of appeal, namely, that the proposals were not fairly considered in accordance with the factors specified in the RFP, the Board turns its attention to the second most important factor set forth in the evaluation criteria listed, namely, "Overall Experience and Technical Competence." On this limited factor, the MVA Evaluation Committee overwhelmingly determined CBN-STI to be "exceptional" while L-1 was rated merely as "compliant." Unlike the Board's analysis of other evaluation issues discussed above, the Board finds this determination by MVA to be clearly erroneous and without evidentiary justification.

L-1 manufactures the drivers' licenses issued in 44 states. CBN-STI, by contrast, produces drivers' licenses only for the Commonwealth of Virginia, which does not even use color photos.

In fact, neither CBN-STI nor CBN has ever produced for any state in the union a drivers' license or any other personal identification card bearing a color photograph. How then, is CBN-STI conceivably rated superior in experience and competence to the nation's undisputed dominant manufacturer of drivers' licenses?

The definitions of "experience" and "competence" are well known. "Experience" refers to an entity's accumulation of skill or knowledge based upon past participation in an endeavor. The Board is bewildered therefore how MVA may rightfully conclude that a firm which produces drivers' licenses for a single state, and has done so only for a couple of years, is more experienced than the venture that for a considerable period of time has manufactured hundreds of millions more drivers' licenses for over 40 states. "Competence" is the condition of being properly qualified to do something. Even though CBN-STI has never previously produced any secure credential with a color photo, there is no genuine allegation here that either L-1 or CBN-STI is not competent to produce the cards they each propose to MVA. So how is it that CBN-STI is rated as exceptional while L-1 is merely compliant?

It is true that CBN, as contrasted to CBN-STI, has produced foreign secure identification cards like Icelandic passports and Romanian drivers' licenses, but even its solid experience in other countries is modest by comparison to the hundreds of millions in volume of color credentials manufactured by L-1. The Board takes no position to question or dispute the assertion and conclusion that CBN-STI has stellar credentials on the evaluation factor of "Overall Experience and Technical Competence" due to the substantial past proven experience and competence of its subcontractor, CBN, abroad. The Board simply questions how MVA fairly and reasonably determines CBN-STI to be superior to L-1 even though neither CBN nor CBN-STI has ever manufactured a U.S. drivers' license with a color photograph, while L-1 performs that job for almost every state in the union.

Perhaps the difficulty recently encountered by L-1 in California in commencement of its new high-tech operations there is the reason that the MVA Evaluation Committee downgraded L-1's experience and competence to a rating of merely compliant rather than exceptional. If so, that downgrade is misplaced. It is fully conceded by MVA that at its de-briefing, L-1 was specifically informed by MVA that all of its references "checked out ok and spoke highly of the company." It was disingenuous therefore for MVA to have made such an uncontested assurance directly to L-1 while earlier advising the MVA Administrator that L-1 "had significant production and quality issues causing up to eight weeks delay in the production and delivery of DL/ID cards." That statement, included in the procurement officer's memorandum of recommendation for award to CBN-STI, was highly prejudicial. Perhaps it should not have been included in the memorandum at all, but surely had this fault been regarded as so insignificant that it was not even disclosed to L-1 at its de-briefing, it also should not have been sufficiently important to account for any substantial undervaluation of L-1's credentials.

Furthermore, if the California start-up production problems were of such primary concern as to support summary reference to the MVA Administrator by the truncated and one-sided explanation above, the procurement officer should also have fully conveyed to the Administrator the precise nature of those problems, namely, the unique new state-of-the-art production elements required of a tremendous volume of new California drivers' licenses. Maryland is not California. To what extent were problems there the result of initiating new modalities of data transmission from the California Department of Motor Vehicles to L-1, and who was responsible for any breakdown in swift and accurate exchange of information by automated electronic communication? With respect to the design of new Maryland drivers' licenses, it is CBN-STI and not L-1 that will be obligated to re-engineer its ordinary manufacturing process to accommodate production of the secure

credentials solicited here. That is because in the event that this contract is ultimately awarded to CBN-STI, its production facility in Virginia will need to be modified to incorporate into the drivers' licenses to be manufactured for Maryland a laser printed color photograph of the license holder, which is not a component of drivers' licenses in Virginia.

