

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AGS GENASYS CORPORATION)
Under DHR Solicitation No.) Docket Nos. MSBCA 1325
DHR/IMD 08/87-014)

August 20, 1987

Competitive Negotiation - Burden of Proof - An offeror in a competitive negotiation procurement who contests an award to a competing offeror has the burden of proof to show that the competing offeror's proposal did not meet the mandatory requirements of the request for proposals making it unacceptable for further evaluation and discussion.

Competitive Negotiation - Improper Influence - Burden of Proof - The complaining offeror failed to prove that the director of one of the departments of the State agency procuring computer consulting services improperly influenced the procurement officer or the evaluation panel in the exercise of their mandate to evaluate proposals impartially and not in an arbitrary or unreasonable manner. The complaining offeror established that the director of one of the agency departments had both a prior professional relationship and present personal contacts with an employee of the successful offeror, but the director was neither aware of the details of the instant procurement nor did he have contacts or other communications with agency procurement officials or evaluation panel members concerning the procurement.

Competitive Negotiation - Burden of Proof - Favoritism - Allegations of favoritism or improper influence are not sustainable based on an offeror's mere allegations that the procurement officer or the evaluation panel acted improperly or contrary to law in reaching the determination to award the contract to a competing offeror. Appellant failed to show that examination of the proposals by the director of the office responsible for the procurement in the normal course of his duties was improper or that the director acted improperly regarding the evaluation panel's consideration of the proposals and selection of the successful offeror for award.

Competitive Negotiation - Technical Evaluation - A procuring agency may use a numerical scoring system as a guideline in evaluating proposals in a competitive negotiation in an attempt to quantify what is essentially a subjective process. An agency's determination regarding the evaluation and selection of a proposal for award based on the use of a numerical scoring system will not be disturbed unless unreasonable, arbitrary, or in violation of Maryland procurement law or regulations.

Competitive Negotiation - Evaluation of Proposals - Burden of Proof - The Board will only determine whether the determinations of procurement officials regarding the evaluation of the technical merits of proposals are arbitrary, capricious, unreasonable, or contrary to law or regulation, since procurement officials' determinations concerning the relative technical merits of proposals are discretionary and entitled to great weight. Mere disagreement with the judgment of the evaluators assigned to the evaluation panel for the procurement is insufficient to show that the evaluation of proposals is unreasonable.

Competitive Negotiations - Technical Evaluation- Numerical Scoring System -A numerical scoring system used as a guideline to evaluate proposals in a competitive negotiation does not convert into an objective process what is largely a subjective one.

Competitive Negotiation - Evaluation of Written Proposals - A variation in scoring of a written proposal between separate, principal evaluation factors is reasonable where the evaluation factors address different aspects of an offeror's qualifications, although the evaluation factors are intertwined.

Competitive Negotiation - Interview - It is reasonable to expect that scores received on written proposals might be improved or, alternatively, be downgraded based on the oral interview phase of the negotiation and evaluation process.

Competitive Negotiation - Scoring Variations - A disappointed offeror failed to demonstrate that the agency acted arbitrarily in its evaluation and award to another offeror as having the proposal most advantageous to the State, where the disappointed offeror pointed only to normal and reasonable variations in the scoring of proposals by individual members of the evaluation panel under the numerical scoring system set forth in the request for proposals.

Competitive Negotiation - Technical Evaluation - Award - Selection of the lower priced proposal is reasonable where the numerical scores of one offeror's technical proposal when compared to the numerical scores of a competing offeror's technical proposal are so close as to be essentially equal.

Competitive Negotiations - Undisclosed Evaluation Factor - Although evaluation of proposals based on an evaluation factor that is not disclosed in the request for proposals may be unreasonable and contrary to Maryland procurement law if an offeror is prejudiced thereby, the request for proposals here stated that proposals would be evaluated based on the experience generally of an offeror's personnel in database management systems. The request for proposals thereby disclosed the principal evaluation criteria requiring evaluation of proposals based on experience generally in database management systems. This principle evaluation criteria, as set forth in the request for proposals, thus did not limit the evaluation of proposals only to consideration of the VSAM database system currently used by the Department of Human Resources and mentioned in the request for proposals.

Competitive Negotiations - Discussions - Since discussions with offerors in competitive negotiations are inherently flexible, the evaluation panel members reasonably questioned a competing offeror's project manager about the qualifications of that offeror's principal team members and their experience regarding database management systems without having to ask the complaining offeror's project manager similar questions.

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OPINION BY MR. KETCHEN

This is the appeal of a Department of Human Resources' (DHR) procurement officer's decision denying Appellant's protest that the DHR procurement officer improperly waived mandatory requirements set forth in the solicitation and improperly evaluated the proposals in awarding the above captioned contract.

Findings of Fact

1. DHR issued RFP No. DHR/IMD 08/87-014 (RFP) for the procurement of programming support and consulting services for the design, development and implementation of new computer systems and for the continued programming support, implementation, and maintenance of DHR's existing computer systems.

2. The RFP contemplates a basic ordering or indefinite services contract for programming support and maintenance of existing DHR computer systems. Prices are set on a labor rate per hour basis with a maximum ceiling cost specified. Individual work tasks are negotiated by DHR and the successful contractor on a fixed price basis for each task order issued under the overall contract. RFP Section III, "Technical Specifications," thus states as follows:

The Department is seeking contractual programming and consulting services to assist in the general design of new systems and the continued implementation and maintenance of existing systems. The work to be performed will be detailed by

Department issued Task Orders providing specific information as to the scope of work to be performed, the current location of the programs or services required to complete the task assigned and a general time frame estimating the time required to complete the requirements set forth.

The selected vendor will then submit a response to this task detailing his approach to the assigned work. The vendor will also identify which staff will be assigned to complete the task and the proposed fixed price cost to complete the work. The vendor's response to the task order will then be subject to review and approval by the Department and by other State Agencies responsible for overseeing the development of systems in the State.

