

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of A & R/Bowie )  
Limited Partnership )  
 ) Docket No. MSBCA 1690  
Under DGS Contract No. )  
TB-000-921-001 )

December 17, 1992

Evaluation - The Board found the re-scoring in this procurement of a subfactor in the Appellant's proposal, during the review of the Second Best and Final Offer which lowered Appellant's score was arbitrary and capricious. The re-scoring violated the mandate for fair and equitable treatment as pronounced in COMAR 21.05.03.03C (3) (a).

Scope of Review - The Board's function is to determine whether the competitive negotiation process was conducted fairly and reasonably. In this particular appeal the Board found the application of the process in this procurement process was defective.

Evaluation Factors - Pursuant to Maryland's General Procurement Law and its implementing regulations offerors are entitled to know the relative importance of each of the evaluation factors, and it is incumbent upon the procuring agency to adhere to the stated criteria.

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APPEARANCES FOR INTERESTED PARTY:  
Glen Construction Co., Inc.

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OPINION BY MR. PRESS

Appellant appeals the Department of General Services (DGS) Procurement Officer's denial of Appellant's protest and the award of Contract No. TB-000-921-001 to Glen Construction Co., Inc.

Findings of Fact

1. On March 27, 1992, DGS issued a Request for Proposal (RFP), requiring offerors to submit detailed proposals for the design/build of a 300 - bed residence at Bowie State University (Bowie). Proposals were due May 21, 1992.

2. The RFP, Page 5, "Evaluation Factors", states: "award of a contract will be made to the responsible offeror whose proposal best meets the needs of the State as set forth herein. Offerors will be evaluated based on the award criteria listed below."

Paragraph b on page 5 sets forth the method for scoring each award criterion as follows:

b. Each offer will be evaluated and awarded a value of from 0 through 10 for each award criteria. Each value will be multiplied by the weight factor assigned to that award criteria to determine the sub-score for that criteria. All sub-scores will be added to develop the total score for each offer.

Paragraph c on page 6 lists the award criteria and gives the relative weight as follows:

Award Criteria:

<u>Criteria</u>	<u>Weight</u>
(1) Price	9
(2) Design/Build Team Qualifications	4
(3) Maintainability/Operability	3
(4) Design Aspects	6
(5) Life Cycle Cost/Energy Conservation	3
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Paragraph d on page 6 then provides:

The award will be made to the offeror achieving the highest total score based on the final offer. However, the State reserves the right to make the award to the other than the highest point score, when in the opinion of the Secretary, Department of General Services, award to an offeror with other than the highest score is in the best interest of the State.

In accordance with this procedure, DGS ranked each offeror's proposal, with the highest possible score that could be achieved being 250 points (DGS allowed 10 points for each category, which when multiplied by the weight factors totaled 250 points.)

3. DGS made a policy decision to expand MBE participation in the design/development area after issuance of the RFP. Accordingly, DGS issued Addendum No. 1 to the RFP, dated April 15, 1992, modifying the RFP with respect to MBE participation and the award

criteria as follows:

A MBE subcontract participation goal of a minimum of 10 percent of the contract has been established for this procurement. The contractor agrees that this amount of the contract will be performed by minority business enterprises. The contractor also agrees that part of the MBE participation will be on the design/development team. MBE participation on the design/development team, and on the project as a whole, will be a consideration in the evaluation of the Design/Build Team Qualifications. Accordingly, the minority business qualifications are to be included with the Design/Build team qualifications submittal.

4. DGS received nine proposals in response to the RFP. The written technical proposals were evaluated by a team consisting of DGS and Bowie personnel. The "design/build team qualifications" award criterion was divided into five subfactors: architect/engineer, contractor, developer, experience and MBE participation.

The first four subfactors were evaluated by one DGS employee and MBE participation was evaluated by another DGS employee.

The third award criterion, maintainability/operability, was evaluated by two Bowie employees. The fourth award criterion, Design Aspects, consisted of three subfactors, architectural/structural, mechanical and electrical, each of which was evaluated by a separate DGS employee. The fifth award criterion, life cycle/energy conservation, was evaluated by one DGS employee.