This is not to speculate or imply that CBN-STI will have problems facilitating whatever modifications to its present production process that may be necessary to manufacture Maryland drivers' licenses. Indeed, the bulk of the evidence before the Board supports the conclusion that CBN-STI was remarkably prompt, competent and successful in setting up operations at its new plant in Danville, Virginia. But it does appear to the Board that the challenges encountered by L-1 in California were not a significant factor in the perspective of the members of the Evaluation Committee sufficient to support the very damaging and one-sided statement about L-1 conveyed to the MVA Administrator in the recommendation for contract award. If they were, they certainly should have been disclosed to L-1 at de-briefing, but they were not. Instead, the existence of any problem in California was expressly denied at de-briefing.

Also on the subject of what information should have been accurately related to the MVA Administrator in support of the award recommendation to CBN-STI, the Board is troubled that the Administrator was misinformed about the identity of the offeror. CBN-STI is not the same as CBN. In fact, they are very different. CBN-STI alone is not even technically eligible to submit a proposal in response to this RFP but for the use of CBN as its subcontractor. CBN-STI is a relatively new company with a single state contract and not much experience at all. CBN, by contrast, has been around for over a century with a broad history of public sector application of continuously evolving secure printing technologies for Canadian governments and elsewhere. But CBN is not the offeror responding to this RFP. Furthermore, CBN had the

opportunity to guarantee the performance of the offeror, its subsidiary, CBN-STI, but CBN declined to do so. Yet, the letter of recommendation to the MVA Administrator lumps CBN-STI and CBN together as if they are a single legal entity. In fact, they are not.

This defect is noted as a source of prospective confusion on the part of the MVA Administrator and not because it is a legitimate ground of reversal of the award recommendation, because it is not raised as a basis of protest or appeal. But it is appropriately mentioned in *dicta* to explain why the Administrator may have been innocently misled by the recommendation memorandum. Simply put, when making the contract award recommendation, the Evaluation Committee as well as the procurement officer, and in turn, the MVA Administrator, should have been more cognizant of the distinction between CBN and the actual offeror which is the prospective contracting party, namely, CBN-STI. CBN is not offered as a contracting party in the proposal put forward by CBN-STI nor as a guarantor of performance, and in the event of any action for breach, CBN may not be found directly liable to the State for anything.

By way of explanation of the discrete point of prior production experience, the procurement officer testified that the reason that CBN-STI was ranked higher than L-1 was that CBN-STI had more experience with the CBN-STI card. That testimony strikes the Board as somewhat nonsensical. Of course CBN-STI has more experience than L-1 in the manufacture of the CBN-STI card. L-1 has no experience manufacturing its competitor's card. All of the experience with the CBN-STI card is held by CBN-STI.

According to the RFP, there were supposed to have been twelve separate points of technical evaluation considerations, the top two heaviest weighted of which were, first, "Card Design and Security" and second, "Overall Experience and Technical Competence." MVA did not have to include factors like experience or competence in its list of the evaluation criteria it selected

to include in its RFP, and it also did not have to weight those factors so heavily; but because it elected to do so, MVA is bound by State law, regulation and precedent to fulfill those evaluation assurances. (COMAR 21.05.03.03(A)(1); *PSI Services, LLC*, MSBCA 2601, ___ MSBCA ¶___ (2008); *Housing & Development Software, LLC*, MSBCA 2247, 5 MSBCA ¶500 (2001).)

