

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CALSO COMMUNICATIONS)
INC.)
Under DGS Contract No. DGS-) Docket No. MSBCA 1377
OTM-PI/88-02)

August 16, 1988

APPEARANCE FOR APPELLANT: Michael A. Lubin, Esq.
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APPEARANCE FOR RESPONDENT: John H. Thornton
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Competitive Negotiation - Selection of Evaluators - Bias--The selection of an evaluation panel member is a matter within the discretion of the procuring agency and will not be questioned absent evidence of actual bias. Even if the protestor demonstrates actual bias in the selection of the evaluators, the panel's decision will be upheld unless such bias is clearly shown to have permeated their decision. Under the facts of this case Appellant has not met its burden of proof which requires virtually irrefutable evidence, not mere inference or supposition, that the agency acted with a specific and malicious intent to injure Appellant in the selection of the evaluators.

Responsibility - Experience With Predecessor Contractor - It is appropriate for the procurement officer to review performance history under a predecessor contract in assessing a bidder's responsibility. He is not required to equalize competition by taking into consideration the competitive advantage or disadvantage accrued to firms due to their incumbency. Under the facts of this case Appellant has not met its burden of proof of showing whether the competitive disadvantage it suffered was the result of unfair government action or favoritism.

Competitive Negotiation - Technical Evaluation - Bias - Even where it is shown that the evaluator's judgment was affected by bias, a protest will be denied if there is no indication that the bias adversely affected the protestor's competitive standing. Where the evidence revealed that only one evaluator out of four erred in considering the value of the State's past experience with Appellant by misapplying experience in related work both as an independent evaluation factor and in conjunction with other evaluation factors, the Appellant could not show that its competitive standing was adversely affected.

Debarment-Proceedings - Jurisdiction - COMAR 21.08.04 generally provides for a debarment procedure which is discretionary with the Maryland Attorney General of the Secretary of a Department to initiate before the

Maryland Board of Public Works. The Maryland Board of Contract Appeals is not involved in the debarment proceedings in any manner.

Debarment Affidavit - Failure to Provide - There is nothing in the regulations or statute which provides for an automatic determination to exclude a business from competition for a State contract award where it has failed to provide certain information in a required debarment affidavit. Failure to provide such information may be grounds for initiating a debarment proceeding under COMAR 21.08.04.04.B.

Responsibility - Debarment Affidavit - From the Appeals Board's perspective failure to submit a properly signed and completed debarment affidavit raises an issue with regard to the responsibility determination. Even though the debarment affidavit submitted by the awardee contractor may be misleading, under the facts of this case the Appellant has not met its burden of proof necessary to overturn the procurement officer's determination of the awardee's responsibility since that determination will not be disturbed unless shown to be unreasonable, an abuse of discretion or contrary to statute or regulations.

OPINION BY MR. LEVY

This is an appeal from a Department of General Services procurement officer's final determination denying Appellant's protest in this procurement by competitive negotiation. Appellant alleges that the evaluation committee was selected on the basis of bias; the evaluation of Appellant's proposal was arbitrary; the evaluation of Appellant as a "poor performer" was arbitrary and capricious; and the firm announced for award should be excluded because of an error in its debarment affidavit. The State denies all the allegations.

Findings of Fact

1. The Department of General Services, Office of Telecommunications Management (DGS or OTM), in January, 1988, issued request for proposals (RFP) No. DGS-OTM-PI/88-02 for an annual open contact for the purchase, installation and maintenance of telephone and electronic key telephone systems for its facilities statewide.

2. Appellant had held the previous similar contract, (the 1987 contract), with DGS from March 12, 1987 through March 12, 1988. The 1987 contract was the first of this type entered into by DGS because prior to 1987, the State's agencies had been serviced by AT&T or Bell operating systems.

3. The evaluation of proposals under the RFP was addressed in Section

3.04 as follows:

3.04 EVALUATION CRITERIA

Each proposal received will be scored by the individual committee members for each evaluation area. The final score for a proposal will be a composite of all scores from all committee members.

