

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Shirley Contracting Company)
)
) Docket No. MSBCA 2932
Under SHA Contract)
No. PG7005170)

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OPINION BY BOARD MEMBER DEMBROW

This appeal must be denied in the absence of proof of the allegations set forth in the underlying bid protest to the effect that no sufficient cost-benefit analysis was performed and therefore the State is obliged to select the lower priced offer in this "best value" procurement.

Findings of Fact

1. On August 5, 2014, the Maryland State Highway Administration (SHA) issued a Request for Qualifications (RFQ) to identify potential responsible contractors to plan and perform certain road improvements on Maryland Route 210 at Livingston Road and Kerby Hill Road in Prince George's County. Three offerors were approved by SHA as qualified to submit proposals for this design-build contract to reconstruct that intersection as a grade-separated

interchange.

2. The RFQ was issued in anticipation of the subsequent release of a Request for Proposals (RFP) that was directed to the three qualified builders on September 12, 2014. All three of the qualified teams of offerors submitted proposals in response to the RFP, including appellant, Shirley Contracting Company/Dewberry Consultants, LLC (Shirley), and interested party, Concrete General, Inc./Whitman, Requardt & Assoc. (CGI).
3. The RFP disclosed that selection would be determined based upon SHA's determination of best value to the State. Specifically, the RFP committed to "award of the Contract to the responsible offeror whose proposal is determined to be the most advantageous to the State, considering price and the evaluation factors set forth in the Request for Proposals. The Administration has determined that the most advantageous to the State will be the Proposer with the best combination of the Technical Proposal and Price which the Administration determines provides the best opportunity to obtain the right Design-Build Team to ensure a successful project." (RFP Sec. 2.11.08, App. Ex. 2, pg. 140.)
4. The RFP further stipulated that the technical evaluation would be weighted heavier than the financial evaluation, stating, "**When determining which D-B [Design-Build] Teams submittal is the most advantageous to the State, the Technical Proposal will have a higher relative importance than the Price Proposal.**" (Emphasis in original.) (RFP Sec. 2.11.01, App. Ex. 2, pg. 134.)
5. As permitted by the RFP, Shirley proposed to SHA a significant Alternative Technical Concept (ATC), which SHA approved on December 18, 2014. (App. Ex. 12; Tr. 82, 124, 355.) Ultimately, according to SHA evaluators, Shirley's discussion of its approved ATC design was "clearly shown to provide major benefits to future maintenance and were shown

to be innovative and adding permanent value to the project." Specifically, SHA determined that Shirley's ATC discussion "resulted in high ratings for Maintenance of Traffic, Maintenance Benefits, and Innovation/Value added," three of the sub-factors of the most important primary evaluation factor, namely, "Project Technical Elements & Approach" as more fully discussed below. (App. Ex. 16, pg. 7; Tr. 86, 195, 352, 357.)

6. The RFP as amended provided "that liquidated damages in the amount of \$8,670 per calendar day will be assessed for unauthorized extensions beyond the contracted time of completion." (App. Ex. 5, pg. 847.)
7. A single particular procurement officer was not expressly identified as such in this solicitation but the RFQ stated, "All written contacts shall be addressed to: Mr. Jason A. Ridgway, Director, Office of Highway Development." (App. Ex. 1, pg. 5; Tr. 284-288.) The RFQ also said that Statements of Qualification should be directed to "Norie A. Calvert, Director, Office of Procurement and Contract Management." (App. Ex. 1, pg. 19.) Jason Ridgway was SHA's Procurement Officer for this project. (Tr. 117, 272.)
8. Nine Addenda were issued to modify the terms of the original RFP, including Addendum No. 3, which changed part of the evaluation criteria set forth in the RFP as follows:

