

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of BALTIMORE MOTOR COACH)
COMPANY)

Under SAA RFP 84-003)

) Docket No. MSBCA 1216
)

January 8, 1985

Interested Party - In this negotiated procurement, Appellant was determined to be an interested party despite having submitted a proposal adjudged to be only the fourth most advantageous to the State. Since Appellant was alleging that it was unfairly treated in the evaluation process, the possibility existed that it would be in line for award if its allegations proved true.

Board Jurisdiction - Although the instant appeal involved a concession contract and was not to result in an expenditure by the State, Code Article 21 still applied to the procurement. As such, Appellant had the right to protest and to appeal the SAA's denial of its protest to this Board.

Discrimination/Bias - Bias or discrimination will not be attributed to procurement officials based on inference or supposition. An Appellant carries a heavy burden of proof to establish that it has been discriminated against and thus deprived of its right to compete fairly for the award of a State contract.

Discussions - If a State agency conducts discussions or negotiations with one offeror, it must do so with all offerors who have submitted proposals which are acceptable or susceptible of being made acceptable.

Discussions - Whether discussions have been held in a given procurement is a matter to be determined based upon the particular actions of the parties and not merely the characterizations placed thereon by the procurement officer. The test is whether an offeror was provided an opportunity to revise or modify its proposal.

Discussions - Where an offeror submits information relating solely to the determination of its responsibility, the exchange does not constitute a discussion. Here the SAA's post-evaluation request for information demonstrating the highest rated offeror's operational controls, technical skills, financial resources and overall capability to provide the degree of service called for in the RFP was intended to permit the SAA to determine responsibility. Hence, there was no unfairness to Appellant demonstrated by the foregoing.

Evaluation of Proposals - When evaluating the relative desirability and adequacy of technical proposals, a procurement officer is required to exercise business and technical judgment. Under such circumstances, he enjoys a reasonable degree of discretion and, for this reason, his conclusions may not

be disturbed unless shown to be arbitrary or contrary to Maryland law. In this instance, Appellant was unable to demonstrate arbitrary or illegal action sufficient to affect its competitive standing.

Alternate Proposals - Appellant submitted a proposal which offered an approach to service which was not outlined in the RFP. Although the SAA was not required to reject the proposal, it could not consider it without amending the RFP to permit all other acceptable offerors to submit on a similar basis. The SAA likewise had discretion to reject the alternate proposal if it reasonably concluded that the alternate plan was not in the best interests of the State.

Failure to Acknowledge Addendum - Unlike in a competitive sealed bid procurement, the SAA was permitted to consider a proposal submitted without acknowledgment of all addenda and permit an offeror to correct its omission during discussions. This ruling was premised upon discussions having been conducted with all acceptable offerors.

APPEARANCE FOR APPELLANT: Barbara Gold, Esq.
Baltimore, MD

APPEARANCE FOR RESPONDENT: Peter W. Taliaferro
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN BAKER

This appeal arises from an SAA procurement officer's final decision denying Appellant's protest of an award to one of its competitors. Appellant contends that it was discriminated against, as a woman owned firm, in the evaluation of proposals submitted pursuant to the captioned procurement. SAA maintains that Appellant was given a full and fair opportunity to compete equally for the award and that its proposal properly was not determined to be the one most advantageous to the State of Maryland.

Findings of Fact

1. On March 1, 1984, the Maryland Department of Transportation State Aviation Administration (SAA) issued a request for proposals (RFP) from contractors desiring to operate a ground transportation concession between Baltimore-Washington International Airport (BWI) and the Washington, D.C. metropolitan area. Subsequently, three RFP addenda were issued on March 20, April 6 and April 18, 1984 respectively. Each offeror was required to acknowledge receipt of all addenda and affirmatively state that its proposal was based upon full knowledge thereof.

2. Pursuant to the terms of the RFP, the selected contractor was to be given the rights to provide both "Primary Ground Transportation Service" on an exclusive basis between BWI and certain designated locations in Washington, D.C., Prince George's County and Montgomery County, and "Optional Ground Transportation Services" on a nonexclusive basis subject to prior written approval by the SAA.

3. Primary ground transportation was to consist of: (1) "line-haul" service, and (2) "van-type," door to door service. Line-haul service was to be provided along a route originating at BWI and proceeding sequentially to the Capital Hilton in Washington, D.C. and The Greenbelt Limousine Terminal in Greenbelt, Maryland. The contractor was to provide for a minimum of twenty scheduled round trips daily between 5:00 a.m. and 12:00 midnight, with a minimum of one round trip for every two hour period. "Door to Door, Van-Type" service was to be provided within a 25 mile radius of The Greenbelt Limousine Terminal and was intended to permit passengers a means of reaching the airport from their homes, offices, hotels, etc. The contractor was to provide this service with no more than a four hour advance reservation.

