

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AUTOMATED HEALTH)
SYSTEMS, INC.)
) Docket No. MSBCA 1263
Under Department of Human)
Resources Solicitation No.)
CSA EA-09/87-001)

October 9, 1985

Rejection of all bids or proposals - The decision of an agency head to reject all proposals pursuant to §3-301 of Article 21 (Division II, State Finance and Procurement Article §13-301) and COMAR 21.06.02.01C on grounds that such rejection is in the best interests of the State will be disturbed by this Board only upon finding that the decision is not in the best interests of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust.

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OPINION BY CHAIRMAN HARRISON

This appeal arises out of a Request for Proposals (RFP) issued by the Community Services Administration (CSA) a constituent agency of the Maryland Department of Human Resources (DHR), for the statewide provision of local administering agency services for the Maryland Energy Assistance Program (MEAP).

Appellant filed a timely protest from the determination by the Secretary of DHR to reject all proposals and enter into sole source negotiated contracts with the existing providers in various subdivisions to include the

Baltimore City Urban Services Agency (Urban Services), a constituent agency of the City of Baltimore, for provision of services in Baltimore. From a denial of its protest, Appellant takes this timely appeal.

Findings of Fact

1. On June 21, 1985, CSA issued a RFP for the procurement of staff and support services for the local administration of the MEAP which provides energy assistance benefits and associated services during the fall and winter months in all 23 counties and Baltimore City for eligible low income households. (RFP, Paragraph 1.1).

The RFP called for proposals to operate the program in each subdivision under two year contracts extending from September 1, 1985 through September 30, 1987. CSA estimated such contracts would cost a total of \$4 million, and that about \$70 million in benefits would be distributed, over the two-year period.

The MEAP program is 100% federally funded under the Low-Income Home Energy Assistance Act, 42 U.S.C. §§ 8621-8629. Its mission is to provide assistance to low income residents to help meet home heating costs through local administering agencies to the extent that funds are available.

Last fall and winter energy assistance services in all 23 counties and Baltimore City were provided by 20 different local administering agencies. The total number of low income households served statewide reached nearly 90,000 during the winter of 1984-85. It is anticipated that at least this number will continue to be served in future program years. The actual eligible population is estimated to be over 247,000 households, based on 1980 census information.

The local administering agencies have been either local governments, non-profit community action agencies or local departments of social services. They determine eligibility for benefits and issue direct grants to energy suppliers. While the program has been in effect since 1980, these services have never previously been competitively bid.

2. The RFP listed Shirley E. Marcus, Director of MEAP, as the sole point of contact in the State for the purposes of this procurement. (RFP, Paragraph 1.2).

The RFP provided in Paragraph 3.3 that "[a]ny private, public agency or private non-profit community-based organization that has tax exempt status and a governing board of directors may apply for administrative funding available through the RFP." The Appellant is a private agency that met these requirements and all other requirements of the RFP and consequently was eligible to submit a proposal in response to the RFP.

The RFP contemplated the award of several contracts to provide services in each of the 24 jurisdictions in the State.

3. The RFP provided in Paragraph 3.8 that in selecting a contractor . . . "special consideration may be given to local agencies (public or private non-profit) which were receiving Federal funds under any low-income energy assistance program or weatherization program under the Economic Opportunity Act of 1964."

This provision was based, as the RFP noted, on Title 26 of the Federal Low-Income Home Energy Assistance Act. See: 42 U.S.C. §8624(b)(6).

SECTION 4 of the RFP sets forth the procedures for evaluating proposals and selecting contractors.

Section 4.6 thereof sets forth the specific criteria for technical and financial¹ evaluation as follows:

4.6 Criteria for Technical and Financial Evaluation

The criteria that will be used by the Committee for the technical evaluation for the acceptable proposals responding to this RFP are listed below. Each Committee member will score the proposals on each major criterion. Total scoring will be adjusted according to the weighing factors indicated with the major criteria.