<u>Original</u>	<u>Amended</u>
pp. 130-131 2.09 TECHNICAL PROPOSALS 2.09.03 Project Schedule & Project Management A. Design and Construction Summary Schedule The Design and Construction Summary Schedule completion date and date(s) and events critical to this project cannot exceed the dates located elsewhere in the RFP. <i>An earlier completion date, for either the contract completion or critical</i>	p. 130 2.09 TECHNICAL PROPOSALS 2.09.03 Project Schedule & Project Management A. Design and Construction Summary Schedule The Design and Construction Summary Schedule completion date cannot exceed June 19, 2019. It also must include 21 months for concurrent, third party utility relocations to be completed after the Design-Builder completes the advanced clearing and

<p><i>schedule date(s) indicated elsewhere in this RFP, which provides benefit to the Administration, will be given positive consideration in the technical evaluation. Upon execution of the contract, the Design-Builder will be held to the critical schedule dates presented in its Technical Proposal for the calculation of any deductions including, but not limited to, liquidated damages and disincentives.</i></p> <p>(Italics emphasis supplied.)</p>	<p>grubbing.</p>
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(App. Ex. 21.)

In addition to striking the italicized sentence included in the original RFP as shown above, Addendum No. 3 set forth a specific basis of numerical calculation of comparison of financial proposals using an adjusted price formula as set forth in Finding No. 15 below, giving favorable credit based upon earlier assured construction completion date. (Tr. 210, 346.)

9. The basis of evaluation of proposals as set forth in the RFP was as follows:

**TC 2.11 EVALUATION OF PROPOSALS,
OPENING AND SELCTION**

2.11.01 Best Value Process

The Technical Proposal will be evaluated on the pass/fail and technical evaluation factors identified in TC Section 2.09. An evaluation committee (Committee) will determine the pass/fail status and overall technical rating of each Proposal. Once the overall technical rating is determined for each Technical Proposal, the Price Proposal results will be provided to the Committee and a tradeoff analysis will be performed. The Evaluation Committee will prepare a recommendation to the Selection Official indicating which Proposal is the most advantageous to the State (i.e., represents the best value). The Selection Official, together with the Selection Committee, will then assess the Evaluation Committee's recommendation and make a final determination as to which Proposal is the most advantageous

to the State considering the technical and price factors set forth in this document.

When determining which D-B Teams submittal is the most advantageous to the State, the Technical Proposal will have a higher relative importance than the Price Proposal.

2.11.02 Evaluation of Technical Proposals

The following elements of the Technical Proposal will be evaluated and rated on their content, accuracy and presentation.

- Project Technical Elements & Approach - CRITICAL

- Project Schedule & Project Management - SIGNIFICANT

- Environmental Approach - IMPORTANT

The relative importance of the technical evaluation factors and subfactors, when noted, will be weighted based on the following criteria:

- Critical - Factors or subfactors weighted as Critical are approximately three times the relative importance of Important.
- Significant - Factors or subfactors weighted as Significant are approximately two times the relative importance of Important.

(Agency Report, Ex. 4, pgs. 133-134.)

Thus, in addition to the pass/fail component of evaluation factors used for "Legal & Financial Information," there were three categories of subjective technical evaluation factors: (1) "Project Technical Elements and Approach," (2) "Project Schedule and Project Management," and (3) "Environmental Approach." According to the terms of the RFP, "Environmental Approach" was weighted as an "Important" factor in the technical evaluation, while "Project Schedule and Project Management," was rated as a "Significant"

factor, that factor being given twice the weight afforded to "Environmental Approach" which was classified only as "Important," not "Significant." The heaviest weighted primary evaluation factor was "Project Technical Elements and Approach," which was classified as a "Critical" factor, carrying three times the weight of the "Important" factor of "Environmental Approach."