4. The RFP mandated that at least 75% of the line-haul passengers be conveyed by motor coach. These motor coaches could be purchased or leased by the successful contractor and did not have to be new. However, at no time during the contract could any motor coach model in service be older than 10 years. A separate option was provided to utilize SAA-furnished motor coaches.

5. In order to provide door-to-door service, the contractor was required to furnish, at a minimum, six van-type vehicles having the capacity to seat 11 passengers and store accompanying luggage. These vans were to be purchased or leased new by the commencement date of the contract.

6. The RFP contemplated the award of a five year contract with a renewal option of five years to be exercised at SAA's discretion.

7. Section IX of the RFP, in pertinent part, provided as follows:

In consideration of the rights and privileges to be granted to the selected Contractor by the Administration [SAA], the selected Contractor shall pay to the Administration the following fees:

A. The selected Contractor shall pay monthly to the Administration either (1) certain revenues expressed as a minimum annual guarantee (biddable item) for each contract year, or (2) ten percent (10%) of the total gross revenues based upon a "level of business" plateau to be established by the selected Contractor as set forth hereinbelow, derived from its Primary Ground Transportation operations originating at the Airport as stated herein, whichever is greater on a contract year basis. The Administration is not setting any minimum acceptable amounts for Contractor's minimum annual guarantee. . . .

8. Optional ground transportation service was to include charter and other contractual arrangements made between the contractor and the airlines, travel agents, hotels and individuals. The contractor was to pay 10% of those gross revenues derived from each outbound passenger or lost baggage item carried from the airport pursuant to such services.

9. The RFP set forth evaluation criteria under section XIX as follows:

* * *

1. Revenue offer to the Administration, calculated on the basis of a five (5) year agreement.
2. Contractor's discretionary selection of, and justification for the use of, the in-kind contributions offered by the Administration as set forth in Article XI hereof.

Note: The greater selection of in-kind contributions shall have a negative impact in the Administration's evaluation of each Contractor's financial offer to this Request for Proposals.

3. Experience of the Contractor and quality of past performance in similar operations.
4. Plan of operation, including type, number, and size of vehicles.
5. Qualifications and authority of on-site management.
6. Adequacy of proposed operational plan.
7. Operational and financial controls.
8. Proposed method of acquiring (ownership or lease) necessary equipment including motor coaches and vans. As stated in Article XI, Contractors may elect to make use of the Administration's six (6) motor coaches to satisfy the requirement for this type of vehicle.
9. Financial ability to perform (based on Contractor's certified profit and loss statement, and Contractor's pro forma statement of projected revenues and expenses).
10. Analysis of ridership projection.
11. Plan for advertising, marketing, and promotion of the ground transportation service.

B. To achieve the Administration's Minority Business Enterprise goals, the following criteria may be used in the evaluation:

Optional Evaluation Criteria

1. Impact of proposed concession operation on economically and socially disadvantaged citizens.
2. Impact of proposed concession operation on economically and socially disadvantaged business community.
3. Composition of Contractor's ownership.

10. The term "in-kind contributions" was defined in section XI of the RFP to mean non-monetary support to prospective offerors. Two optional in-kind contributions were to be made available to contractors as follows:

a. The furnishing of up to six motor coaches owned by SAA at no cost to the contractor other than that incurred for insurance, operation and maintenance of the motor coach. The depreciation per bus per month was estimated by SAA to be \$1,679 and, hence, this amount was established as the value of the in-kind contribution should a contractor elect to accept it.

b. The selected Contractor, at its election, also was to be given the use of the Greenbelt Terminal on a rent-free basis, including maintenance. The value of this in-kind contribution was said to be \$14,390 per year. The contractor whether using the facility rent-free or not was to be responsible for staffing the facility for its purposes and for all utility and janitorial services.

11. Five timely proposals were submitted to the SAA for consideration on May 4, 1984. The proposals were referred to a Selection Evaluation Panel headed by Mr. John O. Elliott, SAA's Assistant Director for Finance and Administration. Mr. Elliott and his co-panelists, Messrs. Dennis McGlone and Joseph T. Herbert, rated the technical proposals based on their respective content and on personal interviews conducted with each offeror. The members of the evaluation panel were assisted in the assessment of financial ability to perform by Mr. Gary E. Davies, the SAA Chief of Audit.

12. The evaluation of each proposal was done on a point system. A total of 480 points were available for the 11 technical factors to be analyzed under the RFP evaluation criteria. The maximum point total for price was 320.

