

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of B. PAUL BLAINE)	
ASSOCIATES, INC.)	
)	Docket No. MSBCA 1123
Under SAA Contract No.)	
SAA-SV-83-001)	

August 16, 1983

Competitive Negotiation - Evaluation Factors - It is essential that offerors be informed in a request for proposals (RFP) of all principal evaluation factors and their relative importance.

Competitive Negotiation - Evaluation Subfactors - Subfactors need not be disclosed so long as they merely are definitive of the principal evaluation factors listed in the RFP.

Competitive Negotiation - Evaluation Factors - Offerors should be informed of the broad scheme of scoring to be employed and given reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other.

Competitive Negotiation - Evaluation - The State Aviation Administration (SAA) erred in failing to apprise offerors as to the method it would utilize to evaluate price. This error, however, did not have an effect on the competitive positions of the offerors submitting the highest rated proposals and, accordingly, the protest was denied.

Competitive Negotiation - Evaluation Criteria - Evaluation of a technical proposal essentially is a subjective process. Accordingly, objectively measurable criteria need not be set forth in the RFP for this purpose.

Competitive Negotiation - Bias - Bias will not be attributed to procurement officials based on inference or supposition. Appellant here could not show any subjective motivation by the evaluators to downgrade its proposal.

Competitive Negotiation - Scoring of Proposals - Procurement officials enjoy a reasonable degree of discretion in evaluating proposals and the exercise of such discretion may not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations.

Timeliness - Although Appellant learned on the date proposals were tendered that SAA would weigh the technical elements of its proposal at twice the price element, it did not protest this procedure for nearly two months. Pursuant to COMAR 21.10.02.03, this aspect of the protest was untimely and Appellant thus waived its right to complain.

APPEARANCE FOR APPELLANT:

B. Paul Blaine, Jr.
President, B. Paul Blaine Associates, Inc.
Landover, Maryland

APPEARANCES FOR RESPONDENT:

Steven G. Hildenbrand
Steven J. Kmiecik
Assistant Attorneys General
Baltimore, Maryland

OPINION BY CHAIRMAN BAKER

This appeal arises from a competitively negotiated procurement for the services of an economic consultant to the State Aviation Administration (SAA). Appellant contends that the award made to its competitor, Kurth & Company, Inc., should be declared void since the procedures followed by the SAA were not consistent with the requirements of Maryland law. Alternately, Appellant seeks bid preparation costs and other damages allegedly sustained as a result of the SAA's actions.

Findings of Fact

1. SAA placed notices in the May 14, 1982 editions of three local newspapers soliciting offers for a contract to provide certain air service planning and economic analysis necessary to assist its efforts in attracting business to Baltimore/Washington International Airport (BWI). Firms actively engaged in air transportation economic analysis were instructed to write the SAA to obtain a questionnaire.¹

2. Appellant obtained a questionnaire and returned the completed document to the SAA by the required June 17, 1982 due date. On July 9, 1982, however, Mr. Nelson Ormsby, the SAA's Manager of Analysis and Policy Development, returned all questionnaires received with the following explanation:

. . . Unfortunately, we regret to inform you that due to an administrative oversight, our evaluation/selection process has been significantly delayed. Our failure to publish the May 14, 1982 notice in the Maryland Register, as apparently required by State law and competitive procurement regulation²[sic], compels

¹This questionnaire, together with the published notice, served as a request for proposals (RFP). (Tr. 120-121).

²COMAR 21.05.03.02B provides that public notice for competitive negotiations shall be given in the same manner provided for invitation for bids (i.e. competitive sealed bid procurements) under COMAR 21.05.02.04. This latter regulation provides, in pertinent part, as follows:

B. Publication.

(1) Notice of invitation for bids on State contracts for which the bid amount is reasonably expected to be over \$25,000 shall be published in the Maryland Register. Publication shall be 30 days before the bid submission date. Publication of notice less than 30 days before bid submission is defective unless the project is exempt from competitive sealed bidding by

us, in the interest of fairness, to return all completed questionnaires, as submitted. It should be clearly understood that your sealed questionnaire was not reviewed by any member of the Aviation Administration, and I respectfully urge you to resubmit your bid, in accordance with procedures outlined below. . . . (Agency Report, Exh. 3).