10. Each of three primary technical evaluation factors set forth above was to be rated by SHA based upon adjectival ratings of "Exceptional," "Good," "Acceptable," or a lesser rating not pertinent to the instant appeal. In this regard, the RFP stated specifically as follows:

2.11.02.4 Evaluation Results

The technical evaluation factors and the overall Technical Proposal will be rated by and [sic] adjectival method (qualitative/descriptive) method. The following adjectival ratings shall be used in evaluation of each technical evaluation factor and the overall technical rating of the Proposal:

EXCEPTIONAL - The Proposer has demonstrated an approach that is considered to significantly exceed stated objectives/requirements in beneficial way to the Administration. This rating indicates a consistently outstanding level of quality, with very little or no risk that this Proposer would fail to [sic] meet the requirements of the solicitation. There are essentially no Weaknesses [sic] as defined below.

GOOD - The Proposer has demonstrated an approach that is considered to exceed stated objectives/requirements. This rating indicates a generally better than acceptable quality, with little risk that this Proposer would fail to meet the requirements of the solicitation. Weaknesses, if any, are very minor.

ACCEPTABLE - The Proposer has demonstrated an

approach that is considered to meet the stated objectives/requirements. This rating indicates an acceptable level of quality. The Proposer demonstrates a reasonable probability of success. Weaknesses are minor and can be corrected.

In assigning ratings the Administration may assign plus(+) or minus (-) suffix to further differentiate the strengths or limitations within the technical ratings of EXCEPTIONAL, GOOD, and ACCEPTABLE.

The term "weakness," as used herein, means any flaw in the proposal that increases the risk of unsuccessful contract performance. A significant weakness in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance. The term "deficiency" means a material failure of a proposal to meet an RFP requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

(Agency Report, Ex. 4, pgs. 135-136.)

The RFP established no certain degree of separation intended by the use of a plus or minus sign by the Evaluation Committee in refining the three principal adjectival ratings in that fashion. The obvious implication of the use of a plus or minus sign was to indicate that a plus rating was slightly better than the same adjectival rating without a plus sign, while a minus sign was intended to designate a slightly lower rating than the same adjectival rating without a minus sign. (Tr. 278-281.)

11. In accordance with the terms of the RFP, three separate evaluation teams were convened by SHA to evaluate the three different primary evaluation factors specified in the RFP. (RFP Sec. 2.11.02.02.) Those teams conducted detailed and intensive reviews of the competing submissions. (Tr. 161, 169, 215-218, 323-324, 327-329, 338.)
12. SHA's evaluation of the sub-factor components of each of

three primary evaluation factors discussed above carried the following respective weights:

Project Technical Elements & Approach -
CRITICAL

- Project Sequencing - **CRITICAL**
- Maintenance of Traffic - **CRITICAL**
- Maintenance Benefits - **IMPORTANT**
- Innovation and Value added - **IMPORTANT**

Project Schedule & Project Management -
SIGNIFICANT

- Project Schedule - **IMPORTANT**
- Project Management - **CRITICAL**

Environmental Approach - **IMPORTANT**

Consistent with the RFP assurances, SHA's evaluation summary prepared at the conclusion of the evaluation also stated:

The relative importance of the technical evaluation factors and subfactors, when noted, were weighted based on the following criteria:

- Critical - Factors or subfactors weighted as Critical are approximately three times the relative importance of Important.
- Significant - Factors or subfactors weighted as Significant are approximately two times the relative importance of Important.

(App. Ex. 16.)

Thus, the most important factor, "Project Technical Elements & Approach" consisted of four sub-factors, two of which were rated as "Critical," namely, "Project Sequencing" and "Maintenance of Traffic." The other two sub-factors of that main factor were rated as only "Important," carrying a weight of one-third of the weight of the two sub-factors deemed "Critical." The next most important factor, "Project Schedule & Project Management" consisted of two sub-factors, only one of which was rated as "Critical," namely, "Project Management." The third sub-factor, "Environmental Approach"

had no sub-factors specified. The technical evaluation factors and sub-factors were specifically described in some detail by the RFP §§2.09.02, 2.09.03, and 2.09.04. (Agency Report, Ex. 4, pgs. 129-131; Tr. 96, 97, 123.)