3. DHR's Office of Information Management provides data processing services to the four DHR administrations, including the Income Maintenance Administration, the Social Services Administration, the Child Support Enforcement Administration and the Community Services Administration. DHR's primary on-line computer systems for which the RFP seeks computer systems programming support and maintenance support services include the Automated Income Maintenance System (AIMS) and the Automated Masterfile (AMF) which support programs administered by DHR's Income Maintenance Administration. The RFP also requires computer programming support services for the other three administrations as necessary to meet DHR needs.

4. The RFP requested vendors to propose the services of one project manager analyst, one systems analyst and three program analysts.

5. RFP, Section III, "Technical Specifications," specifies mandatory requirements for contractor personnel in pertinent part, as follows:

B. GENERAL RFP MANDATORIES:

1. MUST be able to supply at any given time of an issued contract, at least:
 - a. One (1) Project Manager/Analyst
 - b. One (1) Systems Analyst
 - c. Three (3) Programmer/Analysts

The above staff MUST meet the mandatory skill requirements set forth in this section.

* * *

C. PROGRAMMER/ANALYST POSITION MANDATORY REQUIREMENTS

1. MUST have a minimum of three years of current experience in programming for an IBM 3081 series computer using COBOL with IBM's operating system-MSV/JES2.

* * *

E. SYSTEMS ANALYST POSITION MANDATORIES

Recent experience has determined that on occasion, the Department requires the consulting services of a systems analyst. The position is included in the RFP in the event that similar requirements occur during the contract awarded as a result of the RFP process.

1. MUST have a minimum of three years of current experience in programming for an IBM 3081 series computer using COBOL with IBM's operating system-MSV/JES2.

The host is currently operating with the following IBM Program Products:

- a. ACF/NCP/VS V3 (5667-124)
- b. ACF/EPVS EMULATION PROGRAM

c. ACF/VTAM V3 (5665-289)

- * * *
3. MUST have a minimum of three years experience writing COBOL programs using IBM's Command Level Customer Information Communications System (CICS), MACRO level CICS, and equal experience in preparing or modifying JCL's and PROC's.

- * * *
5. MUST have at least 2 years of current experience performing System Analyst duties. These duties include the ability to review and identify impact of changes on a system's operations and the ability to make modifications under CICS Command or Macro level.

G. PROJECT MANAGER/ANALYST MANDATORIES

Project Manager/Analyst shall supervise the activities of the analysts and provide various administrative and management functions related to the agreement issued as a result of this RFP.

Specifically the Project Manager/Analyst:

1. MUST serve as the principal supervisor of staff assigned under the agreement.

- * * *
10. MUST have a minimum of 5 years of prior experience working with IBM 3081 systems, including expert knowledge of development and programming in COBOL, TSO, CICS, and VSAM environment.

6. RFP, Section III, also lists "desirable" criteria sought for each position specified by the RFP. These criteria are set forth in the Appendix, attached.

7. RFP, Section V, "Evaluation and Selection Procedure," Paragraph B, provides for an evaluation and selection committee (Evaluation Panel) to evaluate all proposals as follows:

The Committee shall first review each proposal for compliance with the mandatory requirements presented in the Specification Section of this RFP. This review will determine if the proposal contains all the elements necessary to enable a full and complete evaluation of the proposal. All mandatory requirements are clearly identified by the word 'MUST' in the text of the RFP.

The failure of a proposal to include all of the mandatory requirements may result in the immediate rejection of the proposal as unacceptable. No further review of 'unacceptable' proposals will be required.

If the procurement officer determines that a mandatory item requires clarification from the offerer, then the proposal will be classified as conditionally acceptable pending satisfactory clarification. This clarification shall be requested in writing by the Procurement Officer.

The State reserves the right to waive a mandatory requirement when it is in its best interest to do so.

8. RFP, Section V.C. provides that negotiations would be conducted by the procurement officer only upon the advice and consent of the Evaluation Panel.¹

9. RFP, Section V, Paragraph C specifies principal evaluation factors and subfactors for evaluating and scoring proposals as follows:

¹Under Maryland procurement law the procurement officer is given the authority to establish procedures for conducting negotiations and to make the determination recommending award of the contract. COMAR 21.05.03.03C.

1. Vendor's Experience 20% ["Factor I"]
 - A. Experience capability and background of responding company.
 - B. Company's experience in the development and support of large scale systems in an environment equivalent to the State of Maryland.
 - C. Company's experience in the development of public welfare eligibility and management systems.
2. Technical Experience and Expertise of Proposed Personnel (40%) ["Factor II"]
 - A. Experience in the management of programming staff related to public welfare eligibility and management systems.
 - B. Experience of analysts related to programming in COBOL, in CICS, VTAM [sic], and TSO.
 - C. Experience in the design and implementation of database management systems.
 - D. Overall quality of the staff proposed as the principal team to be assigned to the contract if selected.
3. Project Manager/Analyst Interview Evaluation (40%) ["Factor III"]

The Department shall conduct interviews with the vendor identified Project Manager of the principal team to ascertain the overall quality of experience and knowledge of the skills and abilities of the principal team members. The results of the interview shall consist of 40% of the overall technical evaluation. (Underscoring added).

Agency Report, Exh. 12.

10. Although not listed in the RFP directly at Section V, Paragraph C3, the evaluation plan DHR used to apply the third principal evaluation factor set forth above includes the following subfactors derived from the RFP's desirable criteria.

1. Describe experiences that your proposed programmer/analyst and systems/analyst have had in the development, implementation, and maintenance of Public Assistance, Food Stamps, Medical Assistance, etc.
2. Describe the analytical experiences of your proposed programmer/analysts.
3. Do any of your proposed P/A staff have MACRO LEVEL CICS experience.
4. Describe the extent of program and system documentation experience of your Systems/Analysts.
5. Have any of your proposed Systems/Analysts had any experience in documenting in-stream procedures to State Data Center production specifications?
6. Has your proposed Project Manager/Analyst had any experience in the development of data base management systems? If so, describe the vendor products used.
7. Describe experiences that your proposed Project Manager/Analyst has in managing the development of Public Assistance systems.