Offerors thereafter were apprised that a "Request For Information" would be published in the Maryland Register and in local newspapers on July 23, 1982 and that, pursuant to this notice, completed questionnaires would be due on August 27, 1982 at 10:30 a.m. A draft copy of the "Request For Information" was enclosed.

3. On Friday, July 23, 1982, the SAA finally published its "Request For Information" in the Maryland Register. This notice, in addition to informing prospective offerors as to how they could participate in the procurement process, explained the evaluation and award process as follows:

An intra-Departmental selection panel will evaluate . . . [submitted] questionnaires in terms of a price and a technical element, and the award will, therefore, be based on the lowest evaluated bid price. The five-member selection panel, in evaluating the technical element, shall apply the following general criteria: firm experience; management/personnel qualifications; support capabilities (including data bases and information processing); strategic/tactical air service planning insights. The price element will consider the hourly rate of personnel in five major categories; firm president; principal analyst (project manager); senior analyst (senior associate); junior analyst (associates); and clerical support. In making an award on a competitive basis, neither the price element nor the technical element shall be the sole criterion for selection.

Following the Aviation Administration evaluation of these questionnaires, a firm will be selected on or about October 7, 1982 to handle the economic analysis element of the BWI Air Service Development Program on a contract basis. This contract will run for 24 consecutive months. The two-year agreement is subject to approval by the Maryland Board of Public Works, and funding for the second year is contingent upon budget approval and a continuing appropriation of funding by the Maryland General Assembly. The draft contract document, and the General

Conditions of the Maryland Department of Transportation, are available for your review as part of this competitive bid process.

4. A total of seven proposals were submitted in a timely manner to the SAA. Although not provided for by Maryland law³, proposals publicly were opened and the pricing factors were read aloud. Completed questionnaires, however, were kept confidential.

5. Immediately prior to opening the proposals, those offerors present were informed by the SAA that the technical evaluation factors would receive twice as much weight as price. (Tr. 37). Appellant was present for the opening of proposals and learned, for the first time, of this evaluation formula. (Tr. 32, 148).

6. In order to score the questionnaires, the SAA Administrator appointed a five member panel. The panel members (evaluators) were recommended to the Administrator by Mr. Ormsby who testified that he looked for people who understood the needs, wants, desires, and goals of the BWI Air Service Development Program. (Tr. 27). The panel, as appointed, consisted of four SAA employees and a representative from the Maryland Department of Transportation whose specialty was air transportation planning.

7. Copies of the completed questionnaires were given to each of the five panel members for evaluation. Prices were obliterated on these copies so as not to affect the technical evaluation.

8. In order to assist the members of the evaluation panel, the SAA's Mr. Ormsby prepared a technical evaluation form. This form reduced the four general technical criteria set forth in the "Request For Information" into subfactors as follows:

A. Experience, Reputation, Location:

1. Number and type of civil air clients
2. Number and type of carrier clients
3. Professional reputation with the State of Maryland
4. Location of principal office, local office
5. Background in, or associations with, federal agencies

³See COMAR 21.05.03.02G which states in pertinent part, that "[p]roposals may not be opened publicly but shall be opened in the presence of two State employees" The purpose of this provision is to avoid disclosure of competing price proposals and preclude subsequent negotiations from developing into an auction. Here, however, the SAA did not negotiate price and, hence, no prejudice resulted from the public opening of price proposals.

B. Management, Personnel:

1. Upper-level management interest and anticipated direct participation in BWI Program
2. Evaluation of Principal Analyst (i.e., the Project Manager) assigned the BWI account
3. Evaluation of Senior Analysts (Senior Associates) Who may from time-to-time work on the BWI account
4. Evaluation of other Associates (Junior Analysts)

C. Support Capabilities:

1. Evaluation of clerical support
2. Evaluation of in-house data processing capabilities
3. Evaluation of supplemental data processing resources
4. Data bases available in-house
5. Other data bases firm can access on a time-sharing basis

D. Strategic and Tactical Insights:

1. BWI as an air cargo facility
2. BWI as an airport of service to Washington
3. BWI as a domestic hub
4. BWI as an international gateway
5. BWI as a center for charter activity
6. The interrelationship of air service development and Airport promotion and marketing

Each subfactor was to be rated on a scale of one (poor) to five (superior).