<u>Evaluation Criteria</u>	<u>Weighting Factor</u>
Understanding of MEAP Activities	5
Applicants knowledge of MEAP needs and comprehension of the level of effort and scope of work involved in all three phases of the program	
Work Plan	25
Completeness and soundness of applicants proposed workplan management methods, linkages with other agencies, recruiting and training, work productivity oversight, report preparation methods of obtaining projected outreach goals	
Vendor Qualifications	35
Related applicant agency experience in administering energy assistance or similar programs. Agency's ability to meet program schedule and productivity	

¹Financial evaluation in the context of the evaluation factors set forth in Section 4.6 meant an applicant's ability relative to fiscal programmatic monitoring and cost containment and not its price or proposal cost.

standards, maintain standard conducted through fiscal programmatic monitoring

Assigned Key Personnel

30

Related Experience
Professional Competency
Education

Clarity and Organization of Proposal

5
100

While experience in administering energy assistance programs is mentioned as a factor under Vendor Qualifications, the special consideration for existing providers under the Federal Low-Income Home Energy Assistance Act is not specifically set forth.

Section 4.7 of the RFP provides in relevant part that:

"A preliminary technical evaluation will be completed by each member of the Selection Committee. All vendors who receive a rating of 80 or more points on the technical proposal evaluation from a majority of the Selection Committee, will receive consideration of their financial proposals. Those for whom a majority of the Selection Committee evaluates with a technical rating of less than 80 points will not be considered further." (Underscoring added).

Financial evaluation and final ranking and selection criteria are provided in Sections 4.4, 4.5 and 4.8 (see Attachment 1). Final evaluation of the technical proposals and financial offers is described in Sections 4.9 and 4.10 (see Attachment 1).

4. Appellant reviewed a copy of the RFP, having become aware of its existence through its advertisement in the Maryland Register (Tr. 35) and determined that it was eligible to submit a proposal because it was a private non-profit company.

At that time, Appellant had under way a number of other projects involving provision of human and social services principally in the field of health care related matters. (Tr. 32-34, 53-56). One of these projects involved providing outreach health care services under a contract with the Maryland Department of Health and Mental Hygiene. However, the contract with the Department of Health and Mental Hygiene represented the only business the Appellant was then performing in the State of Maryland.

5. A preproposal conference conducted by Shirley E. Marcus was held on July 8, 1985. (Tr. 36-40; Joint Exh. 1 at p. 4).² At the preproposal conference Mr. Joseph Nocito, Appellant's Chief Financial Officer, asked Ms. Marcus if Appellant would be given fair and equitable consideration if it submitted a proposal in response to the RFP. (Tr. 38-41). Mr. Nocito received assurances from Ms. Marcus that such consideration would be given

²The parties entered into a stipulation of facts entitled "Statement of Facts Not in Dispute" which was entered into the record as Joint Exhibit 1.

to Appellant's proposal and was advised that DHR was looking for new ideas in administering the MEAP Program and would welcome a proposal from Appellant. (Tr. 41).

At the preproposal conference Appellant submitted 30 written questions to Ms. Marcus and asked for a written response. On July 11, 1985, Ms. Marcus sent a memorandum to all recipients of the RFP enclosing CSA's response to all questions submitted at the preproposal conference. The following question and answer was provided in this memorandum. Question, "Why do you wish to change present provider?" Answer, "Change in State of Maryland Procurement Laws require programs to implement competitive procurement." (Joint Ex. 1 at pp. 4-5).

On July 23, 1985, Appellant submitted a proposal in response to the RFP for provision of services in several jurisdictions including Baltimore City.

6. An evaluation panel was empaneled to review all proposals submitted in response to the RFP. The evaluation panel consisted of seven members including the MEAP Associate Director, a Community Services Administration Monitor, fiscal unit person and representatives from the Weatherization Unit (CDA), Community Services Block Grant (CDA) and the State Office on Aging.

The panel was to review proposals and score each offeror as to its technical and price proposal, then rank and select recommended vendors in each jurisdiction. These recommendations were then to be given to the MEAP Director and forwarded to the Executive Director of CSA for fiscal decisions. (Joint Ex. 1 at p. 5).