<u>Evaluation Areas</u>	<u>Maximum Score</u>
1. Cost	40
2. Organization of Proposal and Technical Compliance	20
a. conformity of requested format (5 points)	
b. compliance with technical specifications (10 points)	
c. Suitability of proposed system/equipment to specifications (5 points)	
3. Vendor experience in similar installations	10
4. Location and number of vendor maintenance and installation centers.	15
5. Vendor maintenance capabilities and previous experience.	15
Total	100

In order to evaluate items 3 and 5 above, vendors shall supply the following information.

A. A list of not less than three contracts of similar size and complexity, not less than two of which shall be within the State of Maryland. The list shall include name of the customer, address and telephone number for customer contact person, date and place of installation. This information shall be included in the technical proposal.

B. Offerors that do not manufacture the installed equipment and cannot fully comply with the requirements of the preceding paragraph may obtain a notarized statement from the manufacturer(s) of the equipment to be installed guaranteeing that maintenance and support in compliance with Section 4.04 of this RFP shall be available to the State for a period of five (5) years following system installation and acceptance. This statement shall be included in the technical proposal. Only those technical proposals that have received a total score of 40, out of a possible 60 points will be considered for further evaluation.

Section 3.04 is further addressed in Addendum No. 1 as follows:

Evaluation Criteria

Grading for this RFP is a little different. It will behoove you to put down the location and number of maintenance and installation centers. Now if you have one center for maintenance and another for installation, please so state. Do not list home addresses of repair men or installers. We want your business locations. There are many points for this because we are covering the whole State. In clearing trouble and maintenances it is of prime importance to know your maintenance locations.

3.04 B.

Only those technical proposals that have received a total score 40, out of a possible 60 points, will be considered for further evaluation. If you don't have a technical score of at least 40 points we will not look at your cost. Your cost of course is worth 40 points.

4. Offerors' maintenance capabilities were addressed in Section 4.05, which provided in pertinent part as follows:

- * * *
- Maintenance will be required twenty four [sic] (24) hours per day, seven (7) days per week for critical State agencies that are involved in the public health, welfare and safety for the citizens of the State of Maryland, i.e., Maryland State Police, state hospitals, legislative offices, etc. Other non-critical, State agencies, i.e., offices opened 8 a.m. to 6 p.m., etc., will not require such extensive maintenance coverage. However, maintenance visits must be made within twenty-four (24) hours of notification.

* * *

Vendors will submit a listing showing information on the locations from which maintenance persons will be dispatched to service systems.

* * *

The State of Maryland has divided its telephone services into two (2) classes. The first class of service, Regular Service (RS), covers for those agencies which operate during the normal business hours of 8:00 a.m. to 5:00 p.m., five (5) days per week. Essential Service, (ES), the second service classification is for those agencies whose activities relate to public safety, health and welfare and which operate during and outside the normally scheduled work week. The Contractor shall respond between 8:00 a.m. and 5:00 p.m., Monday through Friday for all Regular Service (RS) repair notifications within twenty-four (24) hours.

For Essential Service (ES) repairs the Contractor must respond with [sic] two (2) hours to any major malfunctions.

5. Section 4.07 of the RFP required identification of the locations of offeror's service centers, as follows:

The offeror must include the location of all service centers that will serve Metropolitan Baltimore, Metropolitan Washington, and the Western, Southern and Eastern Shores of Maryland. If the installation and maintenance centers are separate, then list each type of center and its location.

6. DGS received timely proposals from Aim Telephones, Inc./Gray Communications, Inc. (Aim/Gray); Atlantic Telephone; AT&T; Harris Lanier; Tel Plus Communications, Inc.; Old Telephone Co.; and Appellant.

7. Mr. John Cook, who is responsible for voice systems for OTM, was the designated procurement officer. As such he was required to serve as one of the evaluators (COMAR 21.05.03.03). He was also given the responsibility for selecting the evaluation committee.

8. The evaluation committee consisted of Lt. Ronald W. George of the Maryland State Police (evaluator number 1/George); Charles Robertson of OTM (evaluator number 2/Robertson); Joel Leberknight of the Maryland Department of Health and Mental Hygiene (evaluator number 3/Leberknight); and John Cook (evaluator number 4/Cook). All four members had experience in state agency telecommunications needs.