9. Members of the evaluation committee were not briefed as to what properly should constitute a one or a five in each category. Mr. Ormsby testified that the reason for this was that the SAA wanted its evaluators to determine what was important based on their own perspective and knowledge of the BWI Air Development Program. (Tr. 70-71).

10. Although the questionnaire sent to prospective offerors requested hourly rates for each class of employee who was to work on the project, neither the questionnaire nor the "Request For Information" required an offeror to list the number of hours which it anticipated that each class of employee would work on a yearly basis. Likewise, the SAA did not set forth a minimum level of effort for each class of employee.

11. In order to evaluate price, Mr. Ormsby prepared a form which assumed that each offeror would require 1000 manhours per year to perform the work called for under the contract. The 1000 manhours further was allocated for evaluation purposes as follows:

<u>Hours</u>	<u>Title / Position</u>
50	President
400	Principal Analyst
300	Senior Analyst
50	Junior Analyst
200	Clerical Support

These allocated hours were to be multiplied by the hourly rates contained in the completed questionnaires to determine the yearly price for each offeror. However, recognizing that all consultants may not classify employees in the manner described in the questionnaire, the evaluation form provided for the consolidation of the hours shown for President/Principal Analyst and for the Senior and Junior Analysts where distinctions were not made by offerors. Further, where clerical support was not identified separately, the form provided that an additional 12.5 hours was to be allocated at the rate charged by the President, 100 hours at the rate charged by the Principal Analyst, 75 hours at the rate charged by the Senior Analyst, and 12.5 hours at the rate charged by the Junior Analyst.

12. Mr. Ormsby testified that while he did not include copies of the technical and price evaluation forms in the RFP or otherwise distribute them to prospective offerors, he reviewed them with the two offerors in attendance at the proposal opening. (Tr. 33-36). Mr. Ormsby acknowledged, however, that he did not discuss these forms until after all proposals had been received. He also testified that the footnote contained on the pricing form describing the allocation of clerical hours was not read aloud. (Tr. 35).

13. The following prices were received by the SAA from Appellant:

<u>Title/Position</u>	<u>Appellant</u>
President	\$50 /hr.
Principal Analyst	\$50 /hr.
Senior Analyst	\$40 /hr.
Junior Analyst	\$35 /hr.
Clerical	0

When these dollar figures are multiplied by the hours allocated for each position, a yearly price of \$36,250 is obtained. However, because Appellant did not identify an hourly cost for clerical support, the SAA adjusted its price in the manner described in finding number 11. This produced an evaluated yearly price of \$45,312.50.

14. The total evaluated price for each of the offerors was as follows:

Appellant	\$45,312.50
Kurth & Company	50,900.00
Simat, Helliesen & Eichner, Inc.	55,850.00

Roberts & Associates	57,000.00
Diemler and Dickemper, Inc.	58,000.00
Acumenics	60,000.00
PRC Speas	73,000.00

Since the SAA decided to weigh price on a 1/3 to 2/3 basis when compared with technical ability, the maximum number of points an offeror could receive for price was 33. Appellant, as low offeror, thus received this total. Kurth, as second low offeror, received the following:

$$\frac{\$45,312.50 \text{ (Appellant's adjusted price)}}{\$50,900 \text{ (Kurth price)}} \times 100 \times .33 = 29.4 \text{ points}$$

15. In the absence of a price adjustment for clerical support, Appellant still would have received 33 points as the low offeror. Point totals for all other offerors would have been affected, however, since Appellant's price was used as a base for computation. The Kurth score, for example, would have been affected as follows:

$$\text{Kurth } \frac{\$36,250 \text{ (Appellant's unadjusted price)}}{\$50,900 \text{ (Kurth price)}} \times 100 \times .33 = 23.5 \text{ points}$$

Accordingly, Kurth's score for price would have been 5.9 points lower had Appellant's price not been adjusted for clerical support.