Each evaluator of the technical proposals acted independently of all other team evaluators. No evaluator of the technical proposal knew the prices of any of the offers and price and technical evaluations were conducted independently of one another. After each submittal, all proposals were reevaluated separately.

5. After the first proposals were submitted and evaluated, separate discussions were held with each offeror on June 17 and 18, 1992, during which the offerors were informed of some of the deficiencies and strengths in their proposals. The First Best and Final Offers<sup>1</sup> were due on July 6, 1992. After evaluating those offers, DGS determined that the prices were above the State's affordable limit of \$7,000,000.00. On July 22, 1992, DGS met

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<sup>1</sup>The RFP "contemplated" First Best and Final Offers.

separately with each offeror for further discussions and read the following statement<sup>2</sup>.

1. Your prices submitted to date for this project exceed<sup>3</sup> the affordability of the State, but are close enough to warrant additional submissions.
2. You are to be given the opportunity to improve your design and to initiate further value engineering<sup>4</sup> which shall reduce costs without reducing the quality of your product or compromise the Request for Proposal. ...."

6. In response, five of the seven offerors submitted cost savings suggestions in addition to price reductions for specific items that had been set forth in the RFP as Exhibit G<sup>5</sup> in an effort to reduce

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<sup>2</sup> There is no allegation that evaluators discussed technical information found in one offer with any offeror other than that offeror. Therefore the record contains no factual predicate for technical transfusion. The RFP required negotiations where individual offerors would be apprised of the weak and strong points of their offer and that this process could be repeated.

<sup>3</sup> In the agency report this is noted as Exhibit 1. This document is also referred to as "Debriefing of Offerors for Design/Build 300 Bed Residence Hall...."

<sup>4</sup> Value engineering is defined in the Construction Dictionary of Construction Terms & Tables as a branch of engineering whose objective is to affect economy in the cost of constructing a project. Evaluating any object's function and bettering the object in terms of dollars and functional objectives.

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EXHIBIT "G"  
COST OPTION ALTERNATIVES

COST, SPECIFY,  
ADD OR DEDUCT

. Interlocking pavers in lieu of concrete walkways with 8" wide by 2'0" deep concrete retaining curbs on each side	_____
. Self-Edging Plastic Laminated Countertops in lieu of Corian	_____
. Baked Metal Toilet Partitions in lieu of Corian, all locations	_____
. Single lever washerless faucets at all vanities in lieu of twist-type faucets	_____

the cost of the project which were received as Second Best and Final Offers on August 5, 1992.

Appellant's Second Best and Final Offer set forth a price of \$6,959,500.00. Appellant's Second Best and Final Offer was the only proposal which offered a price within the affordable limits for the project without submission of a separate list of savings, suggestions, or alternates; limiting its "value engineering" to minor revisions incorporated directly on to the plans.

Glen Construction Company (Glen)'s Second Best and Final Offer, on the other hand, provided the following:

Glen Construction can build the 300-Bed Residence Hall for Bowie State University within your budget if our cost savings ideas are implemented!

Original price on 5/21/92	\$7,398,300
Best and Final on 7/6/92	\$7,314,300
Less Cost Savings	<u>- 389,020</u>
Second Best and Final on 8/5/92	\$6,925,280
Less re-evaluation of overhead and profit	<u>\$ 25,281</u>
Total:	\$6,899,999

\$6,899,999

Appended to this page of Glen's offer was an attachment listing a series of "Cost Savings Ideas for Bowie State University 300-bed Residence Hall (Maintaining the integrity of the RFP)."

7. Sometime between August 5, 1992 and August 14, 1992 the Second Best and Final Offers were evaluated by the technical evaluation team.