13. In a memorandum dated May 28, 1984, Mr. Elliott submitted to Mr. T. James Truby, the SAA Administrator, a recommendation for award of the captioned contract to Airport Baggage Carriers, Inc. (ABC). Point scores also were set forth in the memorandum as follows:

ABC	554
Holland Industries, Inc.	520
Hudson Aviation Services, Inc.	507
Appellant	433
Frederick Limousine, Inc.	412

14. Upon receiving the foregoing recommendation for award, Mr. Truby asked for additional information relating to ABC's ability to sustain long term losses and certain administrative details not contained in the proposal. (Tr. 82). Mr. Elliott relayed this request to ABC by letter dated July 12, 1984. ABC responded on July 23, 1984 and a meeting to discuss this response was conducted on August 16, 1984. As a result of these discussions and the written information provided, Mr. Truby determined that ABC had the financial and technical capability to perform the contract successfully.

15. A decision to award the captioned contract to ABC apparently came after the August 16, 1984 meeting date. Appellant's attorney protested the SAA Administrator's award decision by letter dated August 24, 1984 on the following grounds:¹

a. The male-owned recipient of this contract already has contracts to run between Baltimore and BWI and the District of Columbia and Dulles Airport. The award of the contract gives the male-owned company virtually monopolistic control of airport runs.

b. The male-owned recipient of this contract was afforded an opportunity, after bids had been submitted and before the award was announced, to submit an upgraded marketing plan. This is obviously unfair.

c. Bid announcement was delayed beyond the sixty (60) days set forth in the contract during which the male-owned recipient had time to respond to the opportunity set forth above.

d. A small van-only bid, set forth by The State Aviation Administration, states a preference for MBEs, but this contract does not.

16. A final decision was issued on September 7, 1984 denying Appellant's protest. This decision was received by Appellant on September 11, 1984.

17. A timely appeal was taken on September 25, 1984.

18. A contract was awarded by the SAA Administrator notwithstanding the pendency of this protest appeal.

Decision

A. Motion To Dismiss

1. Is Appellant An Interested Party?

SAA initially contends that Appellant is not an interested party and, for this reason, does not have standing to bring this appeal. The basis for this contention is that Appellant submitted a proposal which was adjudged to be

¹These arguments were refined somewhat during the appeal proceedings. The specific statement of issues presently in dispute is set forth in the opinion.

fourth best. Appellant thus was not in line for award and has not established itself as a party aggrieved by the SAA's award of a contract to ABC. Compare Erik K. Straub, Inc., MSBCA 1193, September 11, 1984.²

COMAR 21.10.02.02A³ provides that only an interested party may have its protest considered. An "interested party" is an actual or prospective bidder, offeror or contractor that may be aggrieved by the actions of the procurement officer affecting its competitive position. COMAR 21.10.02.01A; RGS Enterprises, Inc., MSBCA 1106, April 8, 1983; Delmarva Drilling Co., MSBCA 1096, January 26, 1983. Whether a party is affected competitively involves consideration of the party's status in relation to the procurement and the nature of the issues involved. International Business Investments, B-202164.2, June 8, 1981, 81-1 CPD ¶459.

Here Appellant was one of five offerors competing under a negotiated procurement. What is alleged is that the evaluation process so patently was unfair that Appellant was deprived of an opportunity to compete equally. If this allegation is true, Appellant's competitive position and perhaps its right to an award will have been affected. We cannot say, therefore, that Appellant was not aggrieved by the SAA's evaluation methods, or that it is not an interested party. Compare Computer Science Corporation, B-190632, August 4, 1978, 78-2 CPD ¶85. The motion to dismiss on this basis, therefore, is denied.

2. Is the Captioned Contract Subject to Code Article 21 Requirements?

The instant concession contract will not require SAA to pay money to its contractor for the transportation service provided. For this reason, SAA contends that the contract is not subject to the requirements of Maryland's Procurement Law and, concomitantly, that there is no bid protest remedy available. In support of this proposition, SAA points to Code Article 21, §1-202 which states, in pertinent part, that:

(a) In general. - This Article applies to:

- (1) Every expenditure by a State agency for supplies, services, and construction under any contract or similar business agreement;

²In Erik K. Straub, Appellant was the sixth low bidder under a competitive sealed bid procedure. The Board ruled that Appellant was not an interested party because it failed to establish that all five of the lower bids received were improper. Since Appellant was challenging only the low two bids, it was not apparent that Appellant would receive a direct benefit, i.e., award of the contract, if its protest were upheld.

³COMAR 21.10.02.02A provides that:

"An interested party may protest to the respective procurement officer representing the State agency against the award or the proposed award of a contract for supplies, services, maintenance, or construction."

Subsection (b) of Code Article 21, §1-202, however, sets forth those agencies and types of procurement contracts which are not subject to the requirements of Maryland's Procurement Law. Neither concession contracts nor SAA contracts are excluded expressly from the requirements of the law.