13. In rating the proposals, SHA determined to afford the same adjectival rating of "Good" to each of the proposals submitted by Shirley and CGI for every one of the three primary evaluation factors identified in the RFP; however, CGI received a rating of "Good+" for the "Significant" factor of "Project Schedule and Project Management," while Shirley received for that factor a lower rating of "Good-"; and on the "Important" factor of "Environmental Approach," CGI received a rating of "Good" while Shirley received a slightly lower rating of "Good-." (Tr. 224, 299.) Combining all of the sub-factors into the three primary factors and all three of the primary evaluation factors into the overall technical ranking, CGI was rated overall as "Good" while Shirley was rated slightly lower as "Good-." On the most important of the three factors, namely, "Project Technical Elements & Approach," CGI and Shirley received the same ranking of "Good-." (Tr. 222.) The table below reflects the rankings received by CGI and Shirley for each of the primary evaluation factors.

<i>Evaluation Factor</i>	<u>CGI</u>	<u>Shirley</u>
Legal & Financial Information	Pass	Pass
Project Technical Elements & Approach	Good-	Good-
Project Schedule & Project Management	Good+	Good-
Environmental Approach	Good	Good-
OVERALL TECHNICAL RATING	Good	Good-

(App. Ex. 16, pg. 3.)

The accuracy and validity of the above ratings are not challenged in the instant appeal.

14. The financial evaluation was conducted by an SHA evaluation team separate from the three technical evaluation teams, one for each of the three primary evaluation factors specified for that component of the total evaluation. Each of the evaluation teams initially worked independently and apart from one another without knowledge of matters other than those issues relating to the specific factor of evaluation with which each evaluation team was charged with the responsibility of review and ranking. (Tr. 312-318.) The financial team evaluated the reasonableness of all of the components of the financial proposals submitted and ultimately determined to accept those component costs and totals. (Tr. 311.)
15. The RFP as modified by Addendum No. 3 stated as follows with respect to SHA's method of evaluation of financial proposals:

Once the Price Proposal is determined to be accurate, complete, and reasonable, the Administration will determine the Adjusted Price Proposal amount. This Adjusted Price Proposal will take into account not only the Price Proposal submitted by the Proposer, but the Contract Time entered into the Proposal Form. **The Adjusted Price Proposal, as determined in the method described below, shall be utilized in the Determination of the Successful Proposer as described in TC 2.11.08.**

The number of calendar days will be determined by the difference between the calendar date provided by the Proposer on page 44 and 45 in the Proposal Form of the Request for Proposals and the Notice to Proceed Date of June 1, 2015. For example, a calendar date of June 19, 2019 would be 1,479 calendar days.

The calendar days will then be multiplied by the daily loss of public benefit cost of **\$11,800** per calendar day and then added to the aggregate amount of the Price Proposal to determine the Adjusted Price Proposal. For

example, the Adjusted Price Proposal for a Price Proposal with an aggregate amount of \$50,000,000 and a calendar date of June 19, 2019 would be as follows:

$$\begin{aligned} \text{Adjusted Price Proposal} &= \$50,000,000 + ((1,479 \\ \text{calendar days}) \times (\$11,800/\text{calendar day})) \\ \text{Adjusted Price Proposal} &= \\ \$50,000,000 + \$17,452,200 \\ \text{Adjusted Price Proposal} &= \$67,452,200 \end{aligned}$$

The preceding formula will only be used to determine the Adjusted Price Proposal. The Contract award amount and final payment to the Design-Build Team will be based upon the aggregate amount in the Price Proposal.

(App. Ex. 5, pg. 137.)

The precise value of \$11,800 as "the daily loss of public benefit cost" was determined by traffic engineers in SHA's Office of Planning who specialize in valuation of "user delay," which was said to be a component of actual total value of timeliness of road construction. (Tr. 203, 326, 333-334, 337, 340-341, 345-349.) SHA's use of the adjusted price totals for the financial evaluation rather than the actual prices prior to adjustment based on date of completion is not challenged in the instant appeal.