Agency Report, Exh. 12.

11. To a large extent the subfactors listed above under Factor III reflect the "desirable" criteria set forth in RFP, Section III. (See Appendix).

12. The comparable technical values of the three principal evaluation criteria based on subfactor scores maximized at 5 points per subfactor, as used by DHR, are:

Vendor Experience (Factor I) - 21.4%

3 Subfactors x 5 Points Max. = 15 points

$$\frac{15 \text{ Points}}{70 \text{ Total Points}^2} = 21.4\%$$

Technical Experience and Expertise of Proposed Personnel (Factor II)
- 28.6%

4 Subfactors x 5 Points = 20 Points

$$\frac{20 \text{ Points}}{70 \text{ Total Points}} = 28.6\%$$

Project Manager/Analyst Interview Evaluation (Factor III) - 50%

7 Subfactors x 5 Points = 35 Points

$$\frac{35 \text{ Points}}{70 \text{ Total Points}} = 50 \%$$

13. RFP Section V, Paragraph E, entitled "Final Ranking and Selection," provides as follows:

The Award will be made to the offering Vendor whose proposal comprises the best combination of high technical value and overall low cost. The technical merit of the qualifying proposals will be given moderately greater value than cost.

Combining both the independently determined financial and technical rankings, the Committee will determine the final overall ranking of each proposal submitted by "responsible vendors."

14. RFP Section VI, Paragraph C, entitled "Financial Response," provides as follows:

The financial information shall include a single hourly rate for each labor classification. This hourly rate shall be in effect for twelve months or the full term of the contract issued to the selected vendor whichever is less. The Department of Human Resources shall renegotiate the rate schedule with the selected vendor in the event that the option year of the agreement is negotiated.

RFP, Section I, Paragraph I (page 4) provides that this contract "shall have a duration of one year with a unilateral option to renew annually [sic] for a second year following the date of the fully executed contract issued to the selected vendor."³

15. A pre-proposal conference was held on October 29, 1986 by DHR.

²The total points available for scoring in Finding of Fact No. 12 (70 Points) compared to the scoring matrix in Finding of Fact No. 21 (75 points) differ because of the number of evaluators involved.

³This is a "soft" option, i.e., there was no competition or evaluation regarding the specific conditions of the option, including price, and thus there is no mutuality of obligation for DHR to renew or for the contractor to accept renewal for a set price. See: *Straley v. Osborne*, 262 Md. 514 (1970); *Federal Electric Corp.*, ASBCA 11726, 68-1 BCA ¶6834 (1968), *aff'd*, 202 Ct.Cl. 1028, 486 F.2d 1377 (1973), *cert. denied*, 419 U.S. 874 (1974). Such provisions express an intent to bargain on a sole source basis raising concerns regarding compliance with Maryland requirements for maximizing competition in procurements. If options regarding future performance are sought, the RFP should solicit prices and terms for the option(s) and evaluate them as part of the procurement process. See generally: *Mobilease Corp.*, Comp. Gen. Dec. B-181050, September 27, 1974, 74-2 CPD ¶185 (1974); *ABL General Systems Corp.*, Comp. Gen. Dec. B-182066, December 9, 1974, 74-2 CPD ¶318 (1974).

16. By the RFP closing date of November 19, 1986, DHR received proposals from (1) Appellant, (2) Systemhouse, (3) Jeldex Corporation, (4) Data Personnel and Marketing (DPM), (5) General Analytics, and (6) Comp-U-Staff.⁴

17. Following an initial evaluation three proposals were eliminated from the competition. They did not meet certain mandatory requirements specified in the RFP.

18. Only Systemhouse's proposal met all technical requirements and was acceptable for evaluation. After initial review Systemhouse's proposal did not appear to meet the mandatory requirement specified by RFP Section III, Paragraph E.3, requiring specific experience writing COBOL programs using IBM's MACRO level CICS. After a more detailed review DHR reasonably determined that Systemhouse's proposal met the MACRO level CICS experience requirement as written in the RFP. Systemhouse's proposal also met RFP Section III, Paragraphs C.1 & E.1 requiring three years experience in programming for an IBM 3081 series computer using COBOL with IBM's operating system -MSV/JES2, although DHR waived this requirement.

19. DPM met all mandatory requirements only after waiver of the technical requirement represented by RFP Section III, Paragraphs C.1, E.1 and G.10. Appellant failed to meet RFP, Section III, G.10. This requirement calling for a specified number of years of experience with the IBM 3081 series computer systems for each person identified to serve in the position listed in the RFP was considered too stringent for the procurement. DHR thus waived this requirement pursuant to RFP Section V, Paragraph B, providing that "the State reserves the right to waive a mandatory requirement when it is in its best interest to do so" in lieu of rejecting all proposals and rebidding the RFP (see Finding of Fact No. 7).⁵

20. The technical and financial evaluation was conducted by the Evaluation Panel consisting of three members.⁶ They scored Appellant's and Systemhouse's proposals on the technical evaluation as follows:

EVALUATORS SCORING

	<u>Evaluator</u>				<u>Weighted Total</u>
<u>Factor I (20%) (15 points)</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>Total</u>	
Appellant	15	15	15	45	9.0*
Systemhouse	15	15	14	44	8.8**

⁴During the two years preceeding the instant procurement Appellant and Systemhouse each performed services for DHR under the immediately preceeding indefinite services type contracts under which task orders were issued to either Appellant or Systemhouse.