16. A technical evaluation form was completed for each offeror by the five evaluators. Scores for each offeror were averaged to produce the following result:

<u>Offeror</u>	<u>Score</u>
Kurth	85.4
Roberts	74.0
Simat	72.6
Appellant	66.0
PRC Speas	61.8
Acumenics	46.8
Diemler	43.4

The 2/3 weighting factor was applied to each score in accordance with the following example:

$$\text{Kurth } 85.4 \times 0.67 = 57.2 \text{ points}$$

The other adjusted technical totals thus were:

Roberts	49.6
Simat	48.6
Appellant	44.2
PRC Speas	41.4
Acumenics	31.4
Diemler	29.1

17. Final composite scores for the technical and price evaluations were as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>Price Score</u>	<u>Total</u>
Kurth	57.2	29.4	86.6
Appellant	44.2	33.0	77.2
Roberts	49.6	26.2	75.8
Simat	48.6	26.8	75.4
PRC Speas	41.4	20.5	61.9
Acumenics	31.4	24.9	56.3
Diemler	29.1	25.8	54.9

18. By letter dated October 8, 1982, the SAA awarded a contract to Kurth & Company, Inc. subject to approval by the Board of Public Works. Appellant was notified, on this same date, that it had not been selected for award.

19. Appellant filed a protest with the SAA Administrator on October 15, 1982. (Agency Report, Tab 14).

20. On October 27, 1982, a debriefing⁴ session was conducted by the SAA at Appellant's request. (Tr. 140). Appellant learned for the first time at this session that its price had been adjusted as a result of its failure to set forth an hourly rate for clerical support. (Tr. 140).

21. By letter dated November 8, 1982, the SAA procurement officer issued a final decision denying Appellant's protest.

22. Appellant filed a timely appeal with this Board on November 23, 1982.

23. On December 1, 1982, the Board of Public Works approved the award of the captioned contract to Kurth and Company, Inc.

Decision

Appellant initially contends that the award to Kurth & Company, Inc. is void because the proposals were not evaluated in accordance with the criteria set forth in the RFP as required by law. In this regard, the RFP apprised potential offerors of four general criteria to be used by the SAA in evaluating the technical elements of the proposals. These criteria were (1) firm experience, (2) management/personnel qualifications, (3) support capabilities, and (4) strategic/tactical air service planning insights. In proceeding with the evaluation, however, the SAA divided these general criteria into subfactors and utilized a numerical rating system. Although offerors under this procurement were not made aware of the subfactors and rating system, we find no impropriety in the SAA procedure.

⁴A debriefing may be conducted in competitive negotiations as described in COMAR 21.05.03.06.

It is essential that offerors be informed in an RFP of all evaluation factors and the relative importance to be attached to each such factor so that they may submit accurate and realistic proposals and compete on an equal basis. However, this requirement traditionally has been limited to a disclosure of the principal evaluation factors which form the judgmental bases for award. Where subfactors are utilized in the evaluation of proposals, it is not essential to disclose them so long as they merely are definitive of the main evaluation criteria. Compare North American Telephone Association, Comp. Gen. B-187239, 76-2 CPD ¶495 (1976); Comp. Gen. Dec. B-179703, 53 Comp. Gen. 800 (1974); Health Management Systems, Comp. Gen. B-200775, 81-1 CPD ¶255 (1981). Put another way, the subfactors need not be disclosed if there is a sufficient correlation between them and the general criteria contained in the RFP to satisfy the requirement that offerors be given reasonable notice of the evaluation criteria to be applied to their proposals. Compare Littleton Research and Engineering Corp., Comp. Gen. B-191245, 78-1 CPD ¶466 (1978); Metro Contract Services, Inc., Comp. Gen. Dec. B-191138, 78-2 CPD ¶6 (1978).