7. Twenty-three proposals were received, some covering several subdivisions. In most subdivisions the only proposal was that of the existing provider; but five competing proposals were received in four subdivisions: Baltimore City and Baltimore, Prince Georges, and Dorchester Counties. The only proposals which received a technical score of 80 or more were those of the Alleghany Human Resources Development Corporation (87) and Appellant (83). Seven received technical scores of less than 50, and 10 received a cumulative technical and financial score of less than 150 (out of a possible 200). Urban Services which currently operates the program in Baltimore City, received a technical score of 69. (Exh. 5, Agency Report).

8. On or about July 25, 1985, Mr. Allan J. Hobby, Associate Director of MEAP, who was also responsible for the conduct of the evaluation by the evaluation panel, indicated in an oral conversation with Ms. Marcus a concern that the evaluations of the individual providers in a number of jurisdictions had resulted in their receiving a technical score of less than 80 points. (Tr. 65, 83, 93, 96-97). This concern was conveyed orally by Ms. Marcus on July 26 and in writing on July 29, 1985 to Mr. Lawrence E. Hunt, Executive Director of CSA, and the procurement officer herein. (Tr. 121).

The evaluation that had been conducted by the evaluators under the supervision of Mr. Hobby required approximately two and a half days to complete, commencing on Wednesday, July 24th in the morning and concluding in the afternoon of Friday, July 26th. (Tr. 65, 76-81, 98).

At some point in time during the two and a half days of evaluation of proposals the evaluators indicated a desire to have oral interviews with Appellant and Urban Services concerning their proposals (Tr. 77) and oral interviews of approximately one-half hour in duration were conducted with each. (Tr. 77-78).

9. On July 30, 1985, Darlene Wakefield, Appellant's Program Director, received a letter from Ms. Marcus which stated, "Your proposals³ to administer MEAP in Baltimore City, Baltimore County, and Prince Georges County in fiscal year 1986 have been reviewed, along with competing proposals. Based on the State of Maryland, Title 21 Procurement Regulations and the Department of Human Resources own directive for competitive negotiations, we are requesting from your agency a best and final offer in your cost proposals. You may prepare a summary of line item changes, along with a revised budget summary for submission as your best and final offer." (Joint Exh. 1 at p. 6). Urban Services was also requested to submit a best and final offer for Baltimore City. In response to this letter a meeting was held on or about August 5, 1985 between personnel of Appellant and Ms. Marcus and Mr. Hunt to discuss the request for best and final offers and other fiscal considerations. Appellant's President, Mr. Robert Doran, was present at this meeting as was Ms. Wakefield and Mr. Nocito. (Tr. 47, 197-198). Among items discussed at this meeting were contractor's overhead as an allowable item, rent for intake centers and adequacy of number of personnel required to operate the program. (Tr. 47, 123). At this meeting discussions were conducted concerning multiple bids. The record reflects advice to Appellant that while best and final offers would be received as to its multi-jurisdictional proposal, DHR was extremely reluctant to permit a single provider to provide services in a multiple combination of the jurisdictions of Baltimore City, Baltimore County and Prince Georges County, the three counties encompassing over 50 percent of the total service population Statewide. (Tr. 123-124). At some point in time, during that meeting, Mr. Stephen D. Minnich, Deputy Director of CSA remarked that Appellant's proposal was excellent. (Tr. 47-48, 198).

10. Appellant submitted a best and final offer for Baltimore City⁴ as did Urban Services. Appellant's price under best and final offers was \$711,000 yielding it a combined technical and financial score of 183 (83 technical, 100 price). Urban Services' price under best and final offers was \$967,619 yielding it a combined technical and financial score of 142 (69 technical, 73 price). (Exh. 5, Agency Report; Joint Exh. 1 at p. 7).