In construing the foregoing statutory language in the past, we have concluded that the requirements of Code Article 21 were intended to apply to concession contracts. Solon Automated Services, Inc., MSBCA 1117, February 29, 1984. SAA has not proffered any argument which warrants a reconsideration of that conclusion. For this reason, SAA's motion to dismiss again is denied.

B. Reasonableness of SAA's Evaluation of Proposals

1. General Allegation of Discrimination

Appellant initially argues that both Title VI of the Civil Rights Act of 1964, and Title 49, Code of Federal Regulations, Department of Transportation Programs, mandate that women receive an equal opportunity to compete for and perform in all aspects of contracting to the maximum extent feasible. In this regard, it is alleged that the SAA discriminated against Appellant, a woman-owned company, in its evaluation of proposals and, hence, violated the foregoing statutory proposals and the due process requirements mandated by the 5th and 14th Amendments to the U.S. Constitution. Whatever the merits of this argument and its application to the instant procurement,⁴ we shall not address it in the manner raised. If indeed there was discrimination, a protest is warranted under Maryland's Procurement Law which prohibits the unfair treatment of any bidder or offeror. See Md. Ann. Code (1981 Repl. Vol.), Art. 21, §§1-201(b)(2), 1-201(b)(7), 2-201; COMAR 21.05.03.03C(3).

This Board previously has ruled that bias will not be attributed to procurement officials based on inference or supposition. B. Paul Blaine Associates, Inc., MSBCA 1123, August 16, 1983, at p. 13. However difficult it may be to prove the subjective motivation of State procurement officials, an Appellant seeking to establish that its competitive position was affected by discriminatory actions nevertheless carries the burden. Here that burden of proof was not met. Appellant omitted to offer evidence to establish that one or more of the SAA evaluators was opposed to the award of a contract to a woman-owned company. The arguments presented by Appellant simply addressed the reasonableness of the evaluation process under Maryland law and

⁴Appellant's argument raises numerous questions which never were addressed by either party to this dispute. Title VI of the Civil Rights Act of 1964, for example, concerns federally assisted grants and programs. Assuming that the captioned contract meets this criteria, the parties never considered whether a failure to comport with the requirements of this federal law would void a contract entered into between a grantee State agency and its contractor. Further, the parties did not consider whether responsibility for effecting compliance with the Civil Rights Act lies solely with the Federal government. Despite this omission, the protest fully is resolvable under Maryland law and, hence, a discussion of the application of the Civil Rights Act of 1964 is unnecessary.

regulations. Whether a State procurement official may be unreasonable without being biased is a philosophical question unimportant to the disposition of this appeal. If the SAA truly failed to comply with the requirements of Maryland law in evaluating the proposals submitted under the captioned appeal, or was unreasonable in exercising its judgment, and those failures affected Appellant's competitive standing, the protest will be sustained. Compare Alan-Craig, Inc., B-202432, September 29, 1981, 81-2 CPD ¶263. We thus turn our attention to SAA's conduct of this negotiated procurement.

2. Did SAA Improperly Initiate Proposal Discussions With ABC Without Affording the Same Opportunity to the Other Acceptable Offerors?

COMAR 21.05.03.03C.(3) provides, in pertinent part, that "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals." Inherent in this regulation is the requirement that if a State agency conducts discussions or negotiations with one acceptable offeror, it must do so with all acceptable offerors. Compare 50 Comp. Gen. 202 (1970).

Whether discussions or negotiations have been held in a given procurement is a matter to be determined based upon the particular actions of the parties and not merely the characterizations placed thereon by the procurement officer. "The test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal." MAR, Incorporated, B-194631, August 13, 1979, 79-2 CPD ¶116, p. 3; see also Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD ¶404; The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD ¶459. Where an offeror submits information, after the closing date for proposals, which relates solely to the determination of its responsibility, the submittal is not prejudicial to other offerors and is not considered to constitute a discussion of its proposal. Wheeler Industries, Inc., B-196021, November 29, 1979, 79-2 CPD ¶383.

Here the SAA Administrator did request supplementary data from ABC after the closing date for receipt of proposals and the completion of initial interviews and evaluations. This information generally related to ABC's plan for the administration of the contract. (Appeal File, Tabs 23, 24, 25, 26). Similar information was not requested from the other offerors. SAA contends that its request for information was essential to determine ABC's responsibility and was not used otherwise to evaluate the ABC proposal. Put another way, SAA is contending that the information furnished by ABC does not constitute part of its proposal and, therefore, has not been incorporated into the contract subsequently entered into between SAA and ABC.

