

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEALS OF MAXIMUS, INC.	)	
	)	
Under Dept. of Human Resources	)	Docket Nos. MSBCA 2351, 2357 and 2370
RFP No. CSEA/PR-04-001S	)	
	)	

October 31, 2003

Competitive Negotiation - Evaluator Bias - The Board of Contract Appeals will not find that actual bias exists regarding an evaluator or evaluation committee unless the record reflects irrefutable evidence of specific intent to harm or favor a particular offeror. An assertion of bias based on inference or supposition will not suffice.

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APPEARANCE FOR RESPONDENT:	David E. Beller Joseph B. Spillman Turhan E. Robinson Assistant Attorneys General Baltimore, Maryland
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OPINION BY BOARD MEMBER HARRISON

The above captioned appeals arise out of the recommendation for award by the Department of Human Resources (Department) for a contract to Policy Studies, Inc. (PSI), the Interested Party, for privatization of child support services in Baltimore City and Queen Anne's

County.<sup>1</sup> Inter alia in these consolidated appeals, Appellant alleges that the recommendation for award to PSI should be overturned because the technical evaluation of the proposals was arbitrary, capricious and unreasonable, and the evaluators were biased; the Department's evaluation of the financial proposals was arbitrary, capricious and unreasonable; PSI is neither a responsible nor responsive offeror; and the Department's procurement process violated State procurement law and the RFP in a number of material respects.

#### Findings of Fact

1. The Maryland Department of Human Resources, Child Support Enforcement Administration (CSEA), administers a statewide child support enforcement program intended to ensure that non-custodial parents fulfill their obligations to provide financial and medical support to their children.
2. The program is offered through state and county-funded agencies in 23 counties and Baltimore City and conforms to the requirements of Title IV-D of the Social Security Act (42 U.S.C.A. §§ 651 *et seq.*) providing for a state-federal matching program under which the federal government covers approximately two thirds of a state's administrative costs for child support enforcement services.
3. In an effort to improve services in Baltimore City, the child support enforcement privatization pilot program was established in April 1994 under § 10.119.1, Family Law Article, Annotated Code of Maryland. A competitive contract was awarded in October 1996 to provide the statutorily mandated pilot program in Baltimore City and Queen Anne's County. The pilot ran for three years from November 1, 1996 to October 31, 1999. The statute was amended in 1999 extending the privatization and demonstration pilots through October 31, 2002. The first contractor, Lockheed IMS (Lockheed), experienced difficulties, and Appellant provided the services beginning in 1999.
4. House Bill 495 was introduced in the 2002 Legislative Session to continue privatization in Baltimore City and Queen Anne's County. The General Assembly passed the bill, but the Governor vetoed it. However, the FY 2002 budget bill contained language requiring the Department to use the appropriation for Baltimore City and Queen Anne's County's child support operations with a private vendor. As required by the budget bill language, the Department held a competitive bid process in the summer of 2002 and awarded an 8-month contract to Appellant for the period of November 1, 2002 to June 30, 2003.
5. During the fall of 2002, the CSEA began drafting a request for proposals (RFP) to continue privatization in Baltimore City and Queen Anne's County for an additional four year, three month period with two one-year option renewal periods.
6. During the 2003 Session, the General Assembly introduced Senate Bill 524 and House Bill 564 to establish the privatization pilot program and required the Department to enter into a contract with a private vendor for a three year period with two one-year option renewals.

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<sup>1</sup>The protests from the denial of which the appeals were taken were timely filed with the Department. The appeals were also timely filed with the Board.

7. Based on the pending legislation, CSEA issued an RFP on March 4, 2003 for the privatization pilot program for a three year, three month period, with two one-year option renewal periods.
8. During the Session, the two bills were amended, which changed the contract term to a four year, three month period with two one-year option renewal periods. Addendum #1 to the RFP, issued on March 24, 2003, revised the term of the contract to a four year, three month period beginning July 1, 2003 and going through September 30, 2007, with two one-year options for renewal at the sole discretion of the State. House Bill 564, as passed, included this time frame. Addendum #2, March 31, 2003, and Addendum #3, May 9, 2003, were issued to the RFP amending details for the privatization of child support enforcement services.
9. On March 4, 2003, the Evaluation Committee, consisting of seven persons<sup>2</sup>, received copies of the RFP, evaluation instructions, and duties and responsibilities of evaluators. A pre-proposal conference was held on March 14, 2003. On April 3, 2003, proposals were received from Appellant, the incumbent contractor, and PSI. The proposals, Evaluation Committee Instructions, Evaluation Checklists, and Confidentiality Agreement forms were distributed to the Evaluation Committee on April 10, 2003.
10. The Committee reviewed Appellant's proposal and identified areas needing additional information or clarification. The Committee then reviewed the PSI proposal and identified areas needing additional information or clarification. Discussion Issue notices were sent on April 25, 2003 to both offerors with a due date for response of April 29, 2003. The Committee reviewed Appellant's response to the discussion issues and identified additional areas needing clarification. They also reviewed PSI's response to the discussion issues and identified areas needing clarification.
11. The Committee held a discussion meeting with Appellant on the issues and responses. Appellant was advised that a request for a Best and Final Offer (BAFO) would be issued to provide offerors an opportunity to provide written responses to the additional information not documented in the original proposal or discussion issue response and to respond to any impact of Addendum #3 on the technical or financial proposal.
12. The Committee held a discussion meeting with PSI to discuss issues and responses. PSI was advised that a request for a BAFO would be issued to provide offerors an opportunity to provide written responses to the additional information not documented in the original proposal or discussion issue response and to respond to any impact of Addendum #3 on the technical or financial proposal.
13. The Committee finalized the technical evaluation, ranked technical proposals, and opened and evaluated financial proposals. The Committee determined areas requiring clarification or adjustment. The Committee individually contacted representatives from each offeror and advised them that financial proposals were reviewed, and they discussed issues to be addressed in clarifying or adjusting price offers. The representatives were told that the BAFO should address contents of the discussion related to the financial offer. Both Appellant and PSI submitted a BAFO.

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<sup>2</sup>Four of the evaluators were identified during these proceedings. The identities of the other three evaluators remain confidential. See Benton & Associates, MSBCA 2196 and 2201, 5 MSBCA ¶487 (2000).

14. After a review of the BAFO responses, it was determined that Appellant's BAFO had outstanding technical issues. Accordingly, Appellant was requested to submit a second BAFO with clarification of the outstanding issues and to determine whether it wanted to change its financial proposal. However, PSI did not have outstanding technical issues. Accordingly, PSI was requested to submit a second BAFO containing a financial proposal based upon its technical proposal.
15. As a result of the final evaluation of the offerors' proposals, the Committee recommended that the Contract be awarded to PSI.
16. In a letter dated May 15, 2003, Appellant was notified by the Department that its financial and technical proposals were not the top ranked. Therefore, Appellant was not recommended for award of the Contract.
17. Appellant protested the recommendation for award on May 22, 2003.
18. A debriefing was provided to Appellant in accordance with COMAR 21.05.03.06 on May 29, 2003. Appellant was provided information about the debriefing process, the evaluation process and the results of the technical and financial proposal rankings.
19. On May 30, 2003, the Department denied Appellant's May 22, 2003 protest.
20. Based on information provided at the debriefing, Appellant filed a Supplemental Protest of Intent to Award Contract on June 5, 2003.
21. The Department denied the supplemental protest of June 5, 2003 by final decision dated June 23, 2003.
22. On June 9, 2003, Appellant appealed the May 30, 2003 denial of its May 22, 2003 protest to this Board (MSBCA 2351). Also on June 9, 2003, Appellant obtained information contained in a Department of Budget and Management Action Agenda for the Board of Public Works regarding PSI's financial proposal. Based on that information, on June 12, 2003, Appellant filed a Second Supplemental Protest of Intent to Award Contract.
23. The Board of Public Works (BPW) decided on June 18, 2003 to defer a decision on the recommendation of award to PSI contingent upon this Board ruling on Appellant's appeal. Pending resolution of the dispute, the eight-month contract with Appellant, which was to expire on June 30, 2003, was extended by BPW for an additional six months to December 31, 2003 in order to continue child support enforcement services.
24. On June 24, 2003, the Department denied Appellant's second supplemental protest of June 12, 2003.
25. On July 3, 2003, Appellant filed an appeal with this Board respecting the denials of its first and second supplemental protests (MSBCA 2357).
26. On August 21, 2003, Appellant submitted a third supplemental protest on the subject RFP. The Department denied the protest on September 3, 2003, and Appellant filed its third Appeal with this Board on September 15, 2003 (MSBCA 2370).
27. The three appeals were consolidated during the appeal process. A hearing was conducted over a nine day period between October 8, 2003 and October 21, 2003. On October 28, 2003, the parties filed post-hearing briefs.

## Decision

The generic issues raised by the consolidated appeals for decision are as follows:

- A. Was the Department's evaluation and ranking of Appellant's technical proposal, in comparison to that of PSI, arbitrary, capricious, or unreasonable, and were the evaluators biased against Appellant?
- B. Was the Department's evaluation of Appellant's and PSI's financial proposals arbitrary, capricious, or unreasonable?
- C. Did the Procurement Officer correctly decide that PSI was responsible and that its offer was responsive to the requirements of the RFP?
- D. Did the procurement process violate State law?

We shall discuss these issues and specific factual sub issues encompassed within the generic issues in the order set forth above.

- A. **The Department's evaluation and Ranking of Appellant's technical proposal in comparison to PSI's was not arbitrary, capricious or unreasonable; nor were the evaluators biased against Appellant.**

The RFP provided the following regarding technical evaluation criteria to be evaluated in descending order of importance:

### **5.4 Criteria for Technical Evaluation**

All proposals that are not judged to be susceptible for award will be excluded from further consideration in the awarding of the contract. Any oral presentations shall occur as part of the technical evaluation. The criteria that will be used by the committee for the technical evaluation of the proposals for this specific procurement are listed below in descending order of importance. Each Committee member will rank the proposals according to the major criteria.