16. Prior to application of the aforementioned formula for calculating adjusted price proposals, the total price proposed by CGI was \$82,553,134 compared to Shirley's total price of \$80,556,754, for a price difference of \$1,996,380, representing an actual cost disparity of approximately 2.5%. It is undisputed, however, that actual cost difference was not a proper or considered basis of financial comparison.
17. CGI committed to a project completion date of November 27, 2018 while Shirley proposed project completion by April 5, 2019, 129 days later than CGI's project completion date. (App. Ex. 12, 15.) Shirley did promise substantial completion of the project by November 27, 2015, leaving only

ancillary work still to be done by April 5, 2015, but the RFP made clear that adjusted pricing would be calculated on the basis of the calendar date for project completion set forth by the proposers on Page 847 of the RFP, which was November 27, 2018 for CGI and April 5, 2019 for Shirley. (Tr. 91-93.) As established by the uncontested terms of the RFP, applying the price adjustment of adding to the price proposals \$11,800 per day for each day of construction, CGI's adjusted price total was increased to \$97,598,134 while Shirley's adjusted price was increased to \$97,123,954, a difference of \$474,180, or approximately 0.5% of adjusted price total. (App. Ex. 16, 17.) Other than being incorporated into the adjusted price calculations described above, CGI's promised early completion date was considered by the evaluation committee only during the final trade-off analysis and not during evaluation of the technical proposal. (Tr. 162, 166, 168, 207, 247, 211, 322, 348-350.) One might question the fairness of giving such a significant advantage to CGI for early project completion, given that both proposals assured functionality of the subject interchange by November 27, 2018, but that issue was not raised prior to bid opening nor otherwise as a part of this bid protest appeal.

18. Because Shirley's adjusted price was slightly lower than CGI's, while CGI's technical evaluation was slightly higher than Shirley's, SHA was obligated to perform a cost-benefit analysis further to compare the two close offers to determine whether the superior technical rating of CGI's proposal was worth the extra cost of selecting CGI's offer over Shirley's lower priced offer. Such a trade-off analysis was conducted. (Tr. 155, 175-178, 180, 248-250.) During the final trade-off analysis phase of proposal evaluation, only critical factors were taken into further consideration. (Tr. 171, 221, 361-362.)

19. A twelve-page Memorandum summarizing this procurement was executed by four top SHA officials on March 20, 2015, including two deputy administrators, the District Engineer, and the Director of the Office of Highway Development, who served as the Procurement Officer for this contract. That Memorandum concluded with the following statement regarding the outcome of SHA's cost-benefit analysis:

A discussion and trade-off analysis then continued to determine the most advantageous between Concrete General/WRA and Shirley/Dewberry. Concrete General/WRA's TP [Technical Proposal] of GOOD was higher rated than Shirley/Dewberry's TP of GOOD-. Shirley/Dewberry had a lower adjusted price by approximately 0.5%. Concrete General/WRA's TP was equal to or better than Shirley/Dewberry's TP in all technical evaluation factors. Concrete General/WRA also had a substantially higher rating in the Project Sequencing subfactor (GOOD) when compared to Shirley/Dewberry's subfactor rating (ACCEPTABLE-). This subfactor was one of the two critical subfactors in the critical evaluation factor of Project Technical Elements & Approach. Looking at the other critical subfactors, Concrete General/WRA was equal to Shirley/Dewberry in Maintenance of Traffic with a GOOD- and exceeded Shirley/Dewberry's Project Management rating of GOOD- with a rating of GOOD+. Concrete General/WRA also committed to completing the project by November 27, 2018 which is more than 4 months ahead of the April 5, 2019 date committed to by Shirley/Dewberry and will be a large benefit to safety and mobility of the traveling public.

(App. Ex. 16, pg. 11.)

As a preface to the conclusion quoted above, the Memorandum contained a thorough explanation of the basis of the evaluation rankings of the proposals, including extensive specific reference to evaluation factors and sub-factors.