It is clear from the record that the information requested by SAA was not essential to determine the acceptability of ABC's proposal. All of the proposals received, in fact, already had been deemed acceptable at the time the request to ABC was made. Further, the information tendered by ABC was not intended to modify the offer contained in its proposal. Instead the information was furnished at SAA's request to demonstrate ABC's operational controls, technical skills, financial resources and overall capability to provide the degree of service called for in the RFP. The information furnished provided reasonable assurance that ABC would be able to meet its commitments under the contract. As such, we conclude that the information provided related solely to the determination of ABC's responsibility⁵ as an

offeror and, hence, did not constitute discussions or negotiations. Accordingly, Appellant was not prejudiced and SAA did not violate the requirements of Maryland law.

3. Fairness of the Evaluation Process

When evaluating the relative desirability and adequacy of proposals, a procurement officer is required to exercise business and technical judgment. Under such circumstances, a procurement officer enjoys a reasonable degree of discretion and, for this reason, his conclusions may not be disturbed by a reviewing board or court unless shown to be arbitrary or arrived at in violation of Maryland's Procurement Law. Beilers Crop Service, MSBCA 1066, September 16, 1982, p. 6; B. Paul Blaine Associates, Inc., supra, p. 14.

a. Evaluation of Appellant's Experience and Quality of Past Performance In Similar Operations

SAA developed a numerical rating system to evaluate the proposals received. A numerical rating system is ". . . simply an attempt to quantify what is essentially a subjective judgment for the purposes of realistic and fair proposal evaluation." 52 Comp. Gen. 198, 209 (1972). With regard to the experience and quality of past performance in similar operations criteria, SAA allocated a maximum of 50 points. The four highest rated offerors were given the following point ratings under this evaluation criteria:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	40	48	48	136
Hudson	20	40	35	95
Holland	45	44	40	129
Appellant	15	10	20	45

ABC, the highest rated offeror in this category, successfully is operating three scheduled airport transportation services. These airport ground transportation contracts include service between BWI and Baltimore, Dulles Airport and Washington, D.C., and National Airport and Washington, D.C. With regard to the BWI-Baltimore service, ABC particularly had impressed SAA officials by assuming an unprofitable operation and transforming it into a successful one. Hudson and Holland both were able to demonstrate experience with scheduled airport ground transportation service as well. Hudson, however, was downgraded due to a lack of aggressiveness in performing under the expiring contract for service between BWI and Washington and its apparent poor performance at the Dallas/Ft. Worth Airport.

⁵A responsible offeror is "... a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance." COMAR 21.01.02.59.

Appellant was unable to demonstrate prior experience with airport ground transportation service. However, it has provided scheduled service between National Security Agency offices at Ft. Meade and BWI Airport during the period from October 1981 to September 1983. (Tr. 19). This service involved 18 to 20 daily roundtrips at varying intervals between 6:30 a.m. and 6:00 p.m. While tickets apparently were not sold for this service, Appellant's Mr. Wilkinson testified that his company had considerable experience with the sale of tickets and handling of receipts. This experience was derived from Appellant's daily bus runs to various State racetracks and both Charlestown and Delaware Park in neighboring States. Appellant's yearly revenues since 1979 have equaled or exceeded that which has been forecast for the BWI service to Washington. Accordingly, Appellant contends that it adequately demonstrated the proper experience with scheduled service of the type called for in the RFP.

Appellant was not downgraded for incompetence. Obviously, its officers are experienced and capable of managing the services required under the RFP. Here, however, SAA was measuring relative experience based on past performance in similar operations. Under the foregoing facts, we cannot conclude that the SAA unreasonably gave greater weight to the experience of ABC, Holland and Hudson based on their prior performance of airport ground transportation contracts of a type similar to the instant one.

b. Evaluation of Appellant's Plan of Operation

The evaluation of each offeror's plan of operation was done on the basis of a maximum score of 30 points. The relative scores given the proposals were as follows:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	25	20	12	57
Hudson	0	15	5	20
Holland	5	13	5	23
Appellant	10	5	15	35

The subjective nature of this evaluation is evident from the variation in scoring. In particular, where Messrs. Elliott and McGlone perceived the ABC proposal to be vastly superior to Appellant's presentation of its proposed plan of operation, Mr. Herbert reached the opposite conclusion.