#### **5.4.1 Evaluation Criteria**

##### **A. Work Plan for Proposed Services**

The completeness and adequacy of the offeror's plans and proposed innovative service delivery processes for performing the following activities:

- 1. Continuum of child support services
- 2. Customer services

3. Initiatives for interface and collaboration with other child support service delivery agencies and partners in the delivery of programs and services
4. Internal policy and procedures and case documentation
5. Organization structure and staffing
6. Initiatives for achieving performance standards
7. Progress reporting/deliverables

**B. Assigned Personnel**

The relevant experience and education of key personnel. Under these criteria, the offeror's Contract Manager and Key staff for ongoing project management and operations and transition implementation will be evaluated along with the offeror's job descriptions for other labor categories that will be used to carry out the functions of the project.

**C. Offeror's Qualifications**

The offeror's qualifications will be evaluated based on:

1. Experience and special skills or resources that enhance its ability to meet project goals
2. Experience in operating public programs, ability to meet desired schedule and quality of deliverables
3. Experience in work force transition
4. Financial soundness

**D. Facilities**

The extent to which the offeror's proposed facilities plans, furniture, equipment, information technology and telecommunications plans will contribute to the quality and efficiency of service and to the attainment of contract goals.

**E. Transition Plans**

The extent to which the offeror's transition plan will contribute to a smooth transfer of operations during contract implementation and contract termination.

**F. Quality Assurance, Assessment, and Audit Plan**

The extent to which the offeror's plan for responding to CSEA's quality assurance, self-assessment, monitoring and audit reviews will ensure effective and efficient actions to resolve deficiencies.

**G. Economic Benefits to the State**

The extent of the offeror's effort to recycle dollars, create jobs, generate tax revenues, provide subcontract dollars and other benefits for the State.

The Board finds that the Evaluations Committee's ranking of the proposals was not arbitrary, capricious or unreasonable. In this regard the record reflects that the Evaluation Committee ranked the proposals based only on the factors in the RFP and the information provided by Appellant and PSI in their proposals, responses, BAFO's, or during discussions. The record further reflects that their judgement was not unduly influenced by beliefs that they may have held concerning the merits of privatization or allegations of criminal and civil misconduct by Appellant in its prior performance of the services covered by the RFP.

Just as it does with the Procurement Officer's determination of responsibility, the Board gives "great weight" to the Evaluation Committee's determination of the relative merits of the offerors' technical proposals. Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994), pp. 5-6. The Board has recognized that its function is not "to evaluate proposals in order to determine which should have been selected for award ... but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of Maryland procurement law." *Id.* As the Board has further observed, "under the reasonableness standard we apply, we do not second guess Agency decisions on technical issues." United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989) at p. 71.

Accordingly, the Board "will not disturb an Agency's determinations regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations." Baltimore Industrial Medical Center, Inc., *supra*. Thus, the Board may only sustain Appellant's appeal if the rankings assigned by the Evaluation Committee were "contrary to all objective facts, i.e., were patently arbitrary." Transit Casualty Co., MSBCA 1260, 2 MSBCA ¶119 (1985) at p. 55. "Further, the Board may only review an evaluator's judgement based on what was before the evaluator for review." *Id.*

In challenging the Evaluation Committee's subjective rankings, Appellant makes two arguments. First, Appellant alleges that two systemic flaws in the evaluation process manifested themselves in skewed ratings of Appellant's technical proposal: (1) alleged failure to take into account Appellant's real world performance; and (2) alleged failure to assess the credibility of the offerors' proposals, particularly that of PSI. Second, Appellant alleges that the ranking of

technical criteria was otherwise arbitrary and capricious. The two arguments involving the systemic flaws and arbitrary and capricious ranking are related and will be discussed as such.

### **Alleged Disregard of Appellant's Incumbency**

Appellant asserts that the Department's selection of PSI was arbitrary, capricious, and unreasonable because it disregarded Appellant's incumbency. Appellant argues that it is the only company in the country that has operated a child support enforcement program that compares to Baltimore City in size and scope, and thus the Evaluation Committee failed to factor Appellant's successful incumbency into any of its rankings.

The record does not support Appellant's contention in this regard. Rather it reflects that consideration was given to Appellant's prior performance in all areas where that performance was relevant to the evaluation criteria. The Evaluation Committee apparently found, however, that Appellant's performance was mixed.

The Department prepared a Technical Proposal Ranking Sheet in which it set forth a detailed comparison of the proposals submitted by PSI and Appellant with respect to each of the major evaluation criteria and the matter to be considered in the criteria as delineated in §§ 5.4 of the RFP. This ranking sheet reflects that the Evaluation Committee analyzed Appellant's prior performance in the context of several evaluation criteria. The first, and thus most important, major evaluation criterion was the Work Plan for Proposed Services, which required analysis of seven factors. The Evaluation Committee analyzed Appellant's prior performance under many of these factors. For example, in comparing the offerors' proposals, the Evaluation Committee found, with respect to Appellant, that the "[c]urrent mechanism for screening would need improvement. Based on discussion, offeror [Appellant] learned that current process is inappropriate and plans to implement new procedures." Further, the Evaluation Committee found that Appellant "[d]id not meet Paternity Goal Establishment Goal for FFY02 in Baltimore City," and also found that Appellant's existing organization and structure included four layers of supervisors and thus was more complicated and cumbersome than the structure proposed by PSI. Additionally, the Evaluation Committee found that Appellant had not offered any new initiatives in connection with support orders or case processing on grounds that it had met its goals during the previous years in these areas.

Under the second major criterion, Assigned Personnel, the Evaluation Committee concluded that, because Appellant's key personnel would be continued from the previous contract, Appellant had more experience managing the Baltimore City Child Support Office. Likewise, under the third major criterion, Offeror's Qualifications, the Evaluation Committee found that Appellant's qualifications were superior to those of PSI given its experience and the fact that it was "[c]urrently operating Baltimore City and Queen Anne's County offices." With respect to the fifth major criterion, Transition Plans, the Evaluation Committee concluded that Appellant's transition plan was superior because it was "[a]lready in the building. [It] [w]ill have not [sic] problems in meeting all dates. [It will] [o]nly have to do limited enhancements." Finally, in the Evaluation Summary prepared by the Procurement Officer, it was noted generally



that, “[a]lthough the incumbent vendor [Appellant] has requisite experience in operating a large urban child support office and offers a seamless transition, the proposal offered few innovations.”

Thus the record reflects that the Evaluation Committee considered Appellant’s incumbency. Appellant asserts that the Evaluation Committee should have reached different conclusions as to the nature of its performance and the effect of its performance on the procurement. The Board, however, has repeatedly held that its role is not to substitute its judgement for that of the Agency as to the evaluation of a proposal. In Triad Management Systems, Inc. and Comprehensive Technologies, Inc., MSBCA 1872 and 1874, 4 MSBCA ¶378 (1995 ) at pp. 11–12, the Board observed that:

“... Maryland’s Procurement Law provides that the determination of which proposal best fits the Agency’s needs is the responsibility of the Agency. Such determinations shall not be overturned unless contrary to all objective facts.” Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994) at p. 12. In that same decision, this Board stated that it “does not second guess an evaluation of a proposal, but merely concerns itself with whether a reasonable basis exists for the conclusions and results reached or determined.” Id. at 5. This Board’s function is to decide whether determinations of procurement officials as to the evaluation of the technical merits of proposals are arbitrary, capricious, unreasonable or contrary to law or regulation.” AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987).

In these consolidated appeals the analysis set forth in the Technical Proposal Ranking Sheet and the Procurement Officer’s Evaluation Summary reflect that the Department’s conclusions regarding incumbency issues were logically based and reasonable.

Appellant also argues, in connection with its incumbency issues, that the Procurement Officer, in her June 23, 2003 response to Appellant’s supplemental protest, indicated that COMAR 21.04.01.03 prohibits the Department from assigning any weight to an incumbent’s successful performance. However, in her June 23, 2003 response, the Procurement Officer stated:

Under COMAR 21.04.01.03<sup>3</sup> Responsibility for Preparation, the Procurement Officer is responsible for insuring that specifications for state procurements are nonrestrictive. In preparing the RFP for privatization of child support services in Baltimore City and Queen Anne’s County evaluation criteria was established to meet this requirement.

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<sup>3</sup>COMAR 21.04.01.03 provides: The using agency shall be responsible for preparing the specifications. To the extent practicable, functional or performance criteria shall be emphasized while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State.

Thus, the Procurement Officer explained that the RFP was drafted to be “nonrestrictive” and thereby enable reasonable competition to take place. The Procurement Officer’s observation was correct and consistent with applicable regulations. COMAR 21.04.01.04 provides in pertinent part:

The Procurement Officer or his designee shall be responsible for reviewing the specifications for content, clarity, and completeness and to insure that the specification is nonrestrictive.

Further, COMAR 21.04.01.02A provides:

A specification is the basis of obtaining a suitable supply, service or construction item in a cost effective manner. It is the policy of the State that specifications be written so as to permit maximum practicable competition without modifying the State’s requirements. Specifications may not be drawn in such a manner as to favor a single vendor over other vendors.

The Board has noted that an Agency is required to make an initial prima facie showing that specifications or evaluation criteria alleged to be too restrictive are “necessary for its minimum needs.” Xerox Corp., MSBCA 1111, 1 MSBCA ¶48 (1983 ) at p. 6; The Trane Co., MSBCA 1264, 2 MSBCA ¶118 (1985); ALCO Power, Inc., Comp. Gen. B-207252.2, November 10, 1982, 82-2 CPD ¶433. Accordingly, the Procurement Officer was correct in pointing out that the evaluation criteria could not be tailored to ensure Appellant’s selection as the incumbent. She, however, did not say that Appellant’s prior performance could not be considered under nonrestrictive criteria. As explained above, the Evaluation Committee analyzed Appellant’s prior performance in connection with criteria that were nonrestrictive and facilitated competition. Appellant’s past performance aided its evaluation with respect to certain criteria such as its qualifications and ability to provide a smooth transition, but hurt its evaluation in other areas.

#### **Alleged Failure to Assess the Credibility of the Offerors’ Proposals**

Appellant alleges that the Evaluation Committee failed “to assess the credibility” of the offerors’ proposals. It bases this allegation on the following statement by the Procurement Officer in her June 23, 2003 response to Appellant’s supplemental protest:

The Committee was not charged with verifying the information included in either the [Appellant] or PSI proposals. Committees must accept at face value the information provided in proposals. Committees are not set up to conduct investigations to validate the information that is provided. The process assumes that through a thorough review and discussions with offerors, the Committee will be able to make reasonable judgements about the viability of proposals. Therefore, the expectation that an evaluation committee should verify the validity of proposals is not reasonable.

proposals. Therefore, the expectation that an evaluation committee should verify the validity of proposals is not reasonable.