11. By letter dated August 7, 1985, Dr. Lenwood Ivy, Executive Director of Urban Services, was advised by Ms. Marcus that its proposal to administer MEAP in FY 1986 in Baltimore City had been accepted. (Exh. 6, Agency Report; Joint Exh. 1 at p. 9). Ms. Marcus advised Appellant of this selection by letter dated August 9, 1985. (Exh. 7, Agency Report; Joint Exh. 1 at p. 9).

³Appellant had submitted a multi-jurisdictional proposal for Baltimore City, Baltimore County and Prince Georges County and an individual proposal for each one of these jurisdictions.

⁴The record reflects that a ten person proposal team consisting of staff and high level management of Appellant's organization spent many hours in preparing, submitting and following through with its proposal through best and final offers at a cost of approximately \$24,000.

12. On August 17, 1985, Ms. Marcus and Mr. Hunt met with Mr. Nocito, Ms. Wakefield and Mr. Doran. Counsel for Appellant and DHR were present. (Joint Exh. 1 at p. 6). At this meeting, Appellant's representatives were advised by Ms. Marcus and Mr. Hunt that CSA and DHR had not followed the procedures set forth in the RFP for evaluating and selecting contractors for award under the MEAP proposal. Appellant was further advised that DHR had determined to award the contract for Baltimore City to Urban Services. Mr. Hunt stated that the decision to award to the existing provider was based on subjective factors outside the evaluation factors set forth in SECTION 4 of the RFP.⁵ (Tr. 52-53, 124-128).

13. Mr. Hunt testified that it was his belief that the RFP was flawed in terms of the structuring of the evaluation criteria and in terms of the instruction to evaluation panel members concerning proper evaluation of proposals. (Tr. 134-136, 172-185).

Mr. Hunt testified that he believed the evaluation panel members had fairly and honestly evaluated proposals based on the criteria set forth in the RFP but that the failure of 21 of the 23 proposers (and 19 of 20 existing providers) to achieve the cut-off score of 80 in the technical evaluation indicated that the RFP was deficient; particularly as Mr. Hunt recognized that a number of agencies who failed to achieve 80 points to include Urban Services had in fact performed services in the '84-'85 fall/winter season in a satisfactory manner. (Tr. 122, 127-130, 134-136, 178, 184-185). Mr. Hunt also believed the RFP was deficient in its failure to specifically incorporate as an evaluation factor a special consideration preference for the existing providers as set forth in the Federal Low-Income Home Energy Assistance Act. (Tr. 136).

Mr. Hunt was also concerned that since 19 of 20 existing (previous years') providers of service in various jurisdictions had failed to achieve the 80 point cut-off rating, and would have been excluded, many subdivisions would have been left without providers of service and 95% of the MEAP experience base would have been eliminated.⁶ (Tr. 127-128; Exh. 10, Agency Report at p. 3). Mr. Hunt communicated these concerns to the Secretary of DHR. (Tr. 164-168).

14. On Tuesday, September 4, 1985, Ms. Ruth Massinga, Secretary of DHR, wrote Appellant advising that she had decided to reject all proposals and to negotiate sole source one year contracts with the existing providers.

⁵No change was ever made to the scores given by the evaluation panel to Appellant's proposal, and as forwarded to the selecting officials. As noted above, Appellant's price under best and final offers was \$711,000 yielding it a combined technical and financial score of 183 (83 technical, 100 price). Urban Services' price under best and final offers was \$967,619 yielding it a combined technical and financial score of 142 (69 technical, 73 price).

⁶In response to a question asked of Mr. Hunt during his examination, he indicated that he would have recommended award of the contract to Appellant if the failure to achieve the 80 point cut-off score had been isolated or restricted to Baltimore. (Tr. 183).

Secretary Massinga's letter to Appellant stated:

This is do advise you that I have decided pursuant to Section 21.06.02.01C of the Code of Maryland Regulations to reject all bids on the Request for Proposal for Local Administering Agency Services dated June 21, 1985. I believe that such action is required for the effective operation of the Maryland Energy Assistance program, and, thus, is in the best interest of the State. The Department of Human Resources will immediately enter negotiations with existing providers for one year contracts for October 1, 1985 through September 30, 1986. These actions are necessary to assure that all jurisdictions of the State will be adequately served by local energy assistance agencies for the forthcoming winter heating season.