The consensus of the SAA's evaluators, however, was that the ABC plan of operation was superior to that proffered by Appellant. Appellant objects to this determination because ABC allegedly did not provide sufficient financial data and ridership projections to support its plan. ABC further is said to have omitted a marking scheme for its vans. Explanation as to why these deficiencies render ABC's plan unacceptable was not provided by Appellant's witnesses. Accordingly, we cannot find that the SAA evaluators acted unreasonably.

c. Evaluation of Proposed Advertising, Marketing and Promotion Plan

The respective marketing plans of the offerors were evaluated on a 50 point basis as follows:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	10	30	25	65
Hudson	5	20	20	45
Holland	25	25	30	80
Appellant	10	10	40	60

Appellant's advertising, marketing and promotions plan was prepared by Renaissance Communications, Inc. under an agreement whereby this firm would obtain Appellant's BWI advertising account if an award was received under the captioned procurement. The marketing plan called for a targeting of advertising towards corporate organizations, travel agencies, the military, public organizations and retail establishments. Discount coupons would provide a financial incentive to these groups to buy tickets in bulk. Advertising was budgeted at \$10,000 per month. This amount would buy weekly radio and newspaper advertising. Direct mailings, audio visual displays at the airport and elsewhere, and small promotions also would be used. Revenue received from selling advertising space on the motor coaches and vans would be used to supplement Appellant's budget.

ABC was proposing to spend \$15,000 per year on marketing and advertising. Primary advertising was to be directed at airport traffic and weekly community newspapers. Advertisements were to include discount coupons to attract new customers. Marketing efforts were to be aimed at travel agents, hotels, convention bureaus and institutions and a toll free number for customers was to be provided.

The most elaborate plan was proposed by Holland which offered all of the foregoing and more. Holland, however, budgeted only \$10,000 per year which the SAA believed was conservative.

Appellant was downgraded in its approach because its yearly budget of \$120,000 was considered unrealistic. In this regard, two of the evaluators considered this to be an indication of inexperience.

We conclude that the SAA evaluators were not unreasonable in ranking Holland first for its clearly superior marketing and advertising plan. Similarly, given the narratives presented by ABC and Appellant, we see little difference in their respective approaches. There is nothing in the record, further, which demonstrates a clear superiority of Appellant's plan to that offered by ABC.

d. Evaluation of Ridership Projections

Ridership projections were evaluated on a 30 point basis as follows:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	0	5	10	15
Hudson	0	5	0	5
Holland	0	5	0	5
Appellant	15	7	10	32

Neither ABC, Hudson, nor Holland dedicated a section of their proposals to this criteria. Each received either a zero or a minimal score from the respective evaluators. Appellant, on the other hand, did submit a projection of ridership estimated at 3% of the enplaning and deplaning passengers for each year through 1989. Nevertheless, Appellant received only 32 points, or approximately twice the total awarded to ABC. This, we are told, is patently unfair.

The fact that Appellant provided the requested ridership projection does not entitle it either to a full 30 points from each evaluator or significantly more points than its competitors. Obviously, its ridership projection was to be scrutinized and evaluated. The SAA concluded from its review, that the 3% ridership figure based on BWI passengers was unrealistically high and, accordingly, downgraded Appellant. There is nothing in the record to support Appellant's contention that SAA's conclusion was without a reasonable basis.

e. Evaluation of Plan of Operation, Including Type, Number and Size of Vehicles

This category apparently differs from the earlier one dealing with proposed operational plans in that here the SAA was concerned solely with the deployment and utilization of vehicles. SAA used a 40 point system and arrived at the following ratings:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	35	30	39	104
Hudson	10	20	30	60
Holland	15	25	30	70
Appellant	20	15	20	55

Appellant contends that given the scheduling requirements in the RFP, there was little an offeror could do to be innovative. (Tr. 35). Accordingly, it cannot understand how ABC reasonably could have been given a total of 49 points more than it received under this criteria.

Appellant offered to "lease" the six SAA motor coaches for use in its line haul and charter operations. Additionally, Appellant planned to purchase eight 1985 Chevrolet Beauville, 12 passenger vans. These vans were to have front and rear seat air conditioning. One of the vans was to be equipped with a wheel chair ramp.

ABC likewise planned to accept the SAA in-kind contribution of six motor coaches and purchase vans. The vans to be purchased were Chrysler, 11 passenger models with air conditioning in the front and rear. The ABC proposal does not state precisely how many vans were to be purchased.

Holland and Hudson also intended to use the SAA motor coaches and purchase vans. Hudson, however, planned only to use four SAA coaches and buy the minimum six vans. Holland was to use all six SAA coaches and purchase 15 eleven passenger vans.