Appellant argues that the Procurement Officer's statement that the Evaluation Committee was not charged with verifying the accuracy of factual representations in the offerors' proposals is inconsistent with obligations imposed on the Agency by procurement law and the RFP. Appellant points to § 13-104(d)(1) of the State Finance and Procurement Article which provides that the State may "conduct discussions with an offeror to ... insure an understanding ... of the proposals submitted" and §§ 5.1 and 5.3 of the RFP which authorize the Evaluation Committee to request additional technical assistance from any source and to hold oral discussions with the offerors about their technical proposals.

The Procurement Officer and the Evaluation Committee complied with the provisions cited by Appellant in all respects. The Procurement Officer's observation that an Evaluation Committee does not verify the accuracy of facts and statistics set forth in the proposals was correct and consistent with the provisions cited by Appellant. Given the large amount of factual data presented, verification of all facts and statistics referenced in a proposal may not be practicable. Rather, § 13-104(d)(1) of the State Finance and Procurement Article and §§ 5.1 and 5.3 of the RFP authorize the Evaluation Committee to hold discussions with the offerors and request additional information or clarifications from them in order to understand the nature and scope of the proposals. A procurement officer and an evaluation committee are entitled to rely on the accuracy of the data provided to them and the truthfulness of the affiant providing that data.

In the instant appeals, the Evaluation Committee and the Procurement Officer complied with the requirements of § 13-104(d)(1) of the statute and §§ 5.1 and 5.3 of the RFP in that they held discussions and asked questions to clarify and determine the nature of the proposals. After being briefed on the evaluation process by the Procurement Officer and reviewing the technical proposals of each of the offerors, the Evaluation Committee members met twice as a committee to discuss and review the proposals before meeting with the offerors. During these initial meetings, the Evaluation Committee determined that additional information and clarifications were needed from both offerors before the discussion meetings with them, and they prepared detailed discussion issues to be provided to each offeror. On April 24, 2003, the Procurement Officer sent the discussion issues to the offerors and requested that they respond to the issues in writing prior to their scheduled discussion meetings. The discussion issues provided to each offeror were detailed and covered numerous subjects. For example, 50 discussion issues were presented to PSI relating to the following subjects: intake services, establishment of paternity, enforcement of support orders, decentralized collections and payment processing, interstate case processing, customer services, state supplied services, organizational structure and staffing, facilities, equipment and software, performance standards, assessments and monitoring, transition responsibilities, economic benefits, and background and experience. A review of the discussion issues reflects that the Evaluation Committee and the Procurement Officer conducted a thorough inquiry into the merits of both proposals.

On April 29, 2003, Appellant and PSI both provided detailed responses to the discussion issues. Following the submission of these written responses, the Evaluation Committee met with both Appellant and PSI. After the completion of these discussion meetings, on May 7, 2003, the Procurement Officer notified both Appellant and PSI that they would be permitted to submit a best and final offer (BAFO), and requested that they address additional technical and financial issues in their BAFO. For example, PSI was requested to respond in its BAFO to detailed questions relating to intake, decentralized collections, organization staffing, facilities, equipment software, quality assurance and internal audit functions, and certain financial matters.

Following the Evaluation Committee's review of the offerors' responses to the BAFO issues, the Evaluation Committee determined that there was a further need for clarification. Accordingly, on May 9, 2003, the Evaluation Committee sent a second request for a BAFO to both Appellant and PSI. The Evaluation Committee raised two additional matters with Appellant that related to the establishment of paternity. In sum, the record establishes that the Evaluation Committee held discussions and requested and obtained information relating to the proposals on relevant issues.

### **Ranking of Technical Criteria**

We return now to Appellant's argument regarding ranking of technical criteria. Appellant alleges that the ranking of technical criteria was arbitrary and capricious. Specifically, Appellant challenges the Evaluation Committee's rankings for:

- each of the three criteria for which PSI was ranked higher (Work Plan for Proposed Services, Facilities, and Economic Benefits);
- one criterion that was designated a tie (Assigned Personnel); and
- one criterion for which Appellant was ranked higher than PSI (Offeror's Qualifications).

As set forth below, there was a rational basis for the Evaluation Committee's rankings, and the Board will defer to the Evaluation Committee's expertise and discretion in evaluating the comparative merits of the Proposals.

The Department evaluated the seven major criteria in descending order of importance. The result of the evaluation is depicted by the following analysis of rankings that appears in the record:

<u>Criteria</u>	<u>PSI</u>	<u>Appellant</u>
1. Work Plan for Proposed Services	1	2
2. Assigned Personnel	Tie	Tie
3. Offeror's Qualifications	2	1
4. Facilities	1	2
5. Transition Plan	2	1
6. Quality Assurance, Assessment	Tie	Tie
7. Economic Benefits	1	2
<b>Overall Technical Rank</b>	<b>1</b>	<b>2</b>

As can be seen, PSI received #1 rankings in three major criteria, including the criterion having the most importance. Appellant received #1 rankings in two criteria, the highest of which was number three in importance. It is clear from these rankings that PSI received the number one ranking in the criterion with most importance and more number one rankings than Appellant, and therefore was ranked overall #1. Based on the record, we find this to be both logical and fair as our review of Appellant's specific complaints about the evaluation of each criterion suggests.

**(a) Work Plan For Proposed Services.**

Appellant complains that, for this criterion, it received no credit for meeting the Department's real world goals. As an initial matter, Appellant's claim that it successfully met the Department's real world goals is only partially true. As the Department explained in its Procurement Officer's decision of June 23, 2003:

Appellant provided documentation in Section 3.8 of its proposal of its lack of achievement of the Paternity Establishment goal in Baltimore city and the Current Support and Cases paying Arrears goals for Queen Anne's County. In addition, Appellant includes graphs in this section of the proposal that shows it only met all case processing performance standards in year three of the contract that ended 10/31/02.

As the Department further explained, the Evaluation Committee properly applied the evaluation criteria to the information provided by the offerors in their proposals. The Department's specific responses to Appellant's allegations regarding what the Evaluation

forth in the same letter. The record supports the conclusions set forth in this June 23, 2003 decision.

By way of example we will focus on two of the factors considered in arriving at the ranking of the Work Plan for Proposed Services criterion. With respect to the intake factor, Appellant complains that it “inexplicably ... earned only a second-place ranking.” Appellant’s incredulity, however, does not satisfy its burden of proving that the Evaluation Committee’s ranking was arbitrary. In fact, the Evaluation Committee provided a reasonable basis for ranking PSI higher for this factor, as summarized on its Technical Proposal Ranking Sheet:

#### INTAKE TO INCLUDE CHILD SUPPORT FIRST

MAXIMUS, INC. [APPELLANT]      Rank-2	POLICY STUDIES, INC.      Rank-1
<p>Meet Requirements - Intake to Include Child Support First - Reads like a textbook Standard intake process. No new innovations, continue using existing initiatives. Did not appear to be doing sufficient review when there are duplicate names in the system. Could lead to assigning new IRN [Individual Registration Number] only to learn later that the NCP [Non Custodial Parent] was already in the system. Could create problems down the road for clean-up. Current mechanism for screening would need improving. Based on discussion, offeror learned that current process is inappropriate and plans to implement new procedures. Subcontracting Child Support First. To MBE.</p> <p>Responded to follow-up issue by including a statement that intake performance would be monitored by the QA subcontractor, Manager and supervisor, and refresher training would be provided.</p>	<p>Meets Requirement. Thorough explanation of processes to include customer orientation, staff training procedures related rights and responsibilities, family violence and non-cooperation. Fast track intake process designed to complete the court order establishment process within four months of initial interview.</p> <p>Child Support First conducted by own staff.</p> <p>In response to follow-up issues related to the management of the intake function to include Child Support first, Offeror detailed the procedures that be use (sic.) At the centralized and decentralized offices.</p> <p>Provide Intake Services for Interstate Cases when cases are initiated by MD.</p>

This summary is supported by the parties’ proposals regarding intake as well as information PSI supplied in response to follow-up issues related to the management of the intake function.<sup>4</sup> Nevertheless, Appellant complains that because PSI has never operated the Baltimore City program, PSI’s intake plans are only “predictions of performance” and, thus, cannot be ranked higher than Appellant’s intake proposal. Accepting Appellant’s argument, however, would result in an unfair advantage to an incumbent in any contract award. There is no basis for the Board to substitute its judgement for that of the Evaluation Committee as to which offeror proposed a better intake plan.

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<sup>4</sup>In connection with the Committee’s evaluation of the intake factor, we specifically find that the Committee was properly concerned about the assignment of duplicate IRN’s, correct in their legal interpretation of federal requirements and did not downgrade Appellant due to its initial approach to the issue.

the Board to substitute its judgement for that of the Evaluation Committee as to which offeror proposed a better intake plan.

Similarly, in connection with the factor “communication and interface with other agencies,” Appellant argues the Evaluation Committee could not rationally rate PSI’s “unproven plan” and “untested promises” higher than Appellant’s experience as the incumbent. Contrary to Appellant’s argument, however, it is the Evaluation Committee’s responsibility to evaluate the proposals submitted by the offerors. Based on the offerors’ proposals the Evaluation Committee had a rational basis to rank PSI higher for this factor as illustrated by the Evaluation Committee’s following comments as summarized on its Technical Proposal Ranking Sheet:

#### **COMMUNICATION AND INTERFACE WITH OTHER AGENCIES**

<b>MAXIMUS, INC. [APPELLANT] Rank-2</b>	<b>POLICY STUDIES, INC. Rank-1</b>
Communication and Interface with Other Agencies - Meets Requirement. Response is adequate.	Meets Requirement. Proposes establishing an InterAgency working Committee as a means of involving agencies in the process to facilitate resolving issues with communications and case processing. This represents a proactive approach. PRISM to provide statewide for other child support agencies.

We also reject Appellant’s argument that it should have received the higher ranking on the Establishment of Paternity factor because the Committee allegedly did not understand that administrative subpoenas could not be used to compel genetic testing. The Board is satisfied from the record that the Committee did understand that administrative process or remedies to compel genetic testing required subpoenas issued by the courts and that, in any event, Appellant’s rating was not affected by this issue.