The testimony of the procurement officer about the Evaluation Committee's conclusion to rank the experience of CBN-STI ahead of L-1 because CBN-STI had more experience making the CBN-STI card relegates the Board to conclude that the second technical evaluation factor was not fairly or properly considered at all. Instead, the Evaluation Committee simply duplicated its evaluation of the first factor, "Card Design and Security" when it purported to evaluate the second factor. That is to say that the Evaluation Committee seems to have decided that it preferred the monolithic polycarbonate card proposed by CBN-STI and thereafter afforded to CBN-STI the top rank for both design and experience. The second category of evaluation factors, namely, production experience and competence, should have been evaluated separate and apart from evaluation of the actual security card design components. But it was not and this constitutes a fatal flaw in the procurement because the concerns of the Evaluation Committee deviated from the obligations established by the RFP.

Appellant's final ground of appeal is the second and more serious fault of the Evaluation Committee substantiated during the hearing by the absence of adequate evidentiary support; specifically, that MVA did not conduct a legally sufficient cost-benefit analysis to ascertain the worth or value of the more expensive drivers' licenses proposed by CBN-STI as compared to the lower cost proposal offered by L-1. Appellant claims that this failure caused MVA to abrogate its responsibility to determine fairly which of the two proposals is most advantageous to the State. The Board agrees.

Both of the proposed cards are compliant with all RFP specifications and both are extremely secure. As set forth above, the Board assumes *arguendo* that the card proposed by CBN-STI is superior, as MVA concluded, or at least the Board concludes that MVA was not clearly erroneous nor arbitrary and capricious in determining that the CBN-STI card is best. So the principal secondary challenge of rendering a fair and proper procurement decision should have been the determination of whether the preferred card proposed by CBN-STI is worth the extra price to be paid by MVA.

The obligation to conduct a cost-benefit analysis is not an onerous one. It merely mandates that an agency accurately computes or projects and thereafter takes into consideration the cost of each proposal, giving deliberate and intelligent attention to whether a difference in higher cost to the State is justified by the added value of purchasing the more expensive option. In this case, MVA must simply make an informed evaluation reasonably to determine that the card proposal submitted by CBN-STI is actually worth the extra cost as compared to the less expensive L-1 card.

In this final analysis the Board notes first that the RFP requires that the single factor of cost of each proposal is supposed to receive equal weight as the aggregate value of all twelve factors set forth as the criteria for the technical evaluation. Although the testimony of the procurement officer does include passing reference to the Evaluation Committee's regard for price along with all other factors, on multiple opportunities when that critical factor should naturally have been central to the decision-making process and MVA's ultimate determination, the only testimony adduced at the hearing was that MVA preferred the CBN-STI card. While weighted most important of the technical factors, "Card Design and Security" was supposed have been only one of the twelve elements of the technical

evaluation to be combined and weighed in totality against the singular equally weighted factor of cost.

Testimonial disclosure at the hearing reflects that MVA was, perhaps begrudgingly, obliged by the Department of Budget and Management (DBM) to require that equal weight be afforded to the technical and financial components of proposal evaluation, which is why the RFP expressly includes that obligation and assurance. But there was insufficient evidence adduced by testimony or otherwise to prove that a fair and adequate trade-off analysis was ever actually fully undertaken by MVA, rather than just inserted into the RFP *pro forma* and thereafter ignored. Indeed, it appears that the Evaluation Committee simply decided that it preferred the CBN-STI card and therefore ranked it first technically and then also first in the overall final ranking, regardless of cost. No offered document or oral evidence establishes otherwise.

Of course, MVA does not initially carry the burden of having to prove anything in this proceeding. Its decisions are presumed to be accurate and supported, even after they may be contested by the filing of a bid protest. The burden of proof by a preponderance of the evidence falls entirely upon appellant to establish that equal weight was not afforded to the technical aspect to the financial component of proposal evaluation.