8. By letter dated August 20, 1992 and received on August 26, 1992, Appellant was notified by DGS that Glen was awarded, on August 19, 1992, the contract, on the basis that Glen received the highest total point score for its Second Best and Final Offer. On

August 27, 1992, Appellant requested a debriefing with DGS, which was conducted on September 1, 1992 where Appellant was informed it had received the second highest total point score placing it 1 and 1/2 points behind Glen. On September 4, 1992, Appellant filed its protest. Appellant's basis of protest was that "DGS erroneously applied its own procurement requirements and specifications in ranking Glen with the highest score. Furthermore, Glen's offer was not in conformance with the procurement requirements and specifications and was materially defective and non-responsive. As a result, A & R, and not Glen, should have received the highest total point score."

The specific grounds of the protest were:

"A. Glen's price offer exceeded the advertised cost range for the project;

B. Glen's offer was non-responsive because it included alternates, which apparently were accepted in the award to Glen;

C. Glen's offer was non-responsive because it included drywall ceilings in the proposed construction;

D. There was an inappropriate modification to the scores for design/build team qualifications; and

E. The DGS' use of a pass/fail system with regard to MBE participation on the design/development team and the project as a whole violated the clear mandates of the RFP and Maryland law."

9. On or about October 1, 1992, Appellant asked to meet with representatives from DGS so that it could make a presentation with regard to its protest. DGS agreed to meet with Appellant on October 5, 1992, provided that, if necessary, it be given an extension of time in which to file its Procurement Officer's decision with regard to Appellant's September 4, 1992 protest. At the October 5, 1992 meeting Appellant raised orally additional issues not previously set forth in its September 4, 1992 protest.

10. On October 13, 1992 DGS issued its decision on Appellant's

written and oral protest,<sup>6</sup> from which Appellant appealed on October 21, 1992 to this Board.

11. At the September 1, 1992 debriefing Appellant was afforded the opportunity to review Glen's proposal and to request additional time to conduct further review. COMAR 21.10.02.03B requires a protest to be filed "not later than seven days after the basis for the protest is known or should have been known, whichever is earlier." The failure of Appellant to raise issues involving the specifics of Glen's proposal including allegations of a contingent offer and improper evaluation of life cycle costs until its October 5, 1992 oral protest results in their untimeliness since such alleged defects could have been determined upon review of the Glen proposal at the debriefing and the appeal concerning such issues is accordingly denied.<sup>7</sup>

12. Glen offered to provide gypsum board (aka "dry wall") ceilings even though use of gypsum board on metal framing or furring was withdrawn by Addendum No. 1 to the RFP. However, we find that Appellant has failed to meet its burden to rebut the findings of the Procurement Officer that to the extent Glen proposed to use gypsum board it was not in violation of the RFP.

#### Decision

As this Board has previously acknowledged the standard of its review of a Procurement Officer's decision concerning a negotiated proposal is limited. The Board's function is not to reevaluate the proposals nor to second - guess the agency nor to substitute its judgment for that of the agency. The Board's function is to determine whether the competitive negotiations process was

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<sup>6</sup> The parties agreed that the Procurement Officer would answer all aspects of Appellant's written September 4 and oral October 5 protest; even though the October 5 protest was oral.

<sup>7</sup> Appellant in addition, had opportunity at the September 1 debriefing to review the drawings and specifications pertaining to (a) Trash rooms (b) Ladies rooms (c) Handicapped parking (d) Ceiling heights (e) Lounges and accordingly the oral October 5 protest on these issues is untimely and the appeal thereon is accordingly denied.

conducted fairly and reasonably. Maryland New Directions Inc., MSBCA 1367, 2 MICPEL ¶ 179(1988).

The Appellant's appeal emanates from the mandate concerning the evaluation process as provided in COMAR 21.05.03.03C (3)(a).

"Qualified offerors shall be awarded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals...."

Appellant's initial position is stated in Finding of Fact, No. 8. However, during the course of the hearing the Board was informed that the DGS evaluator assigned to the Design Aspects/architectural structural subfactor in the evaluation process saw fit to re-score Appellant's design of the residence during the review of the Second Best and Final Offer which lowered Appellant's overall score by 3 points<sup>8</sup>. The Board finds that this lowering of Appellant's score at that juncture was arbitrary and capricious and violates the mandate for fair and equitable treatment as pronounced in COMAR 21.05.03.03C (3)(a), see AGS Genasys Corporation, MSBCA 1325, 2 MICPEL ¶ 158 (1987), because Appellant reasonably understood from the course of negotiations through the time for Second Best and Final Offers that its design was acceptable and the purpose of the Second Best and Final Offers was to lower the price through value engineering. Appellant did not change its design in its Second Best and Final Offer.