⁵While waiver of a mandatory RFP requirement is within the discretion of DHR in a competitive negotiation procurement, such action opens the procurement to a charge of unfair and unequal treatment unless the waiver changing the RFP requirement is conducted pursuant to Maryland procurement law. See: Baltimore Motor Coach, Inc., MSBCA 1216, January 8, 1985, 1 MICPEL ¶94 at 23. In this regard, COMAR 21.05.03.03C currently provides that if negotiations indicate that there is a substantive need for a change in an RFP's requirement the procurement officer shall amend the RFP to incorporate the clarification. COMAR 21.05.03.03C further provides that subsequent to the receipt of proposals the head of the procurement agency or his designee may make a written determination that it is in the State's best interest to change the procurement agency's requirements and require another submission of best and final offers. Appellant, however, was not prejudiced by DHR's actions since here waiver of the IBM 3081 series experience requirement, which Appellant did not meet, inured to its benefit. See: Liberty Roofing Co., MSBCA 1184, July 6, 1984, 1 MICPEL ¶77. Compare: COMAR 21.05.03.03C with Md. Ann. Code, State Procurement Article, Section 11-111(d) (effective July 1, 1987). See: North American Telephone Association, Comp. Gen. Dec. B-187239, December 15, 1976, 76-2 CPD ¶495.

⁶One evaluator withdrew and did not otherwise participate in the evaluation after it was determined that both Appellant and Systemhouse listed him as a reference. We find that Appellant was not prejudiced in the evaluation process based on this action. Development Associates, Inc., Comp. Gen. Dec. 187756, May 5, 1977, 77-1 CPD ¶310 at 6.

**Factor II (40%)
(20 points)**

Appellant	20	18	19	57	22.8*
Systemhouse	20	18	17	55	22.0**

**Factor III (40%)
(35 points)**

Appellant	33	31	34	98	39.2*
Systemhouse	32	34	35	101	40.4**

* Appellant Weighted Technical Score: 71.0
 ** Systemhouse Weighted Technical Score: 71.2

Agency Report, Exh. 11.

21. The Evaluation Panel arrived at the weighted technical scores for the Systemhouse and Appellant proposals as follows:

Appellant	71.0	Factor I (45x20%)	+	Factor II (57x40%)	+	Factor III (98x 40%)
Systemhouse	71.2	(44x20%)	+	(55x40%)	+	(101x40%)

Factor III was weighted more heavily than combined Factors I and II. Thus under the scoring scheme used by the Evaluation Panel, the net advantage in scoring of Appellant's proposal on Factor I and Factor II (+3 Rating Points) compared to the net advantage in scoring of Systemhouse's proposal on Factor III (+3 Rating Points) results in an overall higher technical rating for Systemhouse.⁷

22. The Evaluation Panel used a procedure to rate each financial proposal that is summarized as follows:

- a. The RFP required each offeror to submit an hourly cost rate for each of the three RFP position classifications.
- b. The Program/Analyst cost per hour was multiplied by three to reflect that the RFP requires three persons for that classification.
- c. The Program/Analyst rate per hour for 3 Program/Analysts was added to the sum of the two hourly rates for each rate specified for the other two position classifications and the total of the 5 hourly rates was divided by five. This gave an average hourly rate based on the five offered hourly rates that was used in the financial evaluation of the proposals.

Agency Report, April 7, 1987, p. 6.

The lowest average hourly rate arrived at in this manner was provided by DPM. DPM was assigned the 40 points (40%) reflecting the RFP statement that financial qualifications would receive less consideration in the evaluation than technical qualifications.⁸ The financial scores of Systemhouse and of Appellant were determined based on DPM's score as the highest rated offeror as follows:

⁷Principal evaluation factor weights and comparative values based on 3 evaluators:

Factor I:	9 Possible Points of 75 Available Points = 12%*
Factor II:	24 Possible Points of 75 Available Points = 32%
Factor III:	42 Possible Points of 75 Available Points = 56%

* Example: Factor I: 3 Evaluators x 3 Evaluation
 Subfactors x 5 Point Maximum = 45 Points x 20% wt. = 9

⁸The procurement officer's decision indicates technical qualifications versus financial qualifications were to be weighted respectively, on a 55% vs. 45% basis. However, the relative positions would not change since Systemhouse's raw scores were higher than Appellant's on both technical evaluation and price.

$$\frac{\text{DPM Price}}{\text{Systemhouse Price}} = \frac{33.73}{34.75} \times 40 = 38.8 \text{ (Systemhouse Score)}$$

$$\frac{\text{DPM Price}}{\text{Appellant's Price}} = \frac{33.73}{36.40} \times 40 = 37.1 \text{ (Appellant Score)}$$

23. On January 5, 1987, the Evaluation Panel recommended to the acting director of DHR's Office of Information Management that DHR award Systemhouse the contract based on its receipt of the highest combined score based on technical evaluation and price as follows:

	<u>Technical</u>	<u>Financial</u>	<u>Total</u>
Systemhouse	71.2	38.8	110.0
Appellant	71.0	37.1	108.1

24. By letter dated January 19, 1987, Appellant protested contract award to Systemhouse. In summary, Appellant maintained that:

Systemhouse's proposal did not comply with the RFP, Section III, Paragraph E3 requiring three years experience writing COBOL programs using IBM's MACRO level Customer Information Communications System (CICS).

Appellant's proposal was not fairly and consistently evaluated in that its proposal should have received a higher score because it was the incumbent contractor on the previous contract; an evaluator was removed from the Evaluation Panel; and best and final offers were not requested.

Appellant's initial protest was denied by a procurement officer's final decision issued on February 27, 1987.⁹ Agency Report, Exh. 18.

25. Offerors were sent notices of the recommended award to Systemhouse on February 11, 1987. The letter notice from DHR to Appellant indicated that DHR had received Appellant's protest.

26. Appellant filed a second protest (designated as supplemental grounds to its initial protest) on February 24, 1987 more than seven days after the Evaluation Panel's score sheets were sent to it on February 11, 1987.¹⁰ In summary, Appellant maintained that,

Systemhouse did not meet the mandatory requirement set forth in RFP, Section III, Paragraph C.1. of the technical specifications.

DHR did not evaluate both teams of project personnel proposed by offerors as required by the solicitation.

Appellant is entitled to a percentage preference as a Maryland firm pursuant to Maryland Annotated Code, State Finance and Procurement Article, Section 18-301.

The issues raised in Appellant's second protest were denied by a procurement officer's final decision issued on March 13, 1987.