On balance, we see little difference between the four proposals under this criteria. The scores awarded to Appellant, Hudson and Holland accurately reflect this similarity. ABC, in our view, received a disproportionately high number of points for offering virtually the same equipment plan. Appellant adequately has demonstrated an absence of reasonableness in this area.

f. Evaluation of Qualifications and Authority of On-Site Management

This criteria was evaluated on a 30 point basis as follows:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	25	27	28	80
Hudson	15	25	25	65
Holland	5	20	20	45
Appellant	15	15	15	45

The authority of on-site management appears to be equally acceptable to the SAA under the four proposals. Appellant was downgraded, however, due to its lack of experience in managing scheduled service of the precise type contemplated at BWI. Holland was downgraded due to a concern over who would manage the contract after the initial contract manager left the project, as expected, six months after the commencement of service. We find nothing unreasonable about the foregoing evaluation.

g. Evaluation of Proposed Method of Acquiring Equipment

The respective proposed methods of acquiring equipment were evaluated on a 20 point scale as follows:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	15	20	10	45
Hudson	20	20	15	55
Holland	15	20	10	45
Appellant	0	5	8	13

All offerors indicated that they would purchase vans and use the SAA buses. Hudson planned to use only four of the six SAA buses and thus received a somewhat higher rating. ABC, Hudson and Holland all had the resources to purchase vans. Appellant was downgraded because of concern over its ability to secure financing for the purchase. Although Appellant's Mr. Wilkinson testified that a loan was forthcoming either from the Maryland Small Business

Development Financing Authority (MSBDFA) or the Small Business Administration, no evidence as to the certainty of these loans was presented. Further, at the time of Appellant's pre-evaluation discussions with the SAA, Appellant was unable to identify the MSBDFA as the Maryland agency which allegedly would provide it a loan in the event a contract award was secured. (See Resp. Exh. 10). This, of course, precluded the SAA from verifying the pendency of the loan. For these reasons, therefore, we cannot say that the SAA acted unreasonably.

h. Evaluation of Financial Ability To Perform

The offerors' respective financial conditions and abilities to perform contract obligations were evaluated on a 160 point basis as follows:

<u>Offeror</u>	<u>Eval. #1 (Elliott)</u>	<u>Eval. #2 (McGlone)</u>	<u>Eval. #3 (Herbert)</u>	<u>Total</u>
ABC	100	112	80	292
Hudson	75	144	95	314
Holland	90	144	120	354
Appellant	20	16	60	96

The SAA evaluators were assisted by Gary E. Davies who analyzed the short term solvency, long term solvency and earnings of each offeror. Mr. Davies concluded that Appellant, unlike its chief competitors, had both a current debt to equity ratio of less than one and a negative stockholder's equity ratio. (Tr. 65). This raised questions about Appellant's ability to meet current debts as they became due and withstand long term losses. (Tr. 72).

ABC had a positive current ratio and debt to equity ratio. Both Hudson and Holland were superior in this regard to ABC. (Resp. Exh. 21). The SAA evaluation is consistent with Mr. Davies conclusions and ranks Holland and Hudson above ABC and Appellant. Appellant has not demonstrated that this financial analysis and method of evaluation was without a reasonable basis.

i. Evaluation of Price Proposals

The following chart summarizes the SAA's evaluation of price based on a maximum of 320 points:

<u>Offeror</u>	<u>Net Subsidy</u>	<u>% Compar- ative Relation- ship</u>	<u>% of Avail- able Points</u>	<u>Point Award Out of 320</u>
1. Hudson Aviation Services, Inc.	\$460,110	16.4	83.6	267
2. Baltimore Motor Coach Co., Inc.	\$525,190	18.7	81.3	260
3. Airport Baggage Carriers, Inc.	\$580,190	20.7	79.3	254

4.	Holland Industries, Inc.	\$619,190	22.0	78	250
5.	Frederick Limo., Inc.	<u>\$624,190</u>	<u>22.2</u>	<u>77.8</u>	<u>249</u>
TOTAL		\$2,808,870	100%		

As is apparent, none of the offerors was eligible for the maximum point award under this method of evaluation.

The net subsidy figures contained in the foregoing chart were derived by computing each offeror's five year guarantee of revenue and diminishing it by the SAA in-kind subsidy as elected in the respective proposals. For example, ABC guaranteed a total of \$89,000 in revenue to the SAA during the five year life of the contract. It elected to accept the six SAA coaches and use of the Greenbelt terminal. These in-kind contributions had a value of \$669,190 over the same five year period. Hence the net subsidy was \$580,190.

Appellant contends that the SAA improperly read its proposal as accepting the in-kind contribution of the SAA's coaches. Instead Appellant states that it offered to enter into a lease/purchase agreement as evidenced by the following language:

It is the desire of the Company to enter into a lease/purchase agreement and eventually own the coaches after the five year period as specified in the RFP. Lease/purchase terms to be negotiated.