9. Each of the committee members had experience dealing with Appellant by virtue of the 1987 contract and the record indicates that each had expressed at least some dissatisfaction with Appellant prior to being selected as an evaluator.

Lt. George was particularly dissatisfied with Appellant's response to two major outages at the Maryland State Police Barrack in Salisbury. The first outage occurred in the summer of 1987 when a lightning strike knocked out all telephone service and Appellant could not be reached at the number

provided for cases of major malfunction. Service was not restored for three days. The second outage occurred in December, 1987 and Appellant could not be reached until the following day for service.

The other three members expressed complaints about Appellant such as an inadequate supply of inventory, orders not meeting requested due dates, and failure to perform certain work for the Maryland Division of Social Services. See Exhibits K, L and M of the State's Agency Report.

10. The record reflects that the evaluators were not provided guidelines or standards by which to interpret the RFP criteria. There was also no discussion among the evaluators as to what factors should be considered for each criteria.

11. The scoring of Appellant by each evaluator against the technical criteria of the RFP was as follows:

Criterion Number 2. Organization of Proposal & Technical Compliance:

#1 - Lt. George	Score: 15	Comments: "Didn't answer maintenance locations. Appears to have been written for some other R.F.P."
#2 - Mr. Robertson	Score: 16	Comments: None
#3 - Mr. Leberknight	Score: 15	Comments: "Well organized and addressed all points"
#4 - Mr. Cook	Score: 10	Comments: None

Criterion Number 3. Vendor Experience in Similar Installations

#1 - Lt. George	Score: 5	Comments: "Have not been responsive to MSP needs"
#2 - Mr. Robertson	Score: 8	Comments: None
#3 - Mr. Leberknight	Score: 5	Comments: "Has experience from past year but didn't perform well at all."
#4 - Mr. Cook	Score: 0	Comments: "Does not meet DD's [due dates]. Did you ever provide insurance require-

ment? Did not provide protection until I insisted."

Criterion Number 4. Location and Number of Vendor Maintenance & Installation Centers

- | | |
|----------------------|--|
| #1 - Lt. George | Score: 10
Comments: "Not identified state-wide. 4.05B". |
| #2 - Mr. Robertson | Score 10:
Comments: None |
| #3 - Mr. Leberknight | Score: 10
Comments: "Calso didn't list a western office & subcontractor arrangement in Eastern Shore hasn't worked well." |
| #4 - Mr. Cook | Score: 8
Comments: "Arbutus, Balto., Frederick. No Eastern Shore, No Western Maryland." |

Criterion Number 5. Vendor Maintenance Capabilities and Previous Experience.

- | | |
|----------------------|---|
| #1 - Lt. George | Score: 5
Comments: "MSP has had very bad experience with major malfunction response from Calso." |
| #2 - Mr. Robertson | Score: 10
Comments: None |
| #3 - Mr. Leberknight | Score: 5
Comments: "Calso didn't perform well over the past year. Didn't have parts, etc." |
| #4 - Mr. Cook | Score: 5
Comments: "Page 20. Page 25. 4-02B - Do not comply now. Had to call for maintenance report. On present contract." |

12. Appellant's proposal listed ten references, all but one located in Maryland. It also identified three service centers to serve the entire State:

1613 Sulphur Springs Road
Suite 110
Baltimore, Maryland

31 Hopkins Plaza
Baltimore, Maryland

Fort Detrick
Frederick Cancer Research Facility
Frederick, Maryland

See State's Agency Report, Exhibit B at B12-13.

In its 1987 proposal Appellant had also identified three service centers as follows:

3918 Vero Road
Baltimore, MD

10000 A Derekwood Lane
Lanham, MD

Fort Detrick, Building 350
Frederick Cancer Research Facility
Frederick, MD

See State's Agency Report, Exhibit F, at F-2

13. Aim/Gray was recommended by the evaluation committee for the contract award. The proposal submitted by Aim/Gray gives the appearance of a joint bid between Aim Telephones, Inc. and Gray Communications. See State's Agency Report, Exhibit C. However, in its cover letter [Exhibit C4] made a part of the proposal, the relationship between the two firms is expressed as follows:

AIM Telephones, Inc. has agreed to acquire Gray Communications from the Sargent Electric Company. Pending final approvals, the acquisition should be completed in March 1988; we have therefore combined our efforts with Gray Communications to minimize confusion and/or duplication.