The RFP process in this procurement is iterative. Proposals were submitted with an expectation discussions would follow where offerors would be given an opportunity to improve their proposals. The Board finds the Appellant in this procurement was not treated fairly. The design evaluation process had been completed prior to submittal of value engineering. Appellant was not informed that the Design Aspects of its proposal would be re-evaluated after

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<sup>8</sup> The Board was made aware during the summation on Tuesday, December 8, 1992, that a second protest has been filed with DGS pertaining to the evaluation process. The Board finds the issue raised therein concerning this re-scoring is before this Board in this appeal.



Second Best and Final Offers had been submitted. Value engineering as set forth in Exhibit I was paramount in the process at that juncture for offerors had been directed by oral presentation in the DGS meetings of July 22, 1992 to concentrate on this directive. The expectation was that further evaluation would only reflect value engineering suggestions to their respective responses. The DGS evaluator assigned to evaluation of the architectural/structural subfactor of the Design Aspects criterion did evaluate the value engineering but unilaterally re-evaluated Appellant's design, based on a "change of heart" not any design changes. The DGS evaluator at the hearing was asked "you just rethought your impression of the design -- I think you used the word "Macro" -- in a Macro sense and you felt that a point should be taken anyway. The witness: I think you're characterized it very well." Neither the Procurement Officer nor Appellant could have known the basis for the change in Appellant's score until the hearing at this Board.

This Board finds it is fundamentally unfair to the Appellant that their design is found at one stage in the process to be "Very Imaginative" and score Appellant for design at that stage and subsequently have a change of heart, not informing anyone, when the emphasis of the process at the later stage was being directed towards value engineering factors. The timing of the re-scoring violates the process mandated in COMAR 21.05.03.03. The Board finds the three (3) point deduction from Appellant's score after the Second Best and Final Offer must be reinstated. Furthermore, the Board finds as a matter of fact that the testimony at the hearing reflecting a defective process is encompassed within and arises out of Appellant's protest (that "DGS erroneously applied its own procurement requirements") and the Procurement Officer's decision thereon.

Appellant also protests that the value engineering suggestions proposed by Glen in its Second Best and Final Offer constitute alternates. The record reflects that DGS only accepted from the "Shopping List" of value engineering suggestions proposed by Glen

three Exhibit G alternates<sup>9</sup> and four other modifications to Glen's prior proposal which DGS witnesses indicated did not detract from the quality of the RFP. The Board further finds that this selection of cost saving suggestions did not constitute a selection of alternates obligating DGS to issue an addendum to the RFP affording all offerors the opportunity of submitting an appropriate response. See Baltimore Motor Coach, MSBCA 1216, 1 MICPEL ¶94 (1985). However, the Board notes the evaluators made their judgements based on the offers without knowing which of the cost saving suggestions would ultimately be selected by the agency. Glen's list of 22 cost savings ideas are found in Appellant's Ex. 28 C and contain the words "Change" , "eliminate", "provide... instead of" and "delete" relative to various items called for by the RFP or Glen's previous offers.

As to the MBE participation subfactor within the Design/Build Team Qualifications the Board finds the initial RFP included a 10% MBE participation requirement goal on the construction portion of the design/build contract. Addendum No. 1 was issued to amend MBE involvement in the development and design portion. DGS attempting to factor in MBE utilization, determined that each offeror making a good faith effort toward meeting the 10% goal would be given five points in the "Design/Build Team Qualification" segment. Design/build had a total of 40 available points because it had a weight of 4:  $10 \times 4 = 40$ . An offeror that did not make a good faith effort towards the goal was not given any points. This pass fail method of scoring was never communicated to the offerors. This Board finds DGS violated its RFP criteria pertaining to MBE

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<sup>9</sup> The four Exhibit G alternates proposed by Glen were: (1) interlocking pavers in lieu of concrete walkways; (2) self-edging plastic laminated countertops in lieu of Corian; (3) baked metal toilet partitions in lieu of Corian; and (4) single level washerless faucets at all vanities in lieu of twist-type faucets. Glen did not separately submit and identify Exhibit G alternates with its Second Best and Final Offer, but included them in its list of twenty-two cost savings ideas.

evaluation by utilizing a pass fail method which was never communicated to the offerors.