27. Appellant filed an appeal with this Board on March 19, 1987.¹¹

28. DHR awarded the contract to Systemhouse following receipt of approval by the Board of Public Works on April 8, 1987.

⁹There is no indication in the record that the final decision denying Appellant's protest was received by Appellant more than 15 days before March 19, 1987.

¹⁰Given that Appellant arguably may have filed its protest within seven days of its "receipt" of the score sheets, and the record does not reflect otherwise, we will not address whether its second protest was timely.

¹¹The parties waived their right to an evidentiary hearing and submitted the dispute for resolution on the record.

Decision

Appellant initially contends that DHR's selection of Systemhouse, Inc., as the successful offeror for award was improper and unreasonable because the proposals were not evaluated in accordance with the RFP's mandatory requirements as required by law. Contest of an award is a serious matter. Thus Appellant has the burden of proving that the procurement officer's award of the contract was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. See: Xerox Corporation, MSBCA 1111, April 25, 1983, 1 MICPEL ¶48; Hugh J. Courtney v. Board of Trustees of the Maryland State Retirement Systems, 285 Md. 356, 402 A.2d 885 (1979).

Appellant maintains that Systemhouse's proposal was not acceptable for evaluation purposes because it did not meet the mandatory requirement of RFP, Section III, E.3 requiring an offeror's systems analyst to have a minimum of three years experience writing COBOL programs using MACRO level CICS. Two evaluators on the evaluation panel when initially reviewing Systemhouse's proposal determined that the Systemhouse's system analyst did not have the required minimum experience writing COBOL programs using MACRO level CICS. After a closer examination, however, the Evaluation Panel determined that Systemhouse's systems analyst did meet this requirement. In fact, Systemhouse's proposal was the only one initially meeting all RFP requirements making it eligible for further evaluation and discussion. (Finding of Fact No. 18). Accordingly, Appellant has not met its burden of proof on this issue.

Appellant next maintains that the results of the evaluation by the Evaluation Panel were arrived at in an unfair, arbitrary and unreasonable manner. Evaluation of technical proposals based on the evaluation factors developed from a solicitation's requirements is necessarily a subjective process. Such evaluations involve a large degree of discretion, although proposals submitted in response to an RFP in a competitive negotiation are required to be fairly and equally evaluated. If the evaluation method used employs a technical evaluation panel, such as was done here, the evaluators are required to act impartially and not in an arbitrary or unreasonable manner. See: Optimum Systems, Comp. Gen. Dec. B-187560, August 31, 1977, 77-2 CPD ¶165; Development Associates, Inc., Comp. Gen. Dec. B-187756, May 5, 1977, 77-1 CPD ¶310.

Here, Appellant maintains that Systemhouse was improperly and unfairly selected for award based on a relationship between a Systemhouse employee and the acting Executive Director of DHR's Income Maintenance Administration ("IMA Director"). DHR's Income Maintenance Administration is a major user of computer services provided by DHR's Office of Information Management for the management of its programs.

Appellant demonstrated that the IMA Director has had both a personal and professional relationship with a Systemhouse employee over a period of time. Appellant established that the IMA Director worked for the Systemhouse employee for a period of time when both were employed by the State of New Hampshire and later by the State of Maryland and established that they are friends. (Sinclair Deposition, pp. 33-34). Under both circumstances the IMA Director worked under the supervision of the individual who subsequently became a Systemhouse employee. (Sinclair Deposition, pp. 18, 22-26). In fact, when this individual, who is now a Systemhouse employee, formerly worked as a State of Maryland employee he participated in the interview and employment of the IMA Director at DHR. (Sinclair Deposition, p. 28). In addition, the IMA Director acknowledged that during a meeting in July 1986 held to consider concepts for using computer systems to aid in managing its programs and the future design of DHR computer systems he had mentioned Systemhouse as an entity that had expertise and experience in "transporting" systems.¹² (Sinclair Deposition, pp. 36, 53, 56-57). However, the Director of IMA was not aware of the details of this negotiated procurement, was not a member of the Evaluation Panel, and had no contacts or other communications with the Evaluation Panel. (Sinclair Deposition, pp. 9, 15, 51-53, 58-60, 70).

¹²Although not related to the subject matter of the instant RFP, "transporting," "technology transfer," or "systems technology transfer in systems building" involves an automated data processing methodology whereby a State such as Maryland could obtain directly an already developed computer system used by another State to provide similar program services. (Sinclair Deposition, pp. 35-36, 45, 53-56).

Maryland's best interest generally speaking is to have its employees avoid potential conflicts of interest as well as their appearance.¹³ This, of course, must be balanced against the principle that State employees are entitled to pursue their private life and interests as near as possible as those not so employed.

Here, there is no evidence that the IMA Director or anyone else in any way communicated with the procurement officer or the Evaluation Panel about the instant procurement much less exercised improper influence over either the DHR procurement officer or the Evaluation Panel regarding the review and evaluation of the several proposals. Thus, there is no evidence that the IMA Director's previous professional or current contacts with the Systemhouse employee in any way affected the evaluation of the proposals.

Appellant also contends that DHR acted in an unfair, arbitrary, and unreasonable manner in evaluating the proposals because DHR personnel other than the procurement officer and the Evaluation Panel had improper access to offerors' technical and financial proposals. DHR's practice is to closely control proposals submitted in a competitive negotiation procurement during the evaluation and negotiation process. This is an inherently good practice from a procurement policy standpoint.¹⁴ However, if DHR personnel other than the procurement officer or the Evaluation Panel had access to or reviewed the proposals this is of concern regarding the instant procurement if it led to an unfair advantage by one offeror over other offerors during the competitive negotiation process. An improper and unfair advantage could result if the substance of one offeror's proposal became known to another offeror during negotiations. This is the reason underlying COMAR 21.05.03.02 G which provides that "[p]roposals may not be opened publicly but shall be opened in the presence of two State employees . . . Proposals and modifications shall be shown only to State employees having a legitimate interest in them." Accordingly, it would be an improper and unfair procurement practice for DHR personnel not privy to the evaluation and selection process to attempt to influence the Evaluation Panel, or either the procurement officer or the agency head, who have the ultimate responsibility for choosing the successful offeror in accordance with the requirements of Maryland procurement law.