20. On April 1, 2015, but prior to the time that appellant had

the opportunity to see SHA's Memorandum referenced above, Shirley filed a bid protest objecting to the award of the contract to CGI. That bid protest stated as follows:

Shirley received a debriefing on March 25, 2015, at which it was presented with a two-page document titled "Final Selection Results," a copy of which is attached hereto as Exhibit C. Exhibit C indicates that on price, Shirley's proposal was objectively found to be the lowest price and the most advantageous to the State. Shirley's total lump sum price proposal was \$1,996,380 less expensive than Concrete General's, at a total contract amount of \$80,556,754, for a savings of 2.5%. Even after the price proposals were adjusted to account for the proposers' respective completion dates, Shirley still was the least expensive offeror by \$474,180... SHA has failed to provide a sufficient justification for selecting Concrete General's more expensive proposal...The arbitrary nature of SHA's decision is seen in its failure to quantify the difference between Shirley's and Concrete General's respective technical proposals...SHA's treatment of the price difference here amounts to a failure to consider price...SHA's evaluation summary gave no explanation justifying the higher cost associated with Concrete General's proposal. (Exhibit C.) The absence of any meaningful explanation of why the supposed technical difference outweighed the undisputed price difference, means that the procurement record contains no rational basis for SHA to do anything than award the contract to Shirley and obtain the best price for the State...Shirley reserves the right to supplement or amend this Protest. (App. Ex. 18, 18R, pgs. 2, 4, 7, 8; Tr. 296.)

As of the hearing date, no supplement or amendment to Shirley's bid protest was submitted to SHA. (Tr. 264.)

21. By correspondence dated April 21, 2015, SHA took final action denying Shirley's bid protest, stating:

SHA determined that Concrete General's technical proposal was superior to Shirley's technical proposal and the adjusted price proposals submitted by Concrete General and

Shirley were essentially the same...

While Shirley's adjusted price was slightly lower than Concrete General's adjusted price (by approximately 0.5%), the Evaluation Committee and the Selection Officials concluded that the superior merit of Concrete General's proposal outweighed this slight price differential. There are ample reasons to support this decision, including that Concrete General's technical proposal rating was equal to or better than Shirley's technical proposal rating in all technical evaluation factors. The decision that the superior merit of Concrete General's technical proposal outweighs the very slight difference in price was a rational one, particularly in light of the fact that the RFP provided that "the Technical Proposal will have a higher relative importance than the Price Proposal." This decision was in accord with the evaluation factors and procedures set forth in the RFP and is proper; it certainly cannot be considered arbitrary, capricious or contrary to law.

The price evaluation team then presented the Adjusted Prices and its price evaluation to the Evaluation Committee. The result of this process was that both Shirley and Corman Construction [the third qualified proposer] tied for the second highest overall technical rating of "GOOD-" and Shirley had the lowest adjusted price \$97,123,954.00. Concrete General had the highest overall technical rating of "GOOD" and the second lowest price of \$97,598,134.00. The price differential was approximately half of one percent (0.5%).

Pursuant to COMAR 21.05.03 and RFP 2.11.01 and 2.11.08, SHA proceeded to determine which of the two proposals was "most advantageous" to the State. The Evaluation Committee assessed the competing proposal ratings and adjusted prices to determine which proposal was most advantageous. The Committee avoided a formulaic approach. Rather, in considering the ratings of the two proposals, the Committee looked at the strengths and weaknesses on which the ratings were based and what those meant in the context of the

small price difference.

The Evaluation Committee deemed the adjusted price difference between the two proposers to be so close as to be effectively the same. By examining the proposals' strengths and weaknesses, the Committee determined that the difference between the overall technical proposal ratings ("Good" for Concrete General versus "Good-" for Shirley) was more significant than the adjusted price difference of 0.5%, particularly in light of the fact that Concrete General's technical proposal was equal to or better than Shirley's technical proposal in all technical factors.

(App. Ex. 19, pgs. 4 & 9.)