See Resp. Exh. 4, section 4. Under this offer, minimum revenue to the SAA would have been as follows:

1.	Minimum guarantee for five years	\$144,000 ⁶
2.	Revenue from lease of buses at \$1659/bus/mo. x 60 mo. x 6 buses	597,240
3.	Less Subsidy for Greenbelt Terminal	<u>(71,950)</u>
Total		\$669,290

The SAA, however, contends that the RFP did not advise offerors that each of its motor coaches could be leased at the rate of \$1,659 per year. Instead Paragraph XI of the RFP apprised offerors that:

It is currently recognized that it may be prudent and appropriate for the Administration to offer some assistance in the form of in-kind contributions, that is, non-monetary support, to prospective bidders. It is the Administration's intention to evaluate the bids received based on

⁶Based on a trend analysis, Appellant contends that the actual revenue to the SAA would approximate \$245,000 over five years.

those in-kind contributions that each Contractor deems is necessary to effectively commence and maintain the subject Primary Ground Transportation Activity . . .

Note: The greater selections of in-kind contributions shall have a negative impact in the Administration's evaluation of each Contractor's financial offer to this Request For Proposals.

RFP Paragraph XI further states that "[i]f the selected Contractor has elected to use the Administration's motor coaches, the insurance, operation, and maintenance costs of said motor coaches shall be the responsibility of, and at the cost of, the selected contractor." We conclude from the foregoing language that the SAA motor coaches were to be made available to the selected contractor at no cost, for use in providing primary ground transportation, at the contractor's option. Further, where an offeror intended to use these motor coaches, it was to indicate this on Schedule I of its proposal. Offerors also should have understood from the RFP language that the election to use SAA coaches and/or the Greenbelt Terminal would diminish their revenue offers under the evaluation method set forth.

Appellant's offer thus did not comport with the RFP requirements. Under such circumstances, SAA could not have accepted Appellant's proposal without amending the RFP to permit the other offerors an opportunity to submit revised proposals and compete on an equal basis.⁷ Compare Corbetta Construction Co., 55 Comp. Gen. 201, 75-2 CPD ¶144 (1975), motion for reconsideration, 76-1 CPD ¶240 (1976). Since the lease option was not acceptable to SAA, it chose not to amend the RFP. Further, rather than reject Appellant's proposal as unacceptable, the SAA elected to treat Appellant's proposal as requesting the in-kind contribution of six motor coaches. Whatever the propriety of this decision, it certainly was not unfair to Appellant.

C. Failure of ABC To Acknowledge Addendum III

Addendum No. III was issued on April 18, 1984 and contained supplemental information of significance to offerors both in preparing their technical and price proposals. This addendum also changed the due date for proposals to May 4, 1984. ABC submitted its proposal on this date but failed to acknowledge receipt of Addendum No. III. Appellant contends that the ABC proposal, therefore, was unacceptable.

⁷Appellant, in effect, submitted an alternate proposal for consideration by the SAA. In a negotiated procurement, this is not prohibited unless the RFP specifically excludes such an approach. Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD ¶312. If a procurement officer determines that the alternate approach would serve the State's needs, he is obligated to amend the RFP to permit all other offerors to compete on an equal basis. Otherwise, he may reject the alternate proposal as unacceptable. A procurement officer's refusal to recognize an alternate proposal or his rejection of that proposal is a matter of discretion which will not be disturbed absent a clear showing that his action was arbitrary or unreasonable. RKFM Products Corporation, B-186424, September 15, 1976, 76-2 CPD ¶247.

In a competitive sealed bid procedure, this Board previously has noted the general rule that a bidder's failure to acknowledge a material amendment to a solicitation renders a bid nonresponsive. See Liberty Roofing Co., Inc., MSBCA 1184, July 6, 1984, at p. 8. Here, however, we are concerned with a negotiated procurement. In this regard, the Comptroller General of the United States has stated that:

Negotiation procedures, unlike those required for formal advertising, are designed to be flexible and informal. These procedures properly permit the contracting [procurement] officer to do things in the awarding of a negotiated contract that would be a radical violation of the law if the procurement were being accomplished by formal advertising.

47 Comp. Gen. 459, 461 (1968). Accordingly, the failure to acknowledge an addendum in a negotiated procurement necessarily does not preclude consideration of the affected proposal and the omission properly may be made the subject of later discussions and negotiations. Id.

Appellant has failed to adduce evidence indicating that the criteria set forth under Addendum III were not acknowledged by ABC during the discussions⁸ conducted after receipt of proposals. Assuming that such acknowledgment was furnished at this time, we see no prejudice to Appellant or any other offeror.

D. Conclusion

Although we have recognized unreasonableness in the SAA's evaluation of Appellant's plan of operation, including type, number and size of vehicles, this error did not affect the overall ranking of the offerors.⁹ For this reason, consistent with the foregoing analysis, we deny the appeal.

⁸The discussions referred to here were those conducted with each offeror prior to evaluation of the proposals.

⁹Even if Appellant received the same score as ABC under this criteria, it neither would have moved forward in the rankings nor have been in line for award.