However, Appellant has not provided any probative evidence showing that anything untoward in this regard occurred during this procurement. DHR's Office of Information Management was responsible for this procurement. Its Director, who appointed the Evaluation Panel, examined the proposals in the normal course of his duties. In this regard, Appellant did not show that the Director's review of the proposals was improper or that he otherwise acted improperly regarding the Evaluation Panel's evaluation of proposals and selection of Systemhouse for award.

Accordingly, we find that Appellant, who has the burden of proof, has failed to demonstrate by any evidence that the procurement officer or the Evaluation Panel acted contrary to law or otherwise improperly reached their determination to award the instant contract to Systemhouse in accordance with the RFP requirements. Something more concrete than mere allegations of favoritism or improper influence as set forth here is required. See: Information Control Systems Corp., MSBCA 1198, August 29, 1984, 1 MICPEL ¶81; B. Paul Blaine Assoc., MSBCA 1123, August 16, 1983, 1 MICPEL ¶58 at 13; Baltimore Motor Coach, MSBCA 1216, supra, at 10.

¹³There is no statutory or regulatory authority for this Board to issue formal opinions directly on conflict of interest questions concerning officials of other State agencies, although we will address considerations bearing on alleged violations of standards of conduct as they relate to the propriety of a particular procurement. In this regard, Md. Ann. Code, Article 40A, Section 1-102 (Maryland Public Ethics Law), in pertinent part, provides:

(a) The General Assembly of Maryland, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and offices finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and officers will be maintained.

(b) It is evident that this confidence and trust is eroded when the conduct of the State's business is subject to improper influence and even the appearance of improper influence.

¹⁴See: Md. Ann. Code, State Finance and Procurement Article, Section 11-111, "Competitive sealed proposals," Subsection d(4); effective July 1, 1987.

Appellant next contends that DHR conducted the technical evaluation of proposals in an arbitrary and inconsistent manner based on the Evaluation Panel's scoring for Factor III compared to its scoring for Factors I & II. Appellant received a raw score of 98 on Factor III of the evaluation while Systemhouse received a raw score of 101. (Finding of Fact No. 21). Appellant, however, scored higher than Systemhouse on Factor I and Factor II combined.¹⁵

Numerical scoring systems are utilized as guidelines in an attempt to quantify what is essentially a subjective process for the purposes of realistic and fair proposal evaluation. Beilers Crop Services, MSBCA 1088, September 16, 1982, 1 MICPEL ¶25. See: ICOS Corporation of America, Comp. Gen. Dec. B-225392, February 10, 1987, 87-1 CPD ¶146; Northwest Regional Educational Laboratory, Comp. Gen. Dec. B-222591.3, January 21, 1987, 87-1 CPD ¶74. In this regard, in a technical evaluation whether a given point spread between two competing proposals indicates significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within a procuring agency's discretion. See: Tracor, Inc., Comp. Gen. Dec., B-188315, November 8, 1976, 76-2 CPD ¶386 at 19; BDM Services Co., Comp. Gen. Dec. B-180245, May 9, 1974, 74-1 CPD ¶237. The determination of the relative merits of proposals thus is the responsibility of the contracting agency and it must bear the burden of any difficulties incurred by reason of a defective evaluation. Since procuring officials enjoy a reasonable range of discretion in evaluating proposals and in determining which offeror or proposal is to be accepted for award, their determinations are entitled to great weight. In this regard, our function is not to evaluate proposals in order to determine which should have been selected for award as the most advantageous proposal, but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of Maryland procurement law. Accordingly, we 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. See: Tracor, Inc., supra at 16.

Appellant describes as an illustration of DHR's arbitrary and inconsistent scoring of the proposals based on Factor I & II versus Factor III that one evaluator gave Appellant a maximum score of 5 out of 5 on Factor II, Subfactor C concerning the technical experience and expertise of Appellant's personnel in the design and implementation of database management systems. This same evaluator gave Appellant only 4 out of 5 points on Factor III, Subfactor 6, concerning the experience of Appellant's project manager in the development of database management systems. Appellant thus argues that this result is clearly arbitrary because the former criterion (Factor II, C) judged based on review of the actual proposal information simply overlaps the latter criterion (Factor III, 6) which is judged based on the project manager's interview. We disagree. Appellant's illustration does not show that this evaluator acted arbitrarily and inconsistently in the scoring of Appellant's proposal and thus that the overall evaluation was arbitrary and inconsistent. The two criteria mentioned evaluate different aspects of the qualifications sought, although they are intertwined.

Factor II.C calls for an evaluation of the technical experience and expertise of an offeror's proposed personnel based on the offeror's proposal. The evaluation and scoring of Factor II.C is based on review of an offeror's proposal, including resumes submitted with the proposal and reasonably includes the evaluation of an offeror's project manager as part of an offeror's team.

Factor III, 6 on the other hand, calls for a separate evaluation and scoring of the project manager's experience in the development of database management systems following the interview process conducted by the Evaluation Panel. Thus, the evaluator that Appellant points to concluded from her review of Appellant's proposal that its entire team deserved a 5 based on an assessment of the overall database management design experience of its proposed personnel. On the other hand, following the Project Manager interview phase of the evaluation process, this evaluator in exercising her discretion determined that Appellant's project manager deserved only a 4 based on his individual experience in the development and design of database management systems.

Here, in support of its position Appellant points to a variation in scoring between two evaluation criteria that evaluate different aspects of an offeror's qualifications although

¹⁵Factor III on an absolute basis in effect was weighted on a 50% bases (35 out of 70 points) due to the number of subfactors on which the proposals were scored.

these two evaluation criteria are necessarily related. This is insufficient to meet its burden of demonstrating that DHR acted arbitrarily in selecting Systemhouse over Appellant for contract award. The evaluator's subjective judgment that Appellant was entitled to different point scores regarding different aspects of Appellant's qualifications being evaluated was clearly reasonable. Mere disagreement with an evaluator's judgment is insufficient to meet Appellant's burden of showing that the evaluation was unreasonable. See: SETAC, Inc., Comp. Gen. Dec. B-209485, July 25, 1983, 83-2 CPD ¶121.