With regard to the relative importance of each ^{evaluation} criteria, it is not essential to disclose the precise numerical weights to be applied by an agency to each general criteria. Compare 50 Comp. Gen. 565 (1971). However, ". . . offerors should be informed of the broad scheme of scoring to be employed and given reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other." BDM Services Company, Comp. Gen. Dec. B-180245, 74-1 CPD ¶237 (1974) at p. 7. ✓

Here the subfactors used by the SAA in evaluating the technical proposals all were definitive of the general criteria set forth in the RFP. Further, although the four main criteria were not of equal weight, there was not a significant difference in their importance. While we acknowledge that it would have been better to at least list the evaluation criteria in descending order of importance or priority, we conclude that the description provided here was adequate to permit offerors to draft meaningful proposals and compete on an equal basis.

Turning our attention to the price evaluation, SAA erred in its approach. In order to permit fair and equal competition, the SAA had a duty to apprise offerors as to its evaluation formula. Compare Lanier Business Products, Inc., Comp. Gen. Dec. B-200695, B-200696 (1), 81-1 CPD ¶188 (1981). By failing to disclose the fact that it would base its evaluation on an estimated 1000 manhours allocated unevenly among five types of personnel, the SAA placed offerors at a competitive disadvantage. Especially egregious was the adjustment made by the SAA for clerical support. Appellant, for example, included a factor for clerical support in deriving its hourly rates for professional staff. If Appellant had known that a further adjustment would be made to these rates by the SAA if it did not separately estimate clerical support, we are convinced that it would have structured its proposal differently.⁵

⁵SAA adopted this evaluation approach because it apparently believed that it otherwise would have had to disqualify an offeror who failed to include clerical costs as a separate item. However, in negotiated procurements it is permissible to conduct discussions to clarify proposals and thereafter seek best and final offers prior to final evaluation. See COMAR 21.05.03.03C. This differs from competitive sealed bid procurements where a bid will be considered non-responsive if it is ambiguous or does not comply in all

Nevertheless, the foregoing error is insufficient to warrant termination of the Kurth contract. Appellant was the low offeror both before and after the adjustment was made to its proposal for clerical support and it thus received the maximum 33 points available for price. Although the adjustment made by the SAA did result in Kurth receiving an additional 5.9 points in the evaluation of its price proposal, the unadjusted dollar figures still would have resulted in Kurth receiving an award based on its superior technical score.⁶ Accordingly, Appellant's competitive position was not affected by this error.

Appellant next contends that the procurement was contrary to the requirements of Maryland law in that the evaluators were not given guidelines or standards by which the proposals could be objectively measured. While it is essential to provide objectively measurable criteria when evaluating price in competitive sealed bid procurements, there is no similar requirement for competitive negotiations. MIS Support Group, MSBCA 1055 (May 7, 1982). Competitive negotiation is used where award cannot be made on the sole basis of price or evaluated price. It is necessary in such procurements to evaluate technical factors along with price to determine which proposal is most advantageous to the State. The review of these technical factors requires the exercise of judgment which necessarily is subjective.

Apparently recognizing the subjectivity of the evaluation process, Appellant next argues that the evaluators were biased by their alleged prior association with several offerors. In this regard, all of the evaluators were familiar with Mr. Kurth, Mr. Simat and Mr. Roberts as a result of prior working relationships. (Tr. 84-85). None of the evaluators, however, ever had worked with Appellant. For this reason, Appellant argues that it was at an unfair disadvantage particularly when scrutinized under the evaluation subfactor involving "professional reputation with the State of Maryland."

Bias ". . . will not be attributed to procurement officials based on inference or supposition." Earth Environmental Consultants, Inc., Comp. Gen. Dec. B-204866, 82-1 CPD ¶43 (1982). Here Appellant has established only that the evaluators knew certain of the offerors as a result of professional relationships. Certainly if these relationships and prior experiences had been good ones, a high rating as to professional reputation could be expected. This is not to say, however, that it necessarily guaranteed a low rating for firms such as Appellant which had no prior dealings with the evaluators. A well written proposal, containing references and prior work history in the State,

material respects with the requirements of the solicitation. The Tower Building Corp., MSBCA 1057 (April 6, 1982).

⁶Using Appellant's unadjusted prices, Kurth would have received 23.5 points for price. (Finding of Fact 15). Kurth's total evaluation for technical and price elements thus would have been 80.7 points, as compared to Appellant's 77.2 points.

could have resulted in Appellant likewise receiving a high rating. In the absence of any evidence showing a subjective motivation on the part of the evaluators to downgrade Appellant, we cannot find bias here.