The Request for Proposal provided in Sec. 4.6 that proposals which did not receive an initial technical rating of 80 points or more would not be considered further. Surprisingly, most of the bidders with prior experience in administering energy assistance programs did not obtain the minimum rating, and several received very low scores. The Department believes that most of these same bidders very effectively administered these programs in prior years. Therefore, it is clear that the technical evaluation process failed to assess properly the qualifications of prospective offerors. Moreover, the evaluation process did not give the "special consideration" to agencies with prior experience as federal law mandates, although the RFP did mention the applicable statute. See 42 U.S.C. §8624 (b)(6).

This decision is also dictated by the lack of time remaining before the start of the winter heating season. There simply is not sufficient time for a new solicitation before we must begin serving the energy needs of MEAP clients.

It should be noted this was the first time the bidding process was used in the MEAP program. The Department believed that a competitive procurement would lower the administrative costs of the program from prior years. Even though the procurement procedures have not been successful, the effort has demonstrated that existing providers can achieve cost savings. It is our expectation that the sole-source negotiations with existing providers will lower these costs even further. In short, the decision to solicit bids has resulted in more funds being available to the low income persons who critically need energy assistance.

In the event that the Department decides to undertake a competitive procurement for the 1986-1987 heating season, please be assured that you will be given every opportunity to compete for these services. We regret any inconvenience or expense this change in course has caused you and thank you for your efforts.

(Attachment 3 to Exh. 10, Agency Report).

15. Secretary Massinga testified that she had discussions with Mr. Hunt, the Department's Deputy Secretary, various staff members and counsel concerning her determination to reject all proposals in this particular procurement. (Tr. 162-163).

The Secretary testified clearly and unequivocally that her determination to reject all proposals was based on her belief following her review of the results of the evaluation that the evaluation process was deficient.⁷ (Tr. 137-169). The Secretary also expressed certain misgivings concerning the preparation of the RFP in terms of the weighting of the technical proposal versus the price proposal. (Tr. 146-147). She testified that she made the decision to engage in good faith in a competitive procurement under Article 21, rather than negotiate contracts with existing providers, and with the expectation that new providers might replace existing providers, to foster competition, to explore the possibility of multi-jurisdictional coverage, to achieve cost savings and more efficient performance and to explore new and innovative methodology. (Tr. 157-158, 169). However, the results of the procurement process in terms of the failure of 21 proposers to achieve the minimum technical score, 19 of whom were existing providers and had performed at least adequately in the previous year, indicated to the Secretary that the process was fatally flawed leading to her concern that there was either something wrong with her expectations, the evaluation process or the evaluations performed by the evaluators. (Tr. 143-144). The Secretary testified inter alia (Tr. 137-169) that (1) faced with the results of the evaluation in terms of the failure of 21 offerors to meet the minimum technical requirements from a point scoring standpoint; (2) faced with a need to fully implement the program by October 1, 1985 to include accomplishment of necessary preprogram activity and inability to detect and correct the flaw or flaws in the RFP in sufficient time to conduct a new procurement even as to Baltimore City alone; and (3) recognizing from her personal experience with the program that the existing providers who failed to achieve the 80 point technical cut-off were in fact able to adequately perform the required services she determined that it was in the best interests of the State to reject all proposals and award sole source negotiated contracts to existing providers.

With respect to the ability of Urban Services to provide required services in Baltimore City, wherein approximately 46% of the total service population Statewide reside, the Secretary testified that based upon her personal involvement in providing solutions to certain short comings experienced by Urban Services in the '83/'84 program period and the improvement of the provision of services in Baltimore City by Urban Services during that period, she was satisfied that Urban Services, despite the technical score it received in the evaluation process, was fully competent to provide the services. (Tr. 140-142).