Appellant similarly maintains that the Evaluation Panel's arbitrary and inconsistent scoring is shown by the fact that one evaluator gave Systemhouse a total score of 31 on Factor II but gave Systemhouse the maximum score of 35 on Factor III. The evaluator it describes actually gave Systemhouse a score of 14 on Factor I and a score of 17 on Factor II for a total score of 31 on Factors I & II. In any event, Appellant maintains that this scoring differential demonstrates an unfair and inequitable evaluation process since it was not afforded equal treatment because "either the Systemhouse proposal was improved through discussion with the project manager, or the interview phase of the Systemhouse evaluation went well beyond the scope of the proposal."

To reiterate, technical evaluation of proposals is a subjective process. Numerical scoring systems are used as guidelines to aid in decision making, but such systems do not convert into an objective process what is largely a subjective one. See: ICOS Corporation of America, supra.

Here, Factor II addresses the technical experience and expertise of an offeror's personnel consisting of 5 persons based on the offeror's proposal and the resumes of its personnel submitted with the proposal. Factor III evaluates the overall quality of experience, knowledge, skills, and abilities of an offeror's team as a whole based on its proposal as well as the Evaluation Panel's interview of the project manager. While we agree that there is overlap¹⁶ in the evaluation criteria, as pointed out by Appellant, Appellant fails to demonstrate that it was treated unequally or unfairly because of the scoring variation by one evaluator.

The process Appellant describes that Systemhouse must have improved its scoring based on the project manager interview phase of the technical evaluation may have been exactly what happened. However, it is reasonable to expect a variation in scoring among the principal evaluation factors and to expect that scores might improve, or, for that matter, be downgraded, based on the oral interview phase of the process. Here this evaluator believed Systemhouse was entitled to a perfect score of 35 on Factor III following the interview of its project manager. On the other hand, it was not unreasonable for him to downgrade Systemhouse and give it lower scores on Factor I (14 out of 15 points) and Factor II (17 out of 20 points) for a total score of 31 points out of a possible 35 points on Factor I and Factor II combined based on its written proposal.

The scores of the two other Evaluation Panel members varied as well. One evaluator rated Appellant higher than Systemhouse on Factor III (33 versus 32 points) although she rated Appellant and Systemhouse equally at maximum scores on Factor I (15 points) and Factor II (20 points). The other evaluator rated Appellant lower than Systemhouse on Factor III (31 points for Appellant vs. 34 points for Systemhouse). However, he rated Appellant and Systemhouse equally at the same scores on Factor I (15 out of 15 points) and gave both Appellant and Systemhouse the same downgraded scores on Factor II (18 out of 20 points). (Finding of Fact No. 20).

Here, the evaluators reasonably scored the proposals differently based on different evaluation factors and the exercise of their individual judgments concerning each proposal. Based on the same principle set forth above, procurement officials enjoy a reasonable range of discretion in exercising their judgment in evaluating technical proposals and their determinations concerning technical merits of respective proposals are entitled to great weight. Our mandate is not to substitute our judgment of technical qualifications for theirs but to determine whether actions taken are arbitrary or unreasonable, or contrary to law or regulation. Scoring systems are guidelines used to evaluate proposals to determine the proposal that is the most advantageous to the State on the basis of technical merit and

¹⁶The evaluation criteria seemingly overlap and raise the question of whether they are misleading. However, any objection that the principal evaluation criteria are ambiguous, misleading, or otherwise restrict competition is untimely at this point, since such concern was not raised prior to the date proposals were due. See: Tracor, supra.

price. We find that Appellant by pointing to normal and reasonable variations in scoring by the evaluators in the exercise of their subjective judgment fails to demonstrate that DHR acted arbitrarily in its evaluation and award to Systemhouse as having the proposal most advantageous to the State. See: ICOS Corporation of America, supra.

Since Appellant's scores and Systemhouse's scores were relatively close on Factor III one may reasonably conclude that the Evaluation Panel determined that Appellant's and Systemhouse's proposals were essentially equal with regard to Factor III. We come to the same conclusion regarding Appellant's and Systemhouse's proposals when viewed on an overall technical basis where there was a variation in scores of 0.2 out of 70 available points. Under these circumstances the procurement officer's selection of Systemhouse as having the proposal most advantageous to DHR was reasonable based on its lower price. See: SETAC, Inc., supra, at 10.

Appellant also contends with respect to Factor III that during the project manager interview phase of the evaluation DHR considered an undisclosed evaluation factor and inconsistently applied it to improperly select Systemhouse. Appellant thus states that DHR improperly evaluated Systemhouse's project manager and Systemhouse's personnel regarding their experience in development of database management systems other than VSAM. According to Appellant, the Evaluation Panel improperly gave greater weight to Systemhouse's project manager's qualifications and experience in two particulars. It included the experience of Systemhouse's staff personnel in database management systems development in evaluating the Systemhouse project manager's experience and qualifications. In addition, it considered Systemhouse's project manager's experience in development of database management systems other than VSAM, which Appellant emphasized in its proposal.

Proposals are properly evaluated on the basis of the criteria announced to offerors in the RFP. Evaluation based on undisclosed factors or criteria may be unreasonable and violate the terms of the solicitation and Maryland procurement law if an offeror is prejudiced by such action. Tracor, Inc., supra. Under such circumstances offerors are not competing on an equal basis. Baltimore Motor Coach Co., MSBCA 1216, supra; 1 MICPEL ¶94 at 23.. See: Radiation Systems, Inc., Comp. Gen. Dec. B-180018, June 12, 1974, 74-1 CPD ¶322; Ford Aerospace and Communications Corp., Comp. Gen. Dec. B-200672, December 19, 1980, 80-2 CPD ¶438; Tracor, supra.