#### **(b) Assigned Personnel.**

Appellant argues that rather than ranking the assigned-personnel criterion as a tie, any reasonable evaluator would have given a higher ranking to Appellant. However, Appellant makes this allegation without reference to the key personnel identified by PSI or to their experience and qualifications.

As an initial matter, PSI, with one exception discussed below, identified Key Personnel as required in Section 3.4.7 of the RFP and provided a detailed position description and resume for each Key Personnel member. A review of the material submitted by PSI shows that the key personnel PSI identified have experience and qualifications. As one example, Mr. A, the Project Manager PSI identified to manage the child support operations in Baltimore City and Queen Anne’s County, has nearly 20 years experience in child support and domestic relations. Mr. A has a Masters Degree in Clinical Psychology and served as Director of the National Child

Support Enforcement Association, Mediator and Director for the Maricopa County (Arizona) Judicial Supervision Program, Director of the Family Support Center in Maricopa County, and Director of Domestic Relations for the Arizona Supreme Court.

Appellant's argument that the Evaluation Committee did not consider whether PSI's personnel had more than minimum qualifications is contradicted by the following comments the Evaluation Committee made regarding PSI's personnel:

Many of the proposed personnel have more child support experience and more education than required. Heavily involved in child support professional activities. Single focus of key staff is child support. Seem more experience [sic] in managing child support from an operational perspective.

As further discussed under the heading (c) **Key Personnel** below, the Evaluation Committee's question regarding the identification by PSI of Appellant's employee as the Queen Anne's County Operations Manager, and PSI's response thereto, would not have changed the tie ranking.

(c) **Offeror's Qualifications.**

Because Appellant was ranked higher than PSI (and ranking was either higher (1), lower (2), or tied) in this category, Appellant's allegation that the Evaluation Committee improperly omitted consideration of Appellant's resources in its evaluation of this criterion is irrelevant for purposes of these consolidated appeals.

(d) **Facilities.**

Appellant apparently assumed, should PSI be awarded the contract, that PSI would be taking over the current space from Appellant, and thus there was no differentiation in the offerors' facility plans. Accordingly, the facilities criterion should be ranked as a tie. But the Agency is correct in observing that PSI offered innovations in this area. For example, in addition to Appellant's space, PSI proposed locating "Neighborhood Service Centers in three or more locations that provide most convenient access to customer" to decentralize the bulk of certain intake and establishment functions.



Again, as with other criteria, the rational basis for the Evaluation Committee's ranking is apparent from its description of the relative strengths of the offerors' proposals set forth in the Evaluation Committee's Technical Proposal Ranking Sheet:

4. Facilities - The extent to which the offeror's proposed facilities plans, furniture, equipment, information technology and telecommunications plans will contribute to the quality and efficiency of service and to the attainment of contract goals.	
MAXIMUS, INC. [APPELLANT] Rank-2	POLICY STUDIES, INC. Rank-1
<p>Plan to create interview rooms to afford customer privacy for establishment interviews, conciliation conferences and other customer contacts.</p> <p>Telephone system is an enhancement to meet requirements of RFP for call center.</p> <p>Meet requirement for replacing CSES equipment.</p> <p>MAXSTAR Tracking system - supports customer service and management information.</p> <p>Bar Coding - while a good idea, questioned the effectiveness of this process.</p> <p>Imaging - need further development. Imaging would be conducted after bar coding was completed. Imaging and bar coding complimentary initiatives.</p>	<p>Facilities plan well thought out. Office layouts defined, related to areas, furnishing and equipment.</p> <p>Telephone system and information technology plans will contribute to goal attainment.</p> <p>Telephone system provides enhanced ability to respond to customer inquiries.</p> <p>PSI Link tracking system for customer service.</p> <p>PRISM date base enhances ability to provide ad hoc and other management reports for tracking performance and case processing decision making.</p> <p>Imaging presentation well though out. Will enable staff access to case information (more than one worker at time may use the information).</p> <p>Minimizes the need to access case files and reduces lost case file problem.</p> <p>Neighborhood Service Center plan will contribute to the efficiency of the operation.</p> <p>Neighborhood Centers proposed in order to provide customers better access to services. In response to follow-up issues related to the Neighborhood Centers, Offeror provided additional details related to organization structure, function to be performed, benefits to customer and overall performance improvement.</p>

**(e) Economic Benefits.**

As detailed in Section 4.3.4 of the RFP, economic benefits includes: (a) estimated percentage of contract dollars to be recycled into Maryland's economy; (b) estimated number and types of jobs for Maryland residents resulting from the contract; (c) estimated percentage of tax revenues to be generated for Maryland and its political subdivisions as a result of the contract; and (d) estimated percentage of subcontract dollars committed to Maryland small business and MBE's.

Appellant argues that rather than evaluate economic benefits on the factors included in the RFP, the Evaluation Committee should have ignored the language of the RFP and "based its ranking on the offerors' dedication to support the economy of the State, rather than simply estimating how many cents of every dollar paid will go back to the State." As the Procurement Officer explained, the Evaluation Committee properly evaluated the information supplied in the proposals in conformance with the RFP requirements. However, a mathematical error was made by the Evaluation Committee in its review of the PSI proposal concerning the number of jobs resulting from the Contract. Erroneously the Committee assumed that 190 jobs would be created by PSI and 185 by Appellant. The actual number submitted by PSI, however, was only 185. Therefore, the two offerors were equal in that respect; 185 jobs each. This error, as explained below would not have changed the overall number one ranking of PSI.

Other alleged evaluation issues challenged by Appellant, as discussed below, were appropriately considered by the Committee.

**(a) PRISM**

The Evaluation Committee considered the PRISM software proposed by PSI for statewide use as an added value that would enhance the partnership between the contractor, the State and local child support agencies. Offerors were required in their proposals to propose initiatives to improve services in Baltimore City and to improve interagency relationships. The proposal by PSI to extend the use of PRISM to the State and local child support agencies was within the parameters of this requirement. Therefore, PSI's offer provided added value in that it would make ad hoc reporting accessible to the State and local agencies. In this regard, the Board rejects Appellant's assertion that necessary data would not have been available to PSI.

The Department provided information to PSI and to Appellant that the data extract would be available for use in producing ad hoc and other data management reports. The Department's ability to provide data reports was not an assumption and would not result in substantial additional costs because the data extract was already being produced.

Appellant also asserts that evaluation on PRISM in certain criteria amounted to evaluation of a non disclosed factor. Non disclosed factors should not be used in evaluating proposals, and a disclosed factor must be reasonably related to all criteria under which it is considered. Calso Communications, MSBCA 1377, 2 MSBCA ¶185 (1988) at p. 15.

PRISM was discussed in other categories but was not the sole consideration for the ranking in those categories. PRISM was discussed as information technology and as a resource. Information technology was evaluated under Facilities and resource was evaluated under Offeror's Qualifications as provided for in the RFP. However, we hold that an agency is not precluded from considering an element of a proposal under more than one evaluation criterion where the element is relevant and reasonably related to each criterion under which it is considered. See Infrared Technologies Corporation, B-282912, Sept. 22, 1999, 99-2 CPD ¶ 41, note 2; One Source Management, Inc., B-278044.4, B-278044.6, June 12, 1998, 98-2 CPD ¶11 at p. 6. From our review of the record we do not find that PRISM was improperly considered.

We find that Appellant's assertion that MAXSTAR (as described in the Facilities chart from the Proposal Ranking Sheet) is superior to PRISM is not supported by the record. The record reflects a reasonable basis for the Evaluation Committee to have concluded that PRISM was superior.

**(b) Training**

Training was one of the service requirements under the Internal Policy and Procedures factor under the Work Plan for Proposed Services evaluation criterion. PSI's training proposal is more detailed and comprehensive than Appellant's proposal. PSI offered to share training with the State during discussions and during its oral presentation. Overall, the Evaluation Committee found PSI's proposal to be stronger in Internal Policy and Procedures than the proposal of Appellant.

**(c) Key Personnel**

As discussed above, and contrary to assertions by Appellant, the record reflects that PSI did comply with RFP § 4.3.3.7 regarding key personnel. PSI did provide job descriptions, resumes and letter of intent for key personnel. We will further discuss one other issue concerning this criterion.

PSI did initially identify an employee of Appellant as the Queen Anne's County Operations Manager, Mr. B, who had not, in fact, been offered a position by PSI.<sup>5</sup> Because PSI hoped that the incumbent (under Appellant) would remain as Operations Manager if PSI was awarded the Contract, PSI did not include a resume or a letter of intent. The Evaluation Committee questioned this employment. PSI offered a replacement, whose resume was already provided in its proposal, in response to the Committee's question regarding the individual proposed for the Queen Anne's County Operations Manager. The identification of the replacement did leave the Special Projects Coordinator position for Baltimore City vacant. However, PSI did indicate that it would recruit a new candidate for the Special Projects Coordinator position. Also, PSI included in its proposal a detailed description for the Project

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<sup>5</sup>PSI incorrectly identified the position as being held by a female person in its proposal and in its response to the Committee's question about the position.

also note the relatively small size of the Queen Anne's County operation compared to the Baltimore City operation. While PSI's assumption that Mr. B would accept employment led it to not include the required resume and letter of intent, we do not find that this alleged failure to comply with the RFP requires that the appeals be sustained. The facts here simply do not compare with those that led the Board to sustain the appeal in Michael Scott Cohen, MSBCA 2233, 5 MSBCA ¶492 (2001) where a certain number of years of particular legal experience in a contract for legal services was required and the Procurement Officer improperly waived the failure to meet such requirement. The asserted failures herein differ in severity from those described in Essex Corp., B-246536.3, 92-2 CPD ¶170 (1992), Xeta Int'l Corp., B-255182, 94-1 CPD ¶109 (1994), and Corporate America Research Assoc., Inc., B-228579, 88-1 CPD ¶160 (1988) cited by Appellant. Based on the record, we conclude that the tied ranking for the Assigned Personnel criterion is not materially flawed as a result of the Queen Anne's County Operations Manager issue.