Appellant's next argument addresses the manner in which the questionnaires were scored. In this regard, Appellant contends that the SAA gave the evaluating panel no guidelines or standards from which it could be determined what was to be rated superior or poor. This allegedly resulted in an arbitrary scoring of the proposals.

"The determination of the needs of the . . . [State] and the method of accommodating such needs is primarily the responsibility of the procuring agency which therefore is responsible for the overall determination of the relative desirability of proposals." Health Management Systems, Comp. Gen. Dec. B-200775, 81-1 CPD ¶255 (1981). Accordingly, procuring officials enjoy a reasonable degree of discretion in evaluating proposals and such discretion may not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations. Beilers Crop Service, MSBCA 1066 (September 16, 1982) at p.6; Health Management Systems, supra; Comp. Gen. Dec. B-179703, 53 Comp. Gen. 800 (1974); compare Biddison v. Whitman, 183 Md. 620, 624-25 (1944); Hanna v. Board of Education, 200 Md. 49, 51, 87 A.2d 846, 847 (1952).

The issue for review here, therefore, is not whether it would have been better to specify guidelines for the uniform grading of proposals, but rather whether the discretion given each evaluator under the scoring method chosen by the SAA was exercised reasonably. Appellant insists that this discretion was exercised in an arbitrary manner as demonstrated by the evaluation scores for the subfactor entitled "location of principal office, local office." In this regard, Appellant is located in Landover, Maryland while Kurth is located in Washington, D.C. Both firms are very close to BWI and the SAA offices. Nevertheless, evaluation scores varied as follows:

<u>Offeror</u>	<u>Eval.#1</u>	<u>Eval. #2</u>	<u>Eval. #3</u>	<u>Eval. #4</u>	<u>Eval. #5</u>
Appellant	1	1	5	3	5
Kurth	1	1	4	5	5

While it is true that different evaluators placed varying importance on having a consultant with local offices, we cannot say that the evaluators exercised their discretion in an inconsistent or arbitrary manner. Those who thought proximity was important graded both proposals high and those who believed it was a disadvantage rated both proposals low.

Finally, Appellant alleges that the SAA acted in contravention of Maryland's procurement regulations and unfairly prejudiced its competitive position by weighing the technical elements at twice the value of the price element without indicating this relative importance in the RFP. Regardless of any substantive merit to this contention, however, this aspect of Appellant's protest was untimely raised and may not be considered.

Appellant, in this instance, learned that the SAA planned to weigh proposals on a two to one technical to price basis on the day proposals were submitted and before they were opened. A protest on this ground was not filed, however, until nearly two months later, after the evaluation of all

proposals and the award of a contract to Kurth. Pursuant to COMAR 21.10.02.03, the protest was untimely and Appellant therefore waived its right to raise a legal objection to the award of a State contract to Kurth. Dryden Oil Company, MSBCA No. 1150, July 20, 1983.

Appellant argues that it is within the discretion of this Board to consider untimely protests for good cause shown or if issues of widespread interest significant to procurement practices or procedures are raised. This Board, however, consistently has interpreted the timeliness provisions of COMAR 21.10.02.03 as mandatory requirements. As we repeatedly have pointed out, there is a fine balance which must be maintained between the rights of the protester, the interested party, and the using agency. In order to preserve this balance, it is imperative for protesters to raise their concerns quickly. In the instant appeal, had Appellant raised its objection immediately, proposals could have been returned or kept sealed, an amendment to the RFP could have been issued, and all offerors could have been given the opportunity to submit revised proposals or best and final offers. See COMAR 21.05.03.03C.(4). This would have preserved the competitive position of all offerors and avoided significant delay to the procurement. By waiting until the award process was completed before protesting, Appellant unnecessarily cast a shadow both on the vested rights of Kurth & Company, Inc. and the State's efforts to proceed expeditiously with its BWI Air Development Program. This precisely is why the timeliness requirements set forth in COMAR 21.10.02.03 are important and strictly must be adhered to.

For the foregoing reasons, therefore, the appeal is denied in its entirety.