

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ECONOMIC &  
TECHNICAL CONSULTANTS, INC. )

) Docket No.  
) MSBCA 1572

Under Office of People's )  
Counsel RFP 90-015 )

April 19, 1991

Bid Protest - Timeliness - Bid protests are required to be initially filed in timely fashion with the procurement officer, not the Board of Contract Appeals.

Competitive Negotiation - Technical Evaluation - The Board of Contract Appeals will not disturb an agency's determinations regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations.

**APPEARANCES FOR APPELLANT:**

Jatinder Kumar, President  
Economic & Technical  
Consultants, Inc.  
Rockville, MD

**APPEARANCES FOR RESPONDENT:**

Doris F. Low  
Staff Attorney  
Joseph P. Gill  
Assistant Attorney General  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that it should have been awarded a contract under the captioned Request for Proposal (RFP).

Findings of Fact

1. Maryland People's Counsel (MPC) participates in rate proceedings before the Public Service Commission (PSC) in order to represent the interests of residential and noncommercial utility users. A public service company has the right to establish a new rate or rate change after 30 days notice to the PSC and publication of a tariff schedule setting forth the changes proposed and the time when the new rate or rate change will go into effect. The proposed new rate or rate change becomes effective upon the date specified in the application, unless suspended by the PSC.

2. While MPC has no technical staff, it does have statutory authority to hire or to periodically retain experts in the utility regulation field including economists, cost of capital experts, rate design experts, accountants, engineers, transportation specialists and others necessary to discharge its responsibilities. The instant appeal involves a