**(d) Staff**

RFP § 4.3.3.2B required the offeror to provide position descriptions for each labor category and plan for recruiting and hiring for vacant positions. PSI provided position descriptions for each labor category. Also, in addition to indicating that it would offer employment to the current contractor's staff and estimating that the majority of these employees would accept positions, PSI included its recruitment plan that would facilitate the hiring for and filling of vacant positions. PSI provided a detailed description of the process it would use to fill vacant positions if employees of the current contractor did not accept employment with PSI. The evaluation criteria for assigned personnel did not factor in whether or not an offeror (i.e. Appellant) employed (as it presumably did) all of the necessary key personnel and staff. The staff factor was focused on relative experience and education of key personnel and job descriptions for other labor categories that would be used to carry out the functions of the project. We conclude that the Committee appropriately considered the staff factor in its evaluation of the proposals.

**(e) Furniture**

Respecting the Facilities criterion, PSI provided a detailed discussion of the facility layout to include individual offices, modular furniture arrangement, conference facilities, break facilities, file room, storage, space and furniture for State-furnished staff and for CSEA personnel, space for legal units, space for genetic testing and space for self-assessment and audit staff. PSI proposed using a modular furniture arrangement similar to that planned for the 20<sup>th</sup> Judicial District of Tennessee.

Additionally, PSI fully addressed the Evaluation Committee's concern about start up in its response to Discussion Issue 47.

**(f) Information Technology**

Information technology is one of the subfactors under Facilities. The Committee properly considered PRISM within any of the criteria subfactors to which PRISM or information technology is relevant. PRISM was discussed in other categories but was not the sole consideration for the ranking in those categories. The discussion in other categories permitted an evaluation of how this technology would be used to enhance a specific function. Under the Facilities criterion, the Evaluation Committee evaluated information technology based on its contribution to the quality and efficiency of service and to the attainment of Contract goals. PSI offered PSI Link, a tracking system for customer service, which is the PRISM database for producing ad hoc and management reports, making case processing decisions, using imaging technology to minimize use of hard copy records and permitting multiple workers access to the information. The evaluation of the PSI imaging proposal was discussed only under the Facilities criterion. The record reflects that the Evaluation Committee viewed PRISM as an additional benefit and not as a stand-alone evaluation factor. As previously stated, the Committee properly considered PRISM under more than one evaluation criterion because it is relevant and reasonably related to each criterion under which it is considered.

**(g) Telecommunications Plan**

The offerors' telecommunications plans are discussed in their proposals under the telecommunications plans factor for the Facilities criterion and the customer service factor for the Work Plan criterion. Accordingly, the telephone systems for Appellant and PSI had to be evaluated in both criteria. PSI's proposal and response to Discussion Issues thoroughly addresses telephone lines and describes the features under facilities, customer service and transition.

The alleged "Havoc" from PSI's proposed new telephone system was not, in fact, an issue for the Evaluation Committee. In notes made by one person during the Committee's checklist review of PSI's proposal, there was a comment: "What kind of havoc will be created in establishing new #'s and notifying customers of new #'s." PSI addressed the Evaluation Committee's concerns about its telephone system in the Discussion Issues issued on April 24, 2003.

The RFP required offerors to detail how they would meet facility requirements to include the provision of telephone and data lines. PSI described its plan for meeting this requirement. The Evaluation Committee pointed out in the discussions that the data line was already available at the current locations, and the acquisition would only be required if PSI leased space at different locations. This information was not included in the RFP; however, it was known by Appellant. Therefore, the Committee was bringing the availability of data line information to PSI's attention does not constitute error.

The Department, in an apparent attempt to enhance the transition process, made an inquiry of Appellant 30 days before the expiration of its contract about availability of existing telephone numbers. It does not appear from the record that this was an effort to take the lead in

arranging telephone and data lines for PSI. Contrary to Appellant's assertions, the Department's efforts to enhance a transition is not a violation of the procurement process.

We turn now to consideration of Appellant's allegations of evaluator bias.

Appellant relies in part on the 2002 audits and investigation initiated by Ms. Theresa Kaiser, then CSEA director, to support its allegation that the Evaluation Committee perceived Appellant to be uncooperative in audits and to have an animus toward Appellant.

Appellant makes a number of other allegations that the members of the Evaluation Committee were biased and engaged in deliberate misconduct in reviewing Appellant's proposal. Appellant alleges that a number of the members of the Evaluation Committee were employees of the Child Support Enforcement Administration (CSEA) who opposed privatization of child support enforcement services and who were attempting to end privatization by awarding the contract to PSI, an offeror that they knew was destined to fail. In this regard, Appellant asserts that the present CSEA director, who replaced Ms. Kaiser, desired that privatization fail and, to that end, had made a point of targeting Appellant's success in operating the program. Appellant further alleges that it has endured numerous false allegations regarding its performance from CSEA employees who are openly opposed to privatization. Appellant also alleges that the composition of the Evaluation Committee was altered from procurements in 1999 and 2002 in order to reduce Appellant's chances of being selected. Appellant states that in the prior procurements, a representative of the Department of Social Services was included on the Evaluation Committee but was not included in the present procurement. Appellant complains that representatives of Baltimore and Anne Arundel Counties were added to the Evaluation Committee who were unfamiliar with Baltimore City and also saw privatization as a threat to their livelihood. Appellant alleges that these individuals also favored PSI because they wanted to select an offeror that would fail. Appellant points to aggressive questioning of its representatives during the oral discussions as evidence that members of the Evaluation Committee were biased against it. Finally, Appellant argues that the Evaluation Committee members must have been biased because other CSEA officials who were not on the Evaluation Committee had, in the past, made negative comments about Appellant's performance and that inspector general oversight over the performance of the program by Appellant was removed in order to ensure Appellant would not be selected in the instant procurement.

Appellant's claim of bias is based on inference or supposition and is legally insufficient. This Board has repeatedly ruled that claims of bias cannot be based on inference or supposition. W.M. Schlosser Co., Inc., MSBCA 2126, 5 MSBCA ¶465 (1999) at p. 5 (citing B. Paul Blaine Associates Inc., MSBCA 1123, 1 MSBCA ¶58 (1983); Information Control Systems Corp., MSBCA 1198, 1 MSBCA ¶81 (1984)). Appellant argues that the Board, citing language from the Board's decision in Benton & Associates, MSBCA 2196 and 2201, 5 MSBCA ¶487 (2000), sets too high an evidentiary bar to establish evaluator bias. Actual bias must be established. The record does not reflect any actual bias.

Appellant has not offered any evidence that any member of the Evaluation Committee had an intention to harm or favor either offeror, that any member opposed the concept of privatization or that any member would or did deliberately recommend that an offeror be selected that was destined to fail in the provision of the required services. The three (3) members of the Evaluation Committee who testified at the hearing specifically denied any such motivation or animus. The record also fails to support Appellant's contentions regarding the present CSEA director and the removal of inspector general oversight.

Appellant also contends that no efforts were made to insure that the members of the Evaluation Committee were not biased and did not have a conflict of interest. This is incorrect. The Evaluation Committee members were provided with a list of duties and responsibilities. The duties and responsibilities stated that each member of the Evaluation Committee was required to render a fair and impartial evaluation based exclusively on (1) the evaluation process contained in the RFP, (2) the contents of the offerors' proposals and information gained from the clarification of proposals, (3) oral presentations, and (4) discussions with offerors or legitimate sources of reference. The Evaluation Committee members were instructed that they were required to perform their evaluation without prejudice or bias and with no conflict of interest. The Evaluation Committee members were instructed that one of their duties, if they found a conflict of interest, was to report it immediately to the Procurement Officer or to the chair of the Evaluation Committee. In the present case, there is no evidence that any member of the Evaluation Committee failed to comply with his or her duties and responsibilities. In this regard, as discussed below, we reject Appellant's assertion that the failure of some Evaluation Committee members to complete individual checklists and/or ranking sheets (i.e., a failure to comply with his or her duties and responsibilities) tainted the procurement.

Returning to Appellant's allegations of bias involving Ms. Kaiser, the record reflects that Ms. Kaiser's tenure with the State terminated on January 15, 2003. The RFP was issued March 4, 2003. Although Ms. Kaiser was director of CSEA when the RFP was drafted and she attended at least one meeting of the committee that drafted the RFP, we find that Ms. Kaiser did not have any material input in the development of the RFP. We find she had no input in the recommendation for award. The Evaluation Committee was established after the issuance of the RFP. The RFP was not drafted in a manner so as to favor a particular offeror. The record further reflects that the Evaluation Committee was not influenced by the investigations of Appellant during Ms. Kaiser's tenure. The Evaluation Committee was made aware of the audits and investigations by Appellant's proposal which discussed the results of the audits performed by the Department's Office of the Inspector General, the Department of Legislative Services and the investigation conducted by the Office of the Attorney General. However, this information was not considered in the Committee's evaluation of Appellant's technical proposal. The Committee's technical evaluation ranking sheet and evaluation summary do not reference the audits and investigations that occurred during Ms. Kaiser's tenure.

Regarding the issue of whether Appellant was perceived by the Evaluation Committee to be uncooperative in audits, we note that the Committee's discussion issues state, "[t]he [Appellant's] written response to Discussion Issues did not include procedures that would be used for conducting audits of its fiscal and security operations. Please provide details by

documenting how those audits will be conducted. In addition, please document the competency level that [Appellant] will require of the Internal Audit and Quality Assurance subcontractor.” In ranking the proposals, the Evaluation Committee indicated that Appellant “provided detailed plan for audits of fiscal and security procedures in its response to follow-up issues.” Thus, it would appear that the Committee did not, in fact, perceive Appellant to be uncooperative in audits and did not downgrade Appellant’s technical ranking on such basis. The Evaluation Committee’s justification for award as noted above does not reference the 2002 audits and investigations in evaluating Appellant’s proposal. In summary, it would appear that the information provided by Appellant on the audits and investigations of 2002, or information concerning such matter that Evaluation Committee members, if any, may have received from other sources, did not have any impact on the Evaluation Committee and were not considered in evaluating Appellant’s proposal.

Finally, we note that the record does not support Appellant’s argument that Mr. Kevin Webb, a member of the Evaluation Committee who worked for Baltimore County’s child support agency, was biased against Appellant because, while participating in the procurement, he conducted a jurisdictional coding audit from which he erroneously concluded that Appellant rather than Baltimore County was largely responsible for coding errors. The record also reflects that the scoring of Appellant’s proposal was not adversely effected by this misunderstanding.

**B. The Department’s evaluation of Appellant’s and PSI’s financial proposals was not arbitrary, capricious or unreasonable.**

Appellant errs in its assertion that the RFP provided for evaluation of the base contract period and not the option years. Appellant also errs in asserting that the technical and financial proposals were not evaluated independently of each other.