The Secretary further testified that the savings of dollars to be achieved by acceptance of Appellant's proposal, and the entering into a contract with Appellant as the provider of services in Baltimore City, was not such as to override the need for the provision of services by an entity with demonstrated experience in providing such services. (Tr. 146-148).

⁷The Secretary testified, as did Mr. Hunt, footnote 6 supra, that had she not been confronted with an evaluation that had resulted in the disqualification of 21 of 23 offerors, and had that problem been confined to Baltimore City, her decision would probably have been to have awarded the contract to Appellant. (Tr. 153-156).

The Secretary candidly testified that she was somewhat embarrassed that the Appellant had been treated in a way that she perceived to be less than professionally. (Tr. 144-145). Nevertheless, it was her judgment that the RFP and/or the process by which the procurement was conducted was clearly deficient or flawed and the totality of circumstance respecting the need to quickly implement the program justified her decision to reject all proposals as the most appropriate of the several options she considered including rejection of all proposals save and except those of Appellant's and Alleghany Human Resources Development Corporation who also achieved a technical score of more than 80 points.

16. In response to the Secretary's determination, Appellant on September 9, 1985 filed a protest with DHR. From the procurement officer's decision denying the protest, Appellant noted this timely appeal on September 12, 1985.⁸

Decision

At the request of the Board, the parties briefed and argued a concern of the Board as to whether it has jurisdiction over the appeal in light of the provisions of Section 1-202(b)(1) of Article 21⁹ which excludes from the application of the State procurement law, the sole foundation of this Board's jurisdiction, contracts¹⁰ or like business agreements between a State agency and another State agency or a political subdivision of the State or other governments. This intergovernmental exception to the scope of coverage of Article 21 is of concern to the Board because of the announced intention of the DHR to award the contract which is the subject of this appeal to Urban Services which is a unit of Baltimore City government. At the time of hearing of the appeal, however, the contract had not yet been entered into. The Board does not decide whether it would have jurisdiction over the appeal if the subject contract had been entered into at the time Appellant noted its appeal or indeed at the time of hearing because the contract had not then been entered into. Under the set of facts before it, the Board concludes that it has jurisdiction to decide this appeal because the RFP was undertaken pursuant to Article 21 and permitted and invited participation by the private sector. The Board, therefore, has jurisdiction to review under the appropriate standard the decision of the Secretary of DHR to reject all proposals pursuant to Article 21 and its implementing regulations and enter into sole source negotiations with the existing providers, thereby excluding from consideration the Appellant, a private sector offeror.

⁸At the conclusion of the hearing of the appeal on September 18, 1985, the Board issued its oral determination that the appeal be denied and the reasons therefore. This was done at the request of the parties due to pendency of proceedings in the Circuit Court for Baltimore City concerning award of a contract to perform the services to Urban Services and the need to implement the program in Baltimore City at the earliest possible time.

⁹Section 1, Chapter 12, Acts 1985 provides that the provisions of Article 21 of the Annotated Code of Maryland are transferred (effective October 1, 1985, Section 2, Chapter 12, Acts 1985) to Division II of the State Finance and Procurement Article. References in this opinion are to provisions of Article 21 in effect at the time of hearing of this appeal.

¹⁰Contract is defined in relevant part as ". . . every agreement entered into by a State agency. . . ." Section 1-101(f) of Article 21 (underscoring added).

The Board has never been called upon to decide the jurisdictional issue framed by the facts before us. The Board has considered the question mindful that its jurisdiction should be narrowly construed. See: Jorge Company, Inc., MSBCA 1047 (July 7, 1982); William E. McRae, MSBCA 1229 (April 22, 1985); James Julian, Inc., MSBCA 1222 (May 14, 1985); Boland Trane Associates, Inc., MSBCA 1084 (May 22, 1985). However, we perceive that the Legislature did intend on the specific state of facts before us that the Board decide the dispute that has arisen respecting the formation of this State contract pursuant to Section 7-202(c) and Section 7-201 (d)(1) of Article 21.