22. On May 4, 2015, Shirley filed an appeal of the foregoing determination with the Maryland State Board of Contract Appeals (Board) following which a two-day hearing was concluded on July 15, 2015.

Decision

The defect in the dichotomy at the heart of appellant's complaint is found in Shirley's assertion that the difference of one-half of one per cent in its lower adjusted price total is substantial, but the difference in the overall technical ratings of CGI and Shirley as "Good" compared to "Good-" is, in the words of counsel for appellant, "essentially the same." "Good" is not the same as "Good-." SHA went to considerable length carefully to differentiate the technical value of the proposals. Appellant is correct in asserting that half a million dollars is a significant amount of money, but that sum must be considered in the context of a design-build contract for a project bearing a total cost approaching \$100 million, understanding that CGI's technical rating of "Good" was superior to Shirley's slightly lower rating of "Good-."

Appellant and the interested party did receive the same score of "Good-" on the most important of the technical evaluation factors, namely, "Project Technical Elements &

Approach," but CGI was rated two steps above Shirley on the significant primary evaluation factor of "Project Schedule & Project Management" and one step above Shirley on the important primary evaluation factor of "Environmental Approach." Thus, the two proposals carried scores that were quite close to one another, but CGI was rated slightly better. The validity of the rankings of the proposals is not in dispute. The only question fairly and properly before the Board is the same issue presented to SHA by Shirley's bid protest, namely, was SHA's determination deficient as a matter of law for failure to conduct a cost-benefit analysis? SHA's March 20, 2015 Memorandum documents that SHA did in fact consider and determine that the small but measureable advantage in the technical component of proposal evaluations outweighed the additional financial cost of selecting the better option preferred by SHA. Contrary to Shirley's allegation that that determination was not "rational," the Board must conclude that, because a fair trade-off analysis was conducted by SHA, its conclusion to select CGI must be upheld.

If the subject RFP had required SHA to afford financial considerations greater weight than that afforded to the technical component of proposal evaluation, appellant would have a stronger claim than that which appears in this appeal. Here, technical rating was required to be given greater weight than financial considerations. Shirley cannot dispute that CGI prevailed in technical evaluation. Appellant's only complaint in that regard is to point out that the difference in the technical evaluation ratings of the two competitors was not great. This is correct, but the financial evaluation was similarly a difference of only one-half of one per cent. Here, while it may have been a close call, because technical carried greater weight than financial, and pricing was comparable, the superior technical proposal must prevail. At the very least, the Board certainly cannot conclude that SHA's determination to select CGI over Shirley was an abuse of agency discretion. That decision was not arbitrary or

capricious. It was soundly based on the slightly higher technical rating given to CGI in a competition for which the validity of technical evaluation ratings is not contested and technical rating was required to be given greater weight than financial considerations.

Appellant relies primarily upon the Board's holding in the Appeal of L-1 Secure Credentialing, Inc. (L-1), MSBCA No. 2793, _____ MSBCA ¶_____ (2012) to support Shirley's contention that SHA failed to perform a legally sufficient cost-benefit analysis when it determined not to select the lower priced proposal. However, in L-1, *Id.* at pg. 34, the Board made it clear that the requirement of trade-off consideration is not necessarily a demanding or burdensome exercise, stating, "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."

Unlike the facts present in L-1, *Id.*, here it is abundantly clear that a detailed cost-benefit analysis was indeed conducted by SHA during the final deliberations of the Evaluation Committee resulting in the decision to select CGI. SHA used the very words, "trade-off analysis" in describing the basis of its determination not to select Shirley. Those words appear twice on the final page of SHA's justification Memorandum prior to the signature page. Also quite unlike the instant appeal, in L-1, *Id.* at pg. 36, the Board noted that the technical rankings remained utterly unchanged after opening and reviewing the disparate financial cost of the competing proposals, concluding, "the procurement file is completely devoid of any document whatsoever pertaining to the conduct of a cost-benefit analysis." Also unlike the case at bar, technical and financial components of proposal evaluation were required to carry equivalent weight

in L-1, *Id.* Moreover, appellant here fails to establish a *prima facie* case that financial factors were not considered during proposal evaluation. The facts adduced prove quite the opposite.