**(a) The Department properly included the option years in the financial evaluation as required by the RFP.**

Appellant contends that the Department’s review of its financial proposal was arbitrary and capricious because the Department included the cost of two option years in the total price used to establish the financial ranking of the proposals. Appellant states that this alleged error requires that the procurement be set aside because it submitted the lower price for the initial three year, three month contract period and because the PSI proposal was lower only if the two option years were included. Appellant claims that it should be determined to be the low bidder based on a Department of Budget and Management budgetary approval document which does not reflect option years. However, the methodology set forth in the RFP is controlling. The RFP instructs the Committee to review each proposal for total price, to include the option years, in order to establish a financial ranking of proposals, from lowest to highest. The RFP contains Price Forms for Baltimore City, Queen Anne’s County and CSES equipment. The final price of each Price Form is entitled Total Price. The final lines of the Price Forms for Baltimore City and Queen Anne’s County include amounts for the base contract period and the option periods. These amounts plus the amounts for CSES equipment were to be totaled to derive an offeror’s price.



This total price, which includes option years, was then used by the Evaluation Committee to determine the rankings from the lowest to the highest. The financial offers were as follows:

Offeror	Financial Offer	Financial Rank
PSI	\$56,285,505	1
Appellant	\$56,776,979	2

Therefore, the evaluation of the financial offers was based on the evaluation factors set forth in the RFP, which included the option years in the total price. The Department of Budget and Management budgetary approval document was not the governing factor for determining the total price, but rather the RFP. This is further borne out by the Board of Public Works Agenda, which includes the option periods in the total price.

The evaluation of the financial proposals was based on the evaluation factors set forth in the RFP as provided in COMAR 21.05.03.03A(1). Appellant erroneously asserts that options were included as an unannounced afterthought for evaluation. The RFP reflects that the option years were to be considered as part of the total price. The last BAFO was used to evaluate the financial proposals, and PSI, with the lowest financial offer including the option years, was properly ranked #1 for the financial proposal.

**(b) The technical and financial proposals were not evaluated simultaneously.**

Appellant alleges that the Evaluation Committee simultaneously evaluated the technical and financial proposals. The record does not support this allegation. The technical and financial proposals were independently evaluated in accordance with the RFP. The financial proposals were separately sealed. The Evaluation Committee completed the technical proposal ranking for each proposal. The financial proposals were opened after the Evaluation Committee completed the technical ranking of the proposals.

Appellant erroneously identifies as simultaneous evaluations the statutorily permitted procurement steps of discussion and BAFO in negotiated competitive sealed proposals. § 13-304(d), State Finance and Procurement Article, Annotated Code of Maryland; COMAR 21.05.03.03C and COMAR 21.05.03.03D. These negotiated steps are set forth in the RFP. As part of the discussion process, and in an attempt to obtain the best value for the State, the Evaluation Committee identified areas in the financial proposals of Appellant and PSI where adjustments could be made. The discussions with PSI of its financial offer related to areas identified by the Evaluation Committee where cost savings could be achieved, including technical areas. The discussions with Appellant related to an accounting for all cost areas based on changes in technical areas. During the discussions, offerors were asked to document the information provided at the discussion meeting that had not already been provided to the Committee in writing. The purpose of discussions and BAFO's is to maximize the State's ability to obtain the best value based on the requirements and the evaluation factors in the RFP. The second BAFO clarified Appellant and PSI responses to the discussion issues. The BAFO's

provided both offerors opportunity to review their technical and financial proposals for any additional changes. Both PSI and Appellant reduced their price offers in their BAFO's in response to the discussions.

PSI's financial proposal is not higher than Appellant's financial proposal. Based on evaluation criteria set forth in the RFP, PSI submitted the lowest offer based on the evaluation of the BAFO's. The Evaluation Committee's composite ranking form and the Evaluation Summary provide detailed information on the evaluation process and comparison of proposals. These documents do not reflect that the Department failed to comply with the statutory, regulatory, and RFP procedures for discussions and BAFO's.

**C. The Procurement Officer properly determined PSI to be responsible and its offer to be responsive.**

Appellant alleges that the award to PSI violates applicable procurement statutes and regulations because PSI's offer is not responsive. COMAR 21.01.02.01B(78) defines "Responsive" as a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids. However, the Department used the competitive sealed proposal procedures for this procurement (rather than an invitation for bid) in accordance with § 13-104, State Finance and Procurement Article, Annotated Code of Maryland and COMAR 21.05.03. Competitive sealed proposals are not evaluated based on a concept of strict responsiveness. *See The Tower Building*, MSBCA 1057, 1 MSBCA ¶13 (1982). Therefore, the concept of strict responsiveness is not relevant to this solicitation, and, in any event, the record does not support Appellant's allegations that PSI's offer failed to meet the requirements of the RFP.

Contrary to Appellant's allegation, the Procurement Officer properly determined that PSI is a responsible offeror; that is, one "who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance." *See* RFP § 5.3.A.1 and COMAR 21.01.02.01B(77). Responsibility encompasses an offeror's capability to fulfill the terms of the contract. *Covington Machine & Welding Co.*, MSBCA 2051, 5 MSBCA ¶436 (1998) at p. 5. Here, the Procurement Officer properly exercised her discretion in determining that PSI was a responsible offeror capable of performing the contract requirements identified in RFP § 3.4.

Because the Procurement Officer is in the best position to assess responsibility, the Board has consistently held that it "will not disturb the Procurement Officer's determination regarding responsibility unless that decision was arbitrary, capricious or clearly erroneous." *Covington Machine & Welding Co.*, *supra*; *see Asplundh Tree Expert Co.*, MSBCA 2087, 5 MSBCA ¶449 (1998) (Procurement Officer's determination regarding responsibility not to be disturbed unless there is no rational basis for his conclusion); *Environmental Controls, Inc.*, MSBCA 1356, 2 MSBCA ¶168 (1987).

(a) **The determination of whether PSI was a responsible offeror has nothing to do with comparisons between PSI and Appellant.**

Appellant focuses on comparisons between PSI and Appellant. While such comparisons are relevant to the technical evaluation and ranking of the parties' proposals, they have nothing to do with the Procurement Officer's threshold determination that PSI is a responsible offeror capable of performing the contract requirements. At issue before the Board on this point is whether the Procurement Officer had no rational basis for her conclusion that PSI is a responsible offeror. Asplundh Tree Expert Co., supra.

(b) **The Procurement Officer properly determined that PSI's experience and real-world performance was sufficient to make it a responsible offeror.**

In arguing against PSI's reliability, Appellant suggests that "PSI's real-world performance is consistently below that of [Appellant]." As shown above, such comparison is irrelevant and not supported by the record. A reasonable person could find from information submitted by PSI in its proposal that PSI has the program knowledge, child support skills, technical resources, hands-on experience, and management expertise to meet Maryland's contract objectives.

Appellant argues that PSI cannot be a responsible offeror because none of PSI's other offices have handled a caseload as large as Baltimore City's. However, there are no other privately-run child support offices in the country with case loads as large as Baltimore City's. Nevertheless, from PSI's proposal it can be determined that PSI has managed large privatized child support operations around the nation.

Furthermore, the Evaluation Committee specifically inquired as to PSI's experience in large urban areas, and it asked how PSI's other experience qualified it to operate a child support office as large as Baltimore City's. Based on information provided by PSI, the Procurement Officer had a rational basis for determining that PSI's experience qualified it as a responsible offeror capable of performing the present contract.

(c) **PSI's experience and performance in urban privatized child support offices.**

As reflected in Section 5 of PSI's proposal, PSI has served as the contractor in other large urban privatized child support offices in Omaha, Nebraska and Atlanta, Georgia. It also manages office in Knoxville, Tennessee; Colorado Springs, Colorado; and Chesapeake and Hampton, Virginia. When PSI began operating the Omaha and Atlanta sites, they were the largest and second largest privatized child support contracts in the nation.

In addition to setting forth PSI's experience managing child support operations in urban jurisdictions, PSI's proposal also detailed its experience managing large complex projects for its other closely related business activities. PSI described its role in designing and rolling out a federally certified child support system in Michigan and in three contracts where PSI provides all services for the administration of the statewide child health insurance program. Further, PSI

discussed its experience in providing consulting and technology development services for certain of the nation's large jurisdictions.

The Evaluation Committee and Procurement Officer could reasonably have found that PSI demonstrated an ability to implement its proposed plan for the current contract based on the experience it has gained through successful implementation of full-service child support privatization contracts in several states; through specific experience operating other complex privatized operations; and through its portfolio of child support management consulting projects that focus on improving service delivery in urban areas.

**(d) The Procurement Officer properly determined that PSI has the requisite fiscal integrity and reliability.**

Appellant also seeks to compare its financial strength with that of PSI. The record reflects that Appellant is the larger company. Partially on this basis, the Department ranked Appellant ahead of PSI on financial strength. However, the issue in determining offeror responsibility is not how the two companies compare, but whether PSI has demonstrated the fiscal integrity and financial resources necessary to meet the requirements of the Contract. The record reflects that it has done so.

The information submitted by PSI shows that it has operated continuously for almost 20 years and has grown steadily in size and financial strength, experiencing growth in both revenue and profit. As required by RFP § 4.3.7, PSI provided copies of audited statements for the last three years, its most current cash flow statement, and a letter of credit from a major national financial institution.<sup>6</sup> PSI's revenue totaled more than \$Y million in 2002, and PSI asserted it has never failed to meet its financial commitments.

Nevertheless, Appellant argues that PSI does not have the financial strength to perform the current contract. However, as demonstrated in PSI's proposal and in information sought by and provided to the Procurement Officer, PSI has access to unused credit lines in excess of \$X million through a major national financial institution.

Appellant argues that PSI's use of a line-of-credit denotes financial instability. However, the RFP specifies that a line-of-credit can be used as evidence of financial responsibility and stability. Based on the record, we find that there was a rational basis for the Procurement Officer's decision that PSI has the financial strength to run the current program.

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<sup>6</sup> The name of this institution and the figures for credit lines and revenue are not provided due to confidentiality concerns. The name and figures appear in the record.