Also of concern to the Board respecting its jurisdiction over the appeal was whether the specific services involved, local administering agency contractual services for the purpose of providing energy assistance benefits and associated services, involved the provision of human or social services directly to third party clients arguably exempt from the coverage of Article 21 at the time the RFP was issued. See the 1984 amendments to Sections 3-207 and 1-202(b) of Article 21 (Chapter 292, Laws 1984) and amendments to COMAR 21.01.03.01A, COMAR 21.01.02.61B and COMAR 21.01.02.68-1 as set forth in Maryland Register, Vol. 12, Issue 2, p. 168 adopted July 29, 1985. However, the Board has determined that the services in question were not human or social services as such but ancillary administrative services necessary to ensure that heat is provided to eligible persons. It is the provision of energy (principally heating fuel) to some 90,000 households Statewide through subsidy payments to energy suppliers and landlords totalling approximately seventy million dollars over the next two years under the federal Low-Income Home Energy Assistance Act that constitutes provision of human or social services. While the administrative services that are the subject of the RFP and which are funded by payments of Low-Income Home Energy Assistance Act grant monies are critically important to the success of the MEAP program, these services are not human or social services in the procurement sense as contemplated by Article 21. Accordingly, the Board need not discuss the extent of coverage for procurement of human or social services contemplated by Article 21 at the time the RFP was issued.

Having concluded that it has jurisdiction over the appeal, the Board now examines the propriety of the Secretary's action in rejecting all proposals and entering into sole source negotiations for contracts with the existing providers.

The RFP issued by CSA apprised offerors that "[t]he State reserves the right to reject any and all proposals . . . or to negotiate with all responsible agencies, in any manner necessary to serve the best interest of the State of Maryland."¹¹ CSA's right to reject all proposals, however, is limited by the following statutory provision:

If the procurement officer, with the approval of the agency head or his designee, determines that it is fiscally advantageous or is otherwise in the best interests of the State, an invitation for bids, a request for proposals, or other solicitation may be cancelled, or all bids or proposals may be rejected.

Md. Ann. Code, Art. 21, §3-301. (Underscoring added).

¹¹See: Paragraph 2.4 of the RFP.

COMAR 21.06.02.01C implements the foregoing statute and specifically addresses the rejection of all proposals. It provides in relevant part:

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement officer, with the approval of the agency head or his designee, determines that this action is fiscally advantageous or otherwise in the State's best interest.

Reasons for rejection of all bids or proposals include but are not limited to:

- (a) The State agency no longer requires the supplies, services, maintenance, or construction;
- (b) The State agency no longer can reasonably expect to fund the procurement;
- (c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;
- (d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;
- (f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or
- (g) All otherwise acceptable bids or proposals received are at unreasonable prices.

(Underscoring added).

While none of the specifically enumerated reasons for rejection of proposals apply to the facts at hand, the enumerated reasons are not all exclusive. We, therefore, look to the specific reasons for the Secretary's decision to reject all proposals to determine if the action was "otherwise" in the best interests of the State.¹² In making the determination concerning whether the Secretary's decision was otherwise in the best interests of the State, we are mindful that the Board's scope of review of the decision is a narrow one and that we may disturb that decision only upon finding that the decision was not in the best

¹²The Secretary testified that the savings of dollars to be achieved by acceptance of Appellant's proposal did not override the need for provision of services by an entity with demonstrated experience in providing such services. Finding of Fact No. 15. Therefore, to uphold the Secretary's decision, it must be found to have been "otherwise in the best interests of the State."

interest of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust. Peter J. Scarpulla, Inc., MSBCA 1209 (November 13, 1984) at p. 9 reversed on other grounds in State of Maryland, Dept. of General Services v. Peter J. Scarpulla, Inc., Circuit Court for Baltimore City 84 347 041/CL28625 (May 31, 1985); Hanna v. Bd. of Ed. of Wicomico Co., 200 Md. 49, 51 (1952); UMBC v. Solon Automated Services, Inc., Circuit Court for Baltimore County Misc. Law Nos. 82-M-38, 82-M-42 (October 13, 1982).