On the other hand, SHA cites as its principal precedent to compel rejection of this case, the Appeal of Facchina-Trumbull-Skanska, Joint Venture (FTS), MSBCA No. 2630, _____ MSBCA ¶____ (2009). In FTS, *Id.* at pg. 43, the Board stated, "The determination of the relative merits of proposals is...the responsibility of the procuring agency and it must bear the burden of any difficulties incurred by reason of a defective evaluation. *E.g.*, [Appeal of] AGS Genasys Corp., MSBCA 1325, 2 MSBCA ¶158 (1987) at pg. 12; [Appeal of] Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994) at pg. 5. Since procuring officials enjoy a reasonable range of discretion in evaluating proposals and in determining which offeror or proposal is to be accepted for award, their determinations are entitled to great weight. This Board does not second guess an evaluation of proposals, but merely concerns itself with whether or not a reasonable basis exists for the conclusions and results reached or determined. *E.g.*, [Appeal of] Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA ¶94 (1985); [Appeal of] Baltimore Industrial Medical Center, Inc., *supra.*" Because in the case at bar there is a reasonable basis of support for SHA's determination, this appeal must be denied.

As was evident during the trial of this appeal, the Board is concerned that CGI might have been given double credit for the advantage of the earlier completion date guarantee it offered to SHA. The terms of the original RFP stated, "An earlier completion date, for either the contract completion or critical schedule date(s) indicated elsewhere in this RFP, which provides benefit to the Administration will be given positive consideration in the technical evaluation." That sentence was removed by Addendum No. 3, and replaced by a specific formula for calculating adjusted prices by multiplying "the daily loss of

public benefit cost of \$11,800 per calendar day" and then adding that amount to the aggregate total of the price proposal in order to determine the adjusted price to be used to make financial comparisons between proposals. One might argue that SHA's deliberate decision to strike the provision about giving positive consideration in the technical evaluation to early completion date, and replacing that sentence with a formulaic approach to determine the precise valuation of early completion as a certain sum to be factored only into the financial evaluation, thereby removed early completion date as a legitimate point of consideration as a part of the technical proposal. Indeed, testimony from the procurement officer reflected that the earlier completion date was not considered as a part of the technical evaluation; only during the trade-off analysis.

Having the intersection improvements completed prior to the winter of 2018-2019 certainly has significant value to the motoring public and to SHA. The value of at least a part of that benefit was precisely quantified by using the sum of \$11,800 per day in SHA's calculation of adjusted prices. CGI's assurance of project completion in November 2018, as compared to Shirley's completion date of April 2019, diminished appellant's price advantage from \$2 million to \$475,000 owing to a reduced "daily loss of public benefit" by virtue of having the grade-separated interchange completed at an earlier date. If a deliberate estimate of the precise full valuation of that benefit was already included in SHA's calculation of adjusted prices used in its financial comparison of the proposals, it would have been improper for SHA in the technical evaluation to give further advantage to CGI for the same factor. But during the course of the hearing, the Procurement Officer explained that the \$11,800 per day pricing adjustment was not intended to include the entire value of earlier project completion. Therefore SHA acted within the scope of legitimate authority when the procurement evaluation summary report noted in connection with the trade-off analysis

that the four month earlier completion date offered by CGI constituted "a large benefit to safety and mobility of the traveling public" in addition to quantifying the value of a portion of that benefit as a component of financial evaluation. The Board notes in addition to the foregoing *dicta* that appellant did not explicitly raise this issue in timely fashion as a grounds of protest to SHA.

For all the foregoing reasons, it is by the Board, this _____ day of July, 2015,

ORDERED, that this appeal be and hereby is DENIED.

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 2932, Appeal of Shirley Contracting Company Under SHA Contract No. PG7005170.

Dated:

Michael L. Carnahan
Clerk