(e) **The Procurement Officer properly found that PSI is able to achieve an orderly transition of contract performance.**

Based on the original implementation deadline, PSI was properly found to be a responsible offeror because it provided a detailed transition plan that met the requirements of the RFP.<sup>7</sup> In addition, PSI's proposal demonstrated that it has the experience needed to transition the child support offices in Baltimore City and Queen Anne's County to PSI smoothly and effectively. As set forth in its proposal, PSI has:

- (a) started up 26 full-service child support offices over the last 11 years, on time;
- (b) transitioned child support offices from other vendors within timeframes; and
- (c) achieved an on-time record in opening 14 new hire reporting operations and five privatized voluntary acknowledgment processing centers.

(f) **Appellant's reference to the "Lockheed IMS experience" has nothing to do with the determination that PSI is a responsible offeror for this Contract.**

Appellant argues that the award of the Contract to PSI would lead to "a repeat of the Lockheed scenario in the 1996 procurement" because PSI's proposal allegedly over-estimated its collections in order to offer a lower price percentage. As an initial matter, the record reflects that what Lockheed did more than seven years ago has nothing to do with the Procurement Officer's determination that PSI was a responsible offeror capable of performing the present Contract. Appellant has not shown that the Procurement Officer had no rational basis for determining that PSI was capable of performing the Contract for the price it offered. Indeed, the amount of child support payments that PSI will collect over the life of the Contract ultimately will depend on the strength of PSI's implementation plan, a plan which the Evaluation Committee ranked above that of Appellant.

Based on the record relating to review of PSI's experience, financial stability, and strength of its detailed technical plan, we find that the Procurement Officer had a rational basis to determine that PSI is capable of performing the present Contract. The Board will not substitute Appellant's subjective views nor its own for that of the evaluators. See Maryland New Directions, Inc., MSBCA 1367, 2 MSBCA ¶179 (1988).

PSI meets the criteria for responsibility as defined under Section 5.3.A.1 of the RFP. PSI submitted a proposal that demonstrated its capability in all respects to perform fully the Contract requirements, and it demonstrated its integrity and reliability to assure good faith performance. PSI may be deemed responsible because the record reflects that PSI met the RFP requirement for demonstrating real-world experience on a project of the size and complexity described in the RFP, and the record further reflects that PSI has the requisite financial integrity and reliability to perform and guarantee a successful operation to include an orderly transition of contract

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<sup>7</sup> Since the filing of Appellant's original protest of the award of this Contract to PSI, the State extended Appellant's Contract by six months. Accordingly, PSI would not be required to implement the current Contract until January 1, 2004.

performance. In short, the record reflects that PSI does have the necessary experience and financial stability to perform the Contract, and, save the Queen Anne's County Operations Manager issue discussed above, PSI did respond to all mandatory components of the RFP.

Appellant's perception of financial risk should the Contract be awarded to PSI is a mischaracterization of the Evaluation Committee's deliberations and of the Procurement Officer's determination of responsibility. These allegations by Appellant, we find, are without merit.

**D. The Procurement Process did not violate State law.**

**(a) Descending order of importance.**

The evaluation of proposals was conducted based on the criteria included in the RFP.

Section 5.4 of the RFP set forth seven major evaluation criteria to be considered in the procurement and provided that the criteria were listed in descending order of importance. Appellant argues that during the debriefing the Procurement Officer stated that each of the major criteria was given equal weight. The Procurement Officer's testimony reflects that she would not have said this, and there is not other support of Appellant's assertion in the record.

Appellant's debriefing was held on May 29, 2003. The purpose of the debriefing was to provide Appellant with information on the evaluation of its proposal, and the Department provided Appellant with a schedule showing the evaluation criteria and Appellant's ranking as to each criterion. Appellant was also apprized of the process that was followed. The record establishes that the Department followed the procedural requirements of the RFP, and the major criteria were considered in descending order of importance. PSI was found to be superior (i.e. ranked) on the first, fourth and seventh criteria, Appellant was found superior (i.e. ranked) on the third and fifth criteria, and the offerors were found to be equal (i.e. tied) on the second and sixth criteria.

Following the debriefing meeting on June 2, 2003, the Procurement Officer sent a letter to Thomas A. Grissen, Appellant's General Manager, in which she memorialized the matters discussed at the meeting. The Procurement Officer's June 2, 2003 letter contains a detailed list of the questions asked by Appellant and the responses given by the Procurement Officer. Nowhere in this letter does the Procurement Officer indicate that the major criteria were given equal weight. Indeed, the whole concept of weight appears to emanate from Appellant, which contends that a numerical point system should have been utilized. The Department, however, chose not to establish such a system in the RFP. As will be further explained below, there is no requirement under Maryland procurement law or regulation that a numerical or point system be utilized.

Appellant also argues that the Department violated COMAR 21.05.03.03A(3) because the economic benefits criterion was given equal weight and this provision requires that the economic benefits factor not be given more than 10% weight in a technical evaluation. Appellant is incorrect. COMAR 21.05.03.03A(3) provides in pertinent part:

When a point system is used in the evaluation of these proposals, up to 10 percent of the total allocable technical points may be awarded under an economic-benefits evaluation factor. If a point system is not used, an economic benefits evaluation factor may be included in the technical evaluation factors and be ranked in its relative order of importance, as the Procurement Officer determines.

In the present procurement, because a point system was not used in evaluating the proposals of Appellant and PSI, the 10% rule of this regulation is inapplicable, and the relative order of importance to be afforded the economic benefits factor is left to the determination of the Procurement Officer. The Procurement Officer in this case ranked the economic benefits factor last in the relative order of importance of the seven major criteria.

**(b) The evaluation and ranking methodology in the RFP was not arbitrary or irrational.**

Section 5.4 of the RFP set forth the criteria and process for the technical evaluation of proposals. This section establishes seven evaluation criteria: (1) work plan for proposed services, (2) assigned personnel, (3) offeror's qualifications, (4) facilities, (5) transition plans, (6) quality assurance assessment and audit plan, and (7) economic benefits to the State. The Work Plan for Proposed Services and the Offeror's Qualifications criteria contained seven and four factors, respectively, to be considered. As previously indicated, § 5.4 stated that the seven criteria would be considered in descending order of importance. Further, at the Pre-Proposal Conference held on March 14, 2003, the Procurement Officer explained that, under § 5.4 of the RFP, if there were three offerors, the proposals would be ranked one, two, and three under each of the seven criteria. Accordingly, because only two proposals were submitted, PSI and Appellant were ranked as either 1 or 2 (or tied) with respect to each criterion.

Appellant asserts that the ranking system was too "primitive" to evaluate the proposals and that the Department should have utilized a more elaborate numerical or point system. This Board does not have jurisdiction over this issue, however, because Appellant failed to file a protest before the closing date for proposals. COMAR 21.10.02.03A provides in pertinent part:

A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals.

Accordingly, because the absence of a point system was apparent from the RFP, Appellant was required to file a protest concerning this issue before the closing date for receipt of proposals.

However, Appellant contends that it was not required to file a protest prior to the closing date for receipt of proposals because the ranking system that would be utilized by the Evaluation

Committee was not described at all in the RFP. Thus, Appellant argues it had nothing to protest. This argument does not avail Appellant because if the RFP were so cryptic or ambiguous that it failed to describe any evaluation system at all, this would be apparent from the RFP itself, and thus Appellant was required to file a protest on this basis before the closing date for receipt of proposals.

The Board's decision in Free State Reporting, Inc., MSBCA 2143, 5 MSBCA ¶476 (1999) is on point. That case involved a procurement of court reporting services by the Office of Administrative Hearings (OAH). In its RFP, the OAH stated that the technical proposals of offerors would be made on the basis of the evaluation criteria listed on an enclosed evaluation form. As a result of a clerical error, however, this form was not sent to potential offerors with the RFP package. The form was later made available at the pre-bid conference and may have been sent to certain offerors by facsimile or mail. No offeror protested the absence of evaluation factors prior to the opening of proposals. Following the award of the contract to a competitor, however, Free State protested and filed an appeal with this Board, arguing that it did not receive a copy of the evaluation criteria and that there existed a bias in favor of stenotype reporting at the OAH which was not disclosed as a potential evaluation factor. The Board ruled that it did not have jurisdiction over Free State's protests because it had failed to raise them prior to the opening of the proposals (*Id.* at pp. 6-7).

Here, the RFP advised potential offerors that "[t]his evaluation will be made on the basis of the criteria listed on the enclosed evaluation form. Agency Report Exhibit 1 at 25 (emphasis added). According to Free State, it did not receive the attachment. Therefore, Free State's protest on this ground is an impropriety which should have been apparent to Free State from the solicitation itself. Stated another way, Free State's alleged inability to prepare its proposal in accordance with the factors which were considered by OAH arises from the fact that Free State failed to raise the issue prior to submitting its proposal. The absence of the evaluation sheet, in the face of the clear reference in the RFP, raised a patent ambiguity for which Free State was obligated to request clarification. Helmut Guenschel, Inc., MSBCA 1434, 3 MSBCA ¶211 (1989). As the absence of evaluation factors would have been obvious to Free State, the appeal of any protest related to the absence of the evaluation factors (and their relative importance) may not be considered on the merits. Thus, the Board does not have jurisdiction to consider this appeal, see COMAR 21.10.02.03C (providing that such a late protest may not be considered) and it must be dismissed. ISMART, LLC, MSBCA 1979, 5 MICPEL ¶417 (1997). Crystal Enterprises, MSBCA 1971, 5 MICPEL ¶407 (1996).

Even if the Board were to conclude that it has jurisdiction over this issue, Appellant's contention that the ranking system was too primitive is without merit. As previously indicated,



potential offerors were advised at the Pre-Proposal Conference that (assuming only two offerors) they would be ranked first or second (or tied) with respect to each major criteria. Appellant argues that the ranking system was too primitive because it failed to include sufficient “granularity” to distinguish between excellent and unacceptable proposals in the context of each individual major evaluation criterion and the factors to be considered. Appellant explains that under a point system in which the ranking of each Evaluation Committee member as to each of the seven criteria and factors within these criteria to be considered in ranking the offerors on such criteria were treated as a point, the offerors could have been as close as 73 to 74 points, respectively, or as far apart as 49 to 98 points.

Appellant’s contention is without merit because the evaluation criteria ranking system set forth in the RFP is rational. Rather than employ a point system, the evaluation methodology focused on major criteria which were listed in descending order of importance. The Evaluation Committee was required to make a judgement as to which offeror was superior as to each of the seven criteria. The assignment of numbers was not required to document such judgement.