The Board notes the dilemma confronting the Secretary concerning the failure of 21 of 23 proposers to meet the 80 point cut-off level required for further consideration of a proposal, and the time constraints facing the Secretary in terms of the need to accomplish necessary preprogram activity and have the program operational in all jurisdictions by October 1. If the Secretary had not taken the action she did in rejecting all proposals, technically only two providers would have been eligible under the terms of the RFP to provide services in the jurisdictions for which they submitted proposals, one being Appellant, the other being Alleghany Human Resources Development Corporation.¹³ Therefore, abiding by the terms of the RFP would have resulted in all other jurisdictions, encompassing almost half of the service population, being without any eligible service provider in the upcoming fall and winter season. The Secretary testified concerning her belief that the procurement process or the RFP as drafted was flawed particularly in view of her personal knowledge of the ability of the existing providers to provide the services. The Secretary also testified concerning the inability of the Secretary and other officials involved in this process to detect and correct by way of addendum the flaw or flaws that existed in sufficient time to permit submission of revised proposals for provision of services Statewide or indeed in Baltimore City alone.

Appellant has suggested that one option that was open to the Secretary was to have bifurcated the procurement respecting the failure of 21 offerors to meet the 80 point cut-off by rejecting all proposals (and entering into sole source negotiated contracts) in all jurisdictions save Baltimore City and Alleghany County and awarding the Baltimore City contract to Appellant. We express no opinion on the lawfulness of such an approach under the facts herein except to note that the statute and implementing regulations respecting rejection of bids or proposals set forth above speak in terms of rejection of all bids or proposals. However, the Secretary's testimony reflects that she did consider this option and discussed it with Mr. Hunt but determined to reject that option based on her belief that the entire procurement was fatally flawed and not just the Baltimore City portion thereof. The record reflects that the Secretary also considered and rejected, as discussed above, issuance of an addendum and receipt of revised proposals. The Board does not find that the rejection of these options constitutes an action that was fraudulent, or so arbitrary as to constitute a breach of trust.

¹³Appellant submitted proposals (multi-jurisdictional and individually) for Baltimore City, Baltimore County and Prince Georges County. Alleghany Human Resources Development Corporation submitted a proposal for Alleghany County.

Based upon its review of the record as a whole, the Board does not find that the Secretary's action in rejecting all proposals and entering into sole source negotiations for contracts with the existing providers was fraudulent or so arbitrary as to constitute a breach of trust. Accordingly, the appeal is denied.

Attachment 1

4.4 Financial Evaluation

The separate cost volume of each qualified proposal will be distributed to the Committee following the completion of the technical evaluation. The Committee will determine total costs of the proposals in order to establish a financial ranking of the proposals, from lowest to highest total cost.

4.5 Final Ranking and Selection

Combining the individually evaluated financial and technical rankings, the Committee will determine the final ranking of each vendor's proposal, the recommended selection being that which offers the most advantageous combination of technical merit and cost, e.g., best price/performance ratio.

4.8 Financial Proposal Evaluation

To arrive at a relative value of the financial offers of each of the vendors, the following computation will be used:

$$\text{lowest offer/individual offer} = Y$$

4.9 Combined Technical and Financial Evaluation

A second evaluation of the technical proposal will be done in conjunction with the financial proposal and the oral presentation, if any. At this time, a final score will be assigned to the technical proposal by each member of the Selection Committee.

The technical evaluation by all members of the Selection Committee will be established by the following computation for the technical scores of each of the vendors being considered:

$$\frac{\text{Average Number of Technical Rating Points for Individual Vendors}}{\text{Average Number of Technical Rating Points for Highest Rated Offer}} = X$$

4.10 Total Scores

The technical score (X) and financial scores (Y) for each vendor will be added and the vendor ranked. The vendors with the highest number of points will be selected from the total ranked list of vendors until all jurisdictions in the State are covered by selected agencies.