In the case at hand, appellant challenges the presumption that technical and financial were afforded equivalent weight in proposal evaluation, in part because the final overall rankings are identical to the technical rankings determined prior to disclosure of financial submissions. The overall ranking of proposals is absolutely unaffected by price. While the Board does not suggest that it constitutes a *per se* violation of procurement process for the final rankings to be the same as the technical rankings, especially when there may be little variance among offered charges, here the cost differential between the lowest priced and the most expensive proposal is nearly \$5 million over the initial five-year term of the contract, with a difference of

millions between L-1 and CBN-STI. Nevertheless, despite a price range of more than 25% in prospective savings by choosing the cheapest offer as compared to selecting the most expensive proposal submitted by CBN-STI, the overall final rankings of the six proposals repeated the same exact rankings as the technical evaluations earlier determined without any regard to pricing. In addition, the procurement file is completely devoid of any document whatsoever pertaining to the conduct of a cost-benefit analysis.

This creates a valid *prima facie* claim by appellant that financial considerations were not fully and properly evaluated. The burden of proof therefore shifts onto the State to show that cost was fairly and fully considered. That might have been facilitated by calling one or more members of the Evaluation Committee to testify at the hearing, though MVA surely bears no fault or criticism for electing to protect the confidentiality of their identities and discussions by insulating them from having to testify, invoking the State's well-placed and successful legal opposition to appellant's requests for subpoenas for the Evaluation Committee members to be personally present at trial.

So the obligation of demonstrating that financial considerations were afforded equivalent weight as technical factors fell to the procurement officer. But even after multiple inquiries intended to adduce that evidence during oral examination at the hearing, the procurement officer was unable to assert that any meaningful, genuine, or thorough cost-benefit analysis occurred. State agencies must be held responsible for being able to defend procurement decisions by specific reference to compliance with all aspects of the evaluation criteria established by the RFP, including specific justification for selecting a more costly option, and not just by vague if not meaningless reliance on the assertion that they considered "everything."

By the initial words of the opening statements in the instant appeal, argument by MVA in this proceeding attempts to trivialize

the price distinction between the L-1 and CBN-STI proposals. That is understandable and indeed effective advocacy when cost differential is considered in light of the pennies of difference between L-1 and CBN-STI in pricing on a per-card basis. But those pennies add up when multiplied by the need to issue millions of secure drivers' licenses. In total, the price difference between the L-1 and CBN-STI proposals accounts for the extra expenditure of millions of dollars in state revenue and that spending recommendation is not sufficiently justified by the evidence presented to the Board. This is not to suggest or imply that CBN-STI should not ultimately be determined by MVA to propose the most advantageous card offer to the State; only that the procurement evaluation so far conducted in this RFP is incomplete.

The Board is keenly aware of the importance of potential savings, especially in the current economic and tax climate. Spending decisions must be justifiable and actually justified during procurement review. Agencies are not bound to select the lowest cost proposal except in solicitations based solely on cost. In the case at bar, MVA may eventually legitimately determine for any sound reason to select a more expensive monolithic polycarbonate over a cheaper teslin card; but MVA must first evaluate whether the presumed advantage of the CBN-STI card is worth the extra expense, and in accordance with the terms of the RFP here at issue, MVA must be able to document or otherwise demonstrate that it truly and fully considered price as equivalent in weight to the technical components of the evaluation. The oral and documentary evidence made available to the Board in this proceeding demonstrates only that such proof is lacking to date.

Moreover, the third ranked technical proposal was also the third ranked in price. This was the L-1 proposal. The highest ranked technical proposal, the one submitted by CBN-STI, was also the most expensive. It certainly strikes the Board as odd that the highest ranked technical submission was not downgraded at all in the overall final ranking after it was disclosed that its price

was higher than all others. It is odder still that every single one of the six technical rankings was adopted as the very same as the final overall ranking, despite the significant differences in price. While this evidence is circumstantial and not definitive, it is indicative of the possibility that price was not afforded equal weight as the technical components of the evaluation and this is what was required by this RFP at the insistence of DBM. Evidence offered by the State is weak and insufficient to rebut the inference established by appellant that financial considerations were not weighted by the Evaluation Committee as equivalent in importance to technical evaluation factors.

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

Wherefore it is Ordered this _____ day of May, 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 2793, appeal of L-1 Secure Credentialing, Inc. under MVA RFP No. V-HQ-11016-s.

Dated:

Michael L. Carnahan
Deputy Clerk