There is no legal requirement that the Department adopt a point system such as that espoused by Appellant. COMAR 21.05.03.03A(4), which governs the evaluation of proposals in procurements by competitive sealed proposals, states that numerical rating systems may be used but are not required. The Board has ruled that numerical rating systems are not required. MIS Support Group, Inc., MSBCA 1055, 1 MSBCA ¶17 (1982) at p. 8.

**(c) The Department did not reduce the number of major criteria.**

Appellant argues that the Department violated Maryland procurement law by improperly reducing the number of major evaluation criteria. Appellant suggests that the Department reduced the number of criteria by finding that the proposals submitted by Appellant and PSI were equal with respect to two of the criteria, and, therefore, these criteria were disregarded in making the final award.

Appellant cites no authority in support of this argument. There is no logical reason why an Evaluation Committee cannot find that two proposals are equal with respect to a specific criterion, whether or not numerical rating systems are used. The Board has recognized that in competitive negotiation procurements, an Agency can logically conclude that entire proposals are a tie. United Technologies Corp. and Bell Helicopter, Textron, Inc., *supra*.

In the instant appeals, the effect of the Evaluation Committee finding that the proposals are equal as to a criterion is that neither offeror obtains an advantage over the other as a result of the consideration of the responses to that criterion. Accordingly, the fact that the Evaluation Committee found the proposals to be equal with respect to two criteria does not mean that these criteria were disregarded. We thus reject Appellant’s argument in this regard.

**(d) The Evaluation Committee did not improperly emphasize price proposals over technical proposals.**

Section 5.9 of the RFP requires that technical proposals be given greater weight than price proposals. Appellant suggests that the Evaluation Committee improperly emphasized price over technical proficiency. There is no indication in the record that this occurred. Appellant cites no evidence and states no meaningful analysis to support his suggestion.

In the instant appeals, one cannot logically support the proposition that the Evaluation Committee emphasized price over technical proficiency because PSI was found superior in both areas, and, therefore, was awarded the Contract. If, for example, the Evaluation Committee had found that Appellant had submitted the superior technical proposal and that PSI had submitted a lower price proposal, and the Evaluation Committee had recommended that the Contract be awarded to PSI, then an issue may be presented as to whether price was actually emphasized over technical proficiency. No such issue, however, is logically offered in the instant appeals, and we reject Appellant's argument.

**(e) The Offerors' technical proposals and price proposals were evaluated independently of each other in compliance with COMAR 21.05.03.03A(2) and the terms of the RFP.**

While we have discussed this issue above in dealing with assertions that the Department's evaluation of the financial proposals of Appellant and PSI was arbitrary, capricious and unreasonable, we will also revisit the issue under Appellant's assertion that the procurement process violated State law.

COMAR 21.05.03.03A governs the evaluation by a State Agency of offers in procurements by competitive sealed proposals and the negotiation of contracts awarded through this method. Subsection A2 of this regulation provides that "[t]echnical proposals and price proposals shall be evaluated independently of each other." Consistent with this requirement, Section V (Evaluation Procedures) of the RFP delineated specific procedures for the independent evaluation of technical and price proposals. Section 5.3 of the RFP provided that the Evaluation Committee rank proposals according to the evaluation criteria established in § 5.4. Section 5.3 further stated that the offerors should not include cost data in the technical proposal. Additionally, §§ 5.3 and 5.4 provided that any oral presentation must occur as a part of the technical evaluation. Section 5.5 of the RFP stated that a separate price volume must be submitted by each qualifying offeror and that it would be distributed to the Evaluation Committee following the completion of the technical evaluation. In the separate financial evaluation, the Evaluation Committee was required to review each proposal for total price in order to establish a financial ranking of the proposals from lowest to highest. Finally, § 5.6 of the RFP provided that, after the price proposals were ranked, the Procurement Officer may request qualified offerors to revise their initial proposal by submitting a BAFO. The Procurement Officer's authority to request revised proposals as part of the BAFO process was not limited to price. Section 5.6 stated that the Procurement Officer must notify each qualified offeror of the scope of the requested BAFO. Section 5.6 also stated that the Procurement Officer could request

more than one BAFO and could consult with, and seek the recommendation of, the Evaluation Committee during the BAFO process.

After receipt of the proposals from Appellant and PSI, the Evaluation Committee met twice to discuss the proposals and to adopt discussion issues to be presented to each offeror prior to oral discussions. On April 24, 2003, the Procurement Officer wrote to both Appellant and PSI, enclosing discussion issues and requesting each offeror to respond to the issues in writing prior to the scheduled dates for the discussion meetings. The detailed discussion issues provided to each offeror covered numerous subjects.

Pursuant to the Evaluation Committee's request, on April 29, 2003, Appellant and PSI both provided detailed responses to the discussion issues. Following the submission of these written responses to the discussion issues, the Evaluation Committee met with both Appellant and PSI. After the completion of these discussion meetings, the Evaluation Committee members completed the technical rankings of the offerors.

On May 7, 2003, after completion of the technical rankings, the Procurement Officer notified both Appellant and PSI that they would be permitted to submit a BAFO, and she requested that they address additional technical and financial issues in their BAFO's. For example, PSI was requested to respond to 14 detailed questions which related to intake, decentralized collections, organization staffing, facilities, equipment, software, quality assurance and internal audit functions, and certain financial matters.

Following the Evaluation Committee's review of the offerors' responses to the BAFO issues, the Evaluation Committee determined that there was a further need for clarification. Accordingly, on May 9, 2003, the Procurement Officer sent a second request for BAFO's to Appellant and PSI. The Procurement Officer posed two additional issues to Appellant that related to the establishment of paternity. The award was made following the receipt of the second BAFO's from Appellant and PSI. The technical evaluation rankings of the offerors did not change as a result of technical information obtained and reviewed as part of the BAFO process.

Appellant contends that the Procurement Officer and the Evaluation Committee violated COMAR 21.05.03.03A(2) and Section V of the RFP because, as a part of obtaining BAFO's, the Procurement Officer sought additional information from the offerors that related to technical issues as well as financial issues. Appellant argues that obtaining this additional information as part of the BAFO's violated the regulation and provisions of Section V of the RFP because they mandate that no technical evaluation can occur after the price volumes of the proposals are distributed to the Evaluation Committee and are opened.

This interpretation of COMAR 21.05.03.03A(2) and Section V of the RFP is incorrect. Neither prohibits obtaining additional technical information as part of the BAFO process after the price proposals have been opened. The regulation requires only that the technical and price proposals be evaluated independently. The RFP provisions require that technical proficiency and price be evaluated independently. The fact that the RFP provisions permit the obtaining of BAFO's relating to both technical and financial matters after the completion of the initial

evaluation of both technical and price proposals does not establish that technical and price proposals are not evaluated independently. In the instant appeals, the rankings and evaluations were entirely independent. There is no indication that the price rankings affected the technical evaluation or vice versa.

Furthermore, the Board does not have jurisdiction over Appellant's claim that the Department violated COMAR 21.05.03.03A(2) because a review of technical matters as part of the BAFO process occurred after the price proposals were ranked. This BAFO evaluation process was set forth in the RFP and, thus, was apparent prior to the closing date for submission of proposals. As explained above, COMAR 21.10.02.03 requires that protests alleging improprieties in a solicitation that are apparent from the RFP be filed before the closing date for submission of proposals. In Free State Reporting, Inc., *supra*, the Board ruled that all protests relating to the evaluation process set forth in the RFP that are apparent from a review of the RFP must be raised before the closing date of submission of proposals, or the Board is without jurisdiction to review them. However, assuming *arguendo* that the Board has jurisdiction to review this issue, we find that no violation of the General Procurement Law, COMAR Title 21, or the instant RFP occurred.

(f) **The failure of some Committee members to complete individual checklists and/or ranking sheets did not taint the procurement.**

The record reflects extensive discovery through written requests for production of documents in the consolidated appeals. The discovery, covering thousands of pages, contains the composite evaluation proposal ranking sheet, the composite evaluation summary, and the notes of some of the Evaluation Committee members. The checklists and ranking sheets of some of the Evaluation Committee members were filled out as a result of procedural instructions from the Procurement Officer and the Department of Budget and Management exercising an oversight role. The checklists and ranking sheets are not required by Maryland law or regulations. Despite Appellant's assertions, the absence of the checklists and ranking sheets (because some Committee members failed to fill them out or turn them in if they were filled out) does not, in fact, reflect negate the Evaluation Committee's recommendation for award. The Maryland Court of Appeals has ruled that the *Accardi* doctrine, requiring that an Agency of the government generally observe rules, regulations or procedures that it has established, does not apply to an Agency's departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of Agency business. Pollock v. Patuxent Institutional Board of Review, 374 Md. 463 (2003). The record reflects that while some Committee members did not complete individual checklists and/or ranking sheets, all Evaluation Committee members participated in the Committee review of the proposals, assisted in the identification of the discussion issues, attended the discussion meetings, participated in the Committee's evaluation of proposals and participated in determining the Committee's recommendation for award of the Contract. The Evaluation Committee reached a consensus on each criterion. Therefore, the lack of checklists and/or ranking sheets notes did not prevent the Evaluation Committee members from expressing their opinions and participating in the Committee's decisions. Accordingly, even if *Accardi* applies,

we perceive no prejudice to Appellant to have occurred as a result of the lack of checklists and/or ranking sheets.

Based on the extensive record compiled in these consolidated appeals, we conclude that the procurement was conducted in accordance with law, regulation and the terms of the RFP, that Appellant was treated fairly and that the recommendation for award to PSI is not arbitrary, capricious or unreasonable. Therefore, it is Ordered this 31<sup>st</sup> day of October, 2003 that the above captioned appeals are denied.

Dated: October 31, 2003

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Robert B. Harrison III  
Board Member

I Concur:

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Michael J. Collins  
Board Member

Certification

**COMAR 21.10.01.02 Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

**Annotated Code of MD Rule 7-203 Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (a) the date of the order or action of which review is sought;
- (b) 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
- (c) 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 2351, 2357, and 2370, appeals of Maximus, Inc. under Dept. of Human Resources RFP No. CSEA/PR-04-001S.

Dated: October 31, 2003

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Michael L. Carnahan  
Deputy Recorder