In United Technologies Corp. and Bell Helicopter, Textron, MSBCA Nos. 1407 and 1409, 3 MICPEL ¶ 201 at p. 35 (1989), This Board stated that:

"[I]t is essential that offerors be informed in an RFP of all evaluation factors and the relative importance to be attached to each such factor so that they may submit accurate and realistic proposals and compete on an equal basis." B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA Para. 58, at 9 (1983). Offerors are entitled to rely on the stated evaluation criteria, and the relative weight of those criteria, so as to configure their proposals in the manner they consider most advantageous. Id. See Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶ 116, at 15 (1985) ("Once offerors are informed of the criteria against which their proposals will be evaluated, the procuring agency is required to adhere to those criteria, or inform all offerors of the changes made in the evaluation scheme"). See Also Arltec Hotel Group, Comp. Gen. Dec. B-213788, April 4, 1984, 84-1 CPD Para. 381, ¶ 3 ("procuring agencies . . . do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation."); Genasys Corp., 56 Comp. Gen. 835, 838 (1977) (same).

Pursuant to Maryland's General Procurement Law and its implementing regulations offerors are entitled to know the relative importance of each of the evaluation factors, and it is incumbent upon the procuring agency to adhere to stated criteria. See Mid Atlantic Vision Service Plan, Inc., MSBCA 1368, 2 MICPEL ¶ 173 (1988).


All other criteria and sub-factors were graded based on the

quality of the offer. MBE alone was scored on pass fail. The language of the RFP and its addendum reasonably conveys that the more MBE involvement the higher the score. The language of the addendum that: "MBE participation on the design/development team, and on the project as a whole, will be a consideration in the evaluation of the Design/Build Team Qualifications. Accordingly, the minority business qualifications are to be included with the Design/Build team Qualifications submittal" in this context contemplates a grading of the quality of participation. The evaluator assigned to MBE scoring as late as June continued to evaluate in a qualitative manner in addition to pass fail.

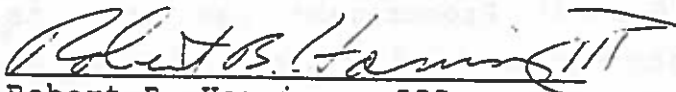
In passing we note that, during the hearing, the Board was apprised by the Senior Project Manager for this procurement, that an offeror acquiring the highest score would not have to be awarded the contract and that the highest score was coincidental. The Board finds this view is misplaced. The cumulative result of a properly administered procurement is what ultimately defines "the best interest of the State" within the Maryland Procurement Law.

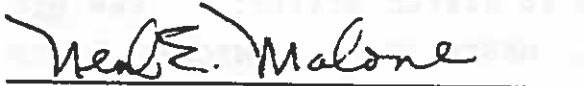
Therefore, for the aforementioned reasons the appeal is sustained.

Dated: December 17, 1992

  
Sheldon H. Press  
Board Member

I concur:

  
Robert B. Harrison, III  
Chairman

  
Neal E. Malone  
Board Member

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1690 appeal of A & R/Bowie Limited Partnership under DGS Contract No. TB-000-921-001.

Dated: *December 17, 1992*

*Mary F. Priscilla*  
\_\_\_\_\_  
Mary F. Priscilla  
Recorder

I hereby certify the following is a true and correct copy of the original as shown to me by the person who presented it for certification.

*[Signature]*  
Notary Public  
My Commission Expires \_\_\_\_\_

*[Signature]*