Based on its status as an incumbent contractor¹⁷ on the preceding contract, Appellant rightly assumed that DHR would evaluate proposals based on the experience and qualifications of each offeror's proposed project manager and staff in a primary database management system known by the acronym VSAM, which is currently used by DHR to conduct several of DHR's major agency programs. Accordingly, Appellant's proposal highlighted its VSAM experience and its project manager highlighted his experience in VSAM during his interview by the Evaluation Panel. However, the RFP did not limit the experience requirement regarding the project manager proposed by an offeror solely to the VSAM database management system. For example, Factor II and RFP, Section III.H.1 (Appendix) separately list experience generally in the design and implementation of database management systems as an evaluation criteria, although VSAM is also mentioned elsewhere as an evaluation criteria. (See Findings of Fact Nos. 5 and 9). Thus, DHR did not limit and was not required to limit its evaluation based on the criteria regarding experience in database management systems development only to the VSAM database management system.

Further, the generally broad principal evaluation criteria represented by Factor III clearly permits evaluation of proposals based on the qualifications and experience of an offeror's project manager and its team members in database management systems design and development other than the VSAM database management system. Appellant thus has not shown that the Evaluation Panel's scoring of proposals based on the database management experience of each offeror's personnel was arbitrary or unreasonable. Accordingly, Appellant fails to establish that DHR unfairly and inconsistently evaluated proposals based on undisclosed criteria contrary to Maryland procurement law.

In addition, Appellant objects that Systemhouse's project manager was questioned

¹⁷Incumbent contractors are not entitled to preference when competing on a new contract, although an agency may properly take into account in proposal evaluation the attributes of incumbent contractors with good performance records. See: Dalfi, Inc., Comp. Gen. Dec. B-224248, January 7, 1987, 87-1 CPD ¶24 at 7.

about the experience of its other team members in developing database management systems, and Appellant was not similarly questioned. In competitive negotiation procurements discussions are flexible by nature. Northwest Regional Educational Laboratory, supra. That the Evaluation Panel asked questions about Systemhouse's staff qualifications and experience in development of database management systems in addition to that of Systemhouse's project manager was within its reasonable discretion to clarify proposals and to evaluate each offeror's qualifications, and was clearly consistent with the principal evaluation criteria set forth at RFP, Section V, Paragraph C.3 (Factor III). RFP, Section V, Paragraph C.3. specifically stated that DHR would conduct interviews with the project manager to ascertain the overall quality of experience and knowledge of the skills and abilities of the principal team members.

In any event, the record reflects that the evaluators considered only the Systemhouse project manager's experience regarding database development and management in rating him individually on Subfactor 6 of Factor III. (See Finding of Fact No. 10; DHR Brief, June 1, 1987, p. 11). They were permitted to inquire of him about the experience and qualifications of other staff members in order to rate Systemhouse's proposal on an overall basis with regard to the several subfactors considered under Factor III. We can only speculate about why Appellant's project manager was not similarly questioned since no evidence on this point was presented. It may be that the Evaluation Panel had sufficient information concerning Appellant's proposal and its personnel, since it was an incumbent, and thus that questions that were asked of Systemhouse were not necessary for Appellant.

We address a final matter. Appellant's two protests to the DHR procurement officer variously argue as follows: Appellant should have received a higher score because it was an incumbent contractor; an evaluator was removed from the evaluation panel; best and final offers were not requested; DHR did not evaluate both teams of personnel proposed by offerors; and Appellant is entitled to a percentage preference as a Maryland firm pursuant to Maryland Annotated Code, State Finance and Procurement Article, Section 18-301. Although the DHR procurement officer addressed and ruled on these issues in his final procurement officer decisions, Appellant did not substantively address these issues in its comments on the agency report or in its brief filed with the Board.

It is apparent to the Board that Appellant does not regard these issues as highly significant to resolution of the instant appeal. In any event, we have reviewed the record as to these matters, and we find no support for their resolution in Appellant's favor. Accordingly, the procurement officer's final decisions regarding these issues are affirmed.¹⁸

For the foregoing reasons, therefore, the appeal is denied.

APPENDIX

D. PROGRAMMER/ANALYST POSITION DESIRABLE REQUIREMENTS

1. It is desirable that the programmer/analyst have at least two years of current experience in writing programs in the above environment directly related to the design, implementation or maintenance of Public Welfare Systems. This would include Public Assistance, Food Stamps, Medical Assistance, etc.
2. It is desirable that the analyst have two years minimum experience in programming database client tracking systems.
3. It is desirable that the analyst have two years of experience in writing programming to State of Maryland Specifications.
4. It is desirable that the analyst have two years of experience providing programming services related to the modification of existing batch programs.

¹⁸Although Appellant requested bid preparation costs, we lack the authority to award such costs to a bidder whose appeal is sustained. See: Spruell Development Corp., MSBCA 1203, December 17, 1984, 1 MICPEL ¶92.

5. It is desirable that the analyst have at least one year of experience in systems analysis.

* * *

F. SYSTEMS ANALYST DESIRABLES

1. It is desirable that the Systems Analyst have at least three years of current experience in writing programs in the above environment directly related to the design, implementation or maintenance of Public Welfare Systems. This would include Public Assistance, Food Stamps, Medical Assistance, etc.
2. It is desirable that the system Analyst have two years of current experience in programming database client tracking systems.
3. It is desirable that the System Analyst have two years of experience in writing and analyzing programming to State of Maryland Specifications.
4. It is desirable that the System Analyst have two years of experience providing programming services related to the modification of batch programs.

* * *

H. PROJECT MANAGER/ANALYST DESIRABLES

1. It is desirable that the Project Manager have at least 2 years experience in Data Base techniques and in the development of database management systems.
2. It is desirable that the Project Manager have at least 2 years experience in managing the development of Public Welfare Systems that include, public assistance eligibility, food stamp issuance, Aid to Dependant Children, and Medical Assistance.
3. It is desirable that the Project Manager have experience using intelligent terminal equipment in a large telecommunications network.