* * *

In the event that this contract is let prior to our formal acquisition of Gray Communications, AIM Telephones, Inc. hereby guarantees all terms and conditions of this contract and would utilize Gray Communications as a subcontractor.

The letter was signed by William C. Christopoulos, President of AIM Telephones, Inc.

14. Mr. Fred Sargent, the President of Gray Communications, Inc. was convicted in 1984 of federal antitrust violations, as president of Sargent Electric Company. Gray Communications, Inc. is a wholly owned subsidiary of Sargent Electric. The debarment affidavit filed by AIM/Gray with its proposal makes no acknowledgment of Fred Sargent's conviction in 1984.

15. Comdial Corporation, a potential subcontractor to Appellant on behalf of itself and Appellant, filed a timely bid protest with the DGS procurement officer on February 25, 1988. See State's Agency Report, Exhibit G. The protest alleged that (1) Appellant's price was the lowest; (2) that the evaluation of Appellant's proposal was improper; (3) that the contract should be awarded to a contractor supplying only products made in the United States; and (4) that Fred Sargent had been convicted in Federal Court in 1984 for conspiring to fix prices.

16. The procurement officer issued his final decision on March 17, 1988. Comdial was rejected as a protesting party for lack of standing to protest since it had not submitted a proposal. The protest was denied on its merits with regard to Appellant.

17. Appellant filed a timely appeal with this Board on March 28, 1988, raising the following issues.:

1. The evaluation committee was selected on the basis of bias and prejudice for the intended purpose of excluding Appellant from the price competition.

2. The ratings assigned by the evaluation committee based on the proposals submitted were arbitrary or contrary to the objective facts.

3. Labeling Appellant a "poor performer" is unwarranted, arbitrary and capricious.

4. Aim/Gray should be excluded from the competition on the basis of the debarment affidavit submitted by Aim/Gray.

Decision

Selection of Evaluators

Appellant alleges that the evaluation committee members were selected by Mr. Cook on the basis of bias and prejudice for the intended

purpose of excluding Appellant from the price competition. Mr. Cook, in his capacity as procurement officer, was given wide discretion in selecting members with telecommunication experience. Yet he chose three evaluators who had personally expressed to him dissatisfaction with Appellant's service under the 1987 contract. Appellant thus argues that Mr. Cook 'rigged the jury' by selecting only individuals whom he knew had registered complaints with him about Appellant.

The selection of an evaluation panel member is a matter falling primarily within the discretion of the procuring agency and will not be questioned absent evidence of actual bias. Fox & Co., B-197272, November 6, 1980, 80-2 CPD ¶1340. "A protestor alleging bad faith on the part of government officials bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with a specific and malicious intent to injure the protestor." The Aeronetics Division of AAR Brooks & Perkins, B-222516, B-222791, August 5, 1986, 86-2 CPD ¶151. Furthermore, even if the protestor demonstrates actual bias in the selection of the evaluators, the panel's decision will be upheld unless such bias is clearly shown to have permeated the decision. Fox & Co., supra

Appellant has failed to meet its burden of proof of the existence of actual bias in the selection of the evaluators. Appellant has shown that Mr. Cook selected evaluators who had expressed to him dissatisfaction with Appellant's performance. This does no more than raise an inference that only evaluators known to be dissatisfied with Appellant were selected or that the evaluators were selected on the basis of their dissatisfaction. However, each of the evaluators selected by Mr. Cook had extensive experience in the telecommunications field and their respective agencies were large users under the telecommunications contract. Therefore their selection did not lack a

rational basis and thus cannot be said to have been shown to be based on improper motives.

Technical Evaluations - Ratings Assigned and Labeling Appellant "Poor Performer" Were Arbitrary

Appellant contends that the alleged bias on the part of the evaluators was reflected in arbitrary and capricious evaluations of its technical proposal. We note it is the evaluator's function to determine the relative merits of technical proposals. "This function, after all, involves the exercise of judgment by the procuring agency's specialists and technicians. A technical determination of this type cannot be ignored by this Board in the absence of a clear showing of unreasonableness." Macke Building Services, MSBCA 1283, 2 MSBCA ¶132 (1986). Even assuming arguendo the validity of an allegation of bias, our inquiry must center on the manner in which the bias is manifested and its effect on the protestor's competitive standing.

In Optimum Systems, Inc., B-187560, August 31, 1977, 77-2 CPD ¶165, the protestor, OSI, maintained that its omission from the competitive range was caused solely by an undue bias on the part of the evaluators, which manifested itself in the form of unwarranted low scores. OSI traced the prejudice to the predecessor contract which it was performing. OSI took the position that the existence of bias is per se an indication that the proposal was not fairly considered. A Blue Ribbon panel investigating charges of bias found "considerable dissatisfaction with OSI services" within the evaluating agency as well as inconsistencies in the evaluation itself. Yet the panel concluded that OSI's relative ranking among the offerors was not changed significantly through those inconsistencies. In other words, the Blue Ribbon Panel determined that any preconceived bias or dissatisfaction with OSI was

not translated to the evaluation process in a manner that affected OSI's competitive position. Upon review of the protest, the Comptroller General of the United States held that even where it is shown that the agency's judgment was affected by bias, the protest will be denied if there is no indication that the bias adversely affected the protestor's competitive standing. See also Delta Systems Consultants, Inc., B-201166, June 23, 1981, 81-1 CPD ¶1519, Alan-Craig, Inc., B-202432, September 29, 1981, 81-2 CPP ¶263, Earth Environmental Consultants, Inc. B-204866, January 19, 1982, 82-1 CPD ¶43, Antenna Products Corp., B-228289, January 19, 1988, 88-1 CPD ¶43.

Appellant contends that its experience performing under the 1987 contract was unfairly considered in criteria three and five. Criterion three, "vendor experience in similar installations," and criterion five, "vendor maintenance capabilities and previous experience," specifically call for subjective experience judgments. As such, they are similar to traditional responsibility determinations yet they serve a different function. They relate to the offeror's attempt to demonstrate the technical ability and competence to meet the agency's needs. See Radiation Systems, Inc., B-211732, October 11, 1983, 83-2 CPD ¶434.

We have held that it is appropriate for state procurement officers to review performance history under a predecessor contract in assessing a bidder's responsibility. Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 at 7 (1984). The procurement officer, monitoring a bidder's performance under the prior year's contract has up to the minute knowledge of whether the bidder is performing the contract requirements adequately and would be responsible to perform under the new contract. Customer Engineer Services, Inc., MSBCA 1332, 2 MSBCA ¶156 (1987). Therefore, where the criteria in a technical evaluation stress responsibility-type factors such as experience and

prior performance, in an attempt to protect performance prospectively, it is appropriate for the evaluators to consider prior performance with the state as it relates to the bidder's technical competence.

Appellant contends that it is put at a competitive disadvantage by being the sole bidder operating under the State's telecommunication contract. It is more often the case where the incumbent contractor is thought to be in an unfairly advantageous position by virtue of his incumbency. In that situation federal procurement law is well settled. The Government is not required to equalize competition by taking into consideration the competitive advantage accrued to firms due to their incumbency. The test to be applied is whether the competitive advantage enjoyed by a particular firm was the result of unfair Government action or favoritism. Fox & Co., supra, See also Telos Computing, Inc., B-190105, May 27, 1978, 78-1 CPD ¶235, Wisner and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture, B-191756, March 6, 1979, 79-1 CPD ¶148.

It is clear that Appellant suffered a disadvantage as a result of its performance under the 1987 contract, but using the above standard, Appellant has not met its burden of proof in demonstrating that the disadvantage was the result of unfairness, arbitrariness, or capriciousness of the State. The evaluators testified that the low evaluations were based on specific incidents of poor performance in installations and maintenance. The score sheets indicate specific complaints of not meeting due dates on installations, poor response to major malfunctions and lack of inventory. Thus there are specific complaints to support the evaluators' low scores of Appellant's experience in these areas. Any disadvantage suffered by Appellant as a result of its incumbency need not be equalized and the evaluators in this respect reasonably exercised their discretion. Fox & Co., supra.

Appellant also contends that the evaluators erred considering the value of the State's experience with Appellant under other RFP criteria. It has been held that such a misapplication of criteria can result in an unreasonable evaluation. In The Center for Education and Manpower Resources, B-191453, July 7, 1978, 78-2 CPD ¶21, CEMR protested the award of the contract to another bidder, IPD. CEMR and IPD both were found technically acceptable but IPD's price proposal was less. The stated evaluation criteria were as follows:

<u>Criteria</u>	<u>Weight</u>
Introduction	15
Technical Approach	45
Related Experience	20
Personnel	20

One of the evaluators considered CEMR's experience under all of the other evaluation criteria rather than restricting it to the 20% "Related Experience" criterion. This had the effect of making past experience worth more in the evaluation process than the 20% stated in the RFP. It was held that since the two proposals were only \$7000 apart, CEMR's proposal should be rescored in accordance with the RFP by the evaluator that misapplied the stated criteria to ascertain if the error had an effect on the selection process. This rationale was applied in two later cases where the Comptroller General reasoned: "for the agency to have evaluated experience in related work both as an independent evaluation factor and in conjunction with other factors would have greatly exaggerated the importance of related experience, contrary to the announced evaluation scheme." Mutual of Omaha Insurance Co. B-201710, January 4, 1982, 82-1 CPD ¶2, AAA Engineering and Drafting Inc., B-204664, April 27 1982, 82-1 CPD ¶387.

In the evaluation scheme before us, criterion four provided an independent evaluation factor rating the location and number of maintenance and installation centers. None of the evaluators gave Appellant full credit in this area due to Appellant's lack of maintenance locations on the Eastern Shore or in Western Maryland as requested by RFP 4.07. (Agency Report Exhibit A-77). However, Lt. George also failed to give Appellant full credit in two other criteria based on this same failure to identify maintenance centers on the Eastern Shore or in Western Maryland. In criterion two, "organization of proposal and technical compliance," he subtracted five points for failure to comply with the technical specification of RFP 4.07. In criterion five, he subtracted ten points for Appellant's failure to have maintenance centers statewide. He testified that he was in fact repeating himself, using the same reasons to justify his scores in criteria two, four and five. While admitting that criterion four specifically addressed the problem he had in mind, he deducted points in all three areas. (May 25, TR 63-64). This is essentially the same situation presented in The Center for Education and Manpower Resources, supra. Criterion four specifically addressed the location of maintenance centers and was weighted accordingly. To allow consideration of the identical factor in two or more criteria effectively overstates its effect, making it worth more than as stated in the RFP. Thus, the evaluation by Lt. George inappropriately misapplied the stated evaluation criteria to Appellant's proposal.

The other three evaluators did to some extent base their evaluations in criterion four on their experience with Appellant over the past year. Both Mr. Leberknight and Mr. Cook admit their scores reflected their dissatisfaction with Appellant's maintenance locations. (May 25 TR 219, May 26 TR 67) Experiences over the past year caused them to believe that it was necessary

for the contractor to have locations serving Western Maryland and the Eastern Shore. They testified that they were not downgrading Appellant on the basis of past experience but rather using their experience under the 1987 contract to assess their future needs. They sought to require that all bidders had maintenance locations serving those areas, thus Appellant was not singled out or unfairly evaluated on the basis of past experience in criterion four.

With regard to criterion two, there is no indication that any evaluator other than Lt. George downgraded Appellant on the basis of past performance. Mr. Robertson testified that he looked only to the proposal itself in rating Appellant's proposal. He specifically testified that experience was not a factor. (May 25 TR 146, 147) Mr. Leberknight testified that he thought Appellant's proposal was a "canned proposal," not specifically tailored to this RFP. Both Mr. Leberknight and Mr. Cook testified they were looking for something in Appellant's proposal that addressed what they thought were the problems under the 1987 contract. (May 25 TR 200, May 26 TR 102-103). Their testimony supports the inference that they were not downgrading Appellant on the basis of past experience but rather looking to the proposal to see how Appellant intended to perform on the contract to be awarded.

None of these evaluators were specifically shown to have downgraded Appellant repeatedly on the identical grounds, as did Lt. George. Nor does the evidence do more than infer the possibility of bias affecting their decisions. Appellant has not met its burden of proof and shown that the evaluations made by Messrs. Robertson, Leberknight and Cook lacked a rational basis or were contrary to the announced evaluation scheme.

Having determined that Lt. George alone was shown to have misapplied the stated criteria, we must determine whether this error, as in the case of The Center for Education and Manpower Resources, supra, adversely affected

Appellant's competitive standing. In order to pass the technical evaluation and have its cost proposal evaluated, Appellant needed to score an average of forty points from each evaluator. The scores Appellant received were as follows:

Eval. 1 - Lt. George	35
Eval. 2 - Mr. Robertson	44
Eval. 3 - Mr. Leberknight	35
Eval. 4 - Mr. Cook	23

This adds up to 137 points out of 160 points necessary to provide a passing average. We recognize that it is not the Board's place to substitute its judgment as to the precise numerical scores which should have been assigned. PRC Computer Center, Inc., et al., B-178205, July 15, 1975, 75-2 CPD ¶35. However, even if Appellant's proposal were to be rescored, restoring the points subtracted by Lt. George in criteria two and five, thus avoiding improper duplication, the addition of the improperly deducted fifteen points to Appellant's score would still not enable it to pass the technical evaluation. See Delta Systems Consultants Inc., supra; Lewis-Shane, CPA, B-221875, June 4, 1986, 86-1 CPD ¶522. Therefore, this error, in and of itself, is not sufficient to sustain Appellant's allegation because there is no indication that its competitive standing was adversely affected. Optimum Systems, Inc., supra.

Department Affidavit

Appellant contends that Aim/Gray should be excluded from consideration on the basis of an alleged false and misleading debarment affidavit which it submitted with its proposal. Appellant alleges that Aim and Gray were joint bidders and, therefore, failure to mention the criminal conviction of Mr.

Sargent, President of Gray, (Finding of Fact No. 14) should be grounds for excluding them from the competition.

The debarment affidavit referred to by Appellant is required by the language of COMAR 21.08.04.10 as follows:

A. Except for procurement under COMAR 21.05.07, any written solicitation, which requires a written bid or proposal, shall require each business responding to the solicitation to:

(1) Affirm that neither the business nor any officer, controlling stockholder, partner, principal or other person substantially involved in its contracting activities, is subject to debarment under Regulation .04 or is currently suspended or debarred pursuant to this chapter or by the action of any other public entity;

(2) If the affirmation described in §A(1) cannot be given, and debarment proceedings have not been instituted against the business pursuant to this chapter, indicate the reasons why the affirmation cannot be given, including the name or names of the person or persons involved, their current positions and responsibilities with the business, the activity listed in Regulation .04 in which they were involved, and the details of their participation in the activity, including the name or names of any entity involved and their positions and responsibilities with the entity; or

(3) If the affirmation described in §A(1) cannot be given, and debarment proceedings have been instituted against the business pursuant to this chapter, indicate the status of the proceedings.

B. Any information received pursuant to §A(2) will be reviewed by the Secretary having jurisdiction over the procurement to determine if a reasonable basis exists for initiation of debarment proceedings.

Regulation .04 referred to in A(1) is COMAR 21.08.04 "Debarment - Statutory Violations." This regulation generally provides for a debarment procedure for a business if it or any of its "officers, partners, controlling stockholders, principals, or other persons substantially involved in its contracting activities" have been convicted or found civilly liable under certain State

and federal statutes. COMAR 21.08.04.04.A. Among those stated violations in COMAR 21.08.04.04 are the following:

* * *

A. (3) Been found civilly liable under state or federal antitrust statutes for acts or omissions in connection with the submission of bids or proposals for public or private contract;

(4) Been criminally convicted of any violation of a state or federal antitrust statute;

* * *

(6) Been criminally convicted of conspiracy to commit any act or omission which would constitute grounds for conviction or liability under any statute described in SA(1), (2), (4), (5);

* * *

B. A business may also be debarred if:

(1) The Board¹ finds it was founded or established, or operates in a manner designed to evade the application or to defeat the purpose of this chapter;

* * *

COMAR 21.08.04.05.A. sets out the procedure for the possible initiation of a debarment proceeding as follows:

A. When the Attorney General receives information believed to constitute possible grounds for debarment of a business or when a Secretary receives such information concerning a business which the Secretary may reasonably expect to seek contracts within his Department's jurisdiction, the Attorney General or the Secretary may recommend to the Board that it initiate debarment proceedings and may also recommend immediate suspension. Copies of the recommendation shall be sent to all Secretaries and the Attorney General, each of whom may comment to the Board on the recommendation. Heads of using agencies may make a recommendation concerning debarment to the Secretary who has jurisdiction over the procurement. (Underscoring added)

The balance of COMAR 21.08.04.05, subsections B-J, deals with the procedure of a debarment proceeding before the Board of Public Works.

¹COMAR 21.01.02.11 defines "Board" to mean the Board of Public Works.

From the above pertinent language of COMAR 21.08.04 certain observations are clear. First, it is discretionary with the Maryland Attorney General or the Secretary of a department to initiate a debarment proceeding before the Board of Public Works. They have the right to evaluate each set of facts to determine if it should go forward to the Board of Public Works. Second, this Appeals Board is not involved in the debarment proceedings in any manner. Debarment is initiated with the Maryland Attorney General or a department Secretary and then may go to the Board of Public Works. Hearings before that Board are to be conducted in accordance with the Administrative Procedure Act which means a party would be entitled to a judicial review by the Circuit Court. COMAR 21.08.04.05.L(1); §10-215 State Government Article. Thus, a business is not automatically debarred from competing in a Maryland Procurement until the described discretionary procedures are completed even though that business may have committed a violation listed under COMAR 21.08.04.04. Finally, we find nothing in the regulations or law which provides for an automatic determination to exclude a business from a competition for a contract award where they have failed to provide certain information in a required debarment affidavit. Failure to provide such information at best may be a grounds for initiating a debarment itself under COMAR 21.08.04.04.B. However, from this Appeals Board's perspective and our authority to review contract formation issues, failure to submit properly signed and completed affidavits raises an issue of responsibility. Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116 (1985). Our review therefore in this case with regard to the debarment affidavit will be limited to the determination of Aim/Gray as a responsible offeror.

As was pointed out in the finding of facts (No. 13) Aim/Gray's proposal gave the appearance of a joint bid between Aim Telephones, Inc. and Gray

Communications. However the proposal's cover letter explained that Aim was in the process of acquiring Gray from Sargent Electric Company. It further advised that if the contract were awarded prior to completion of the acquisition, Aim would guarantee the terms of the contract and Gray would be utilized as a subcontractor. After Appellant filed its protest and made DGS personnel aware of Mr. Fred Sargent's conviction in 1984, as president of Sargent Electric Co., of federal antitrust violations, the procurement officer made an inquiry of Aim with regard to the relationship of Aim, Gray and Mr. Sargent. DGS was advised that Mr. Sargent's 1984 conviction had nothing to do with Gray Communications. They were also advised that Mr. Sargent would not continue as president of Gray once the acquisition of Gray by Aim was completed and that he would not be a full time employee of Aim, even though Sargent Electric would be a minor stockholder of Aim. (Agency Report, Exhibit H). There is nothing in the record to reflect that Mr. Sargent had any significant part in the preparation of the proposal nor will he have a significant part in the execution of the contract.

We must assume that the DGS Secretary or his designee reviewed all of the information provided with regard to Mr. Sargent and Sargent Electric Co. and made the determination not to go forward with a debarment proceeding against them nor to go forward against Aim for failure to disclose the information in the required affidavit. As far as the responsibility determination of Aim/Gray is concerned we are satisfied that Appellant has not shown that Aim/Gray was deliberately trying to mislead the State. The procurement officer has broad discretion and his determination of responsibility will not be disturbed unless clearly unreasonable, an abuse of discretion of contrary to law or regulations. Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 (1984). As the procurement officer stated in his final decision,

there is a sufficient basis for holding that Aim/Gray is a responsible bidder due to the limited role Mr. Sargent will play in regard to this contract. Therefore even though the debarment affidavit submitted by Aim/Gray may have been misleading, Appellant has not met the burden of proof necessary to overturn the procurement officer's determination of responsibility. For the foregoing reasons, the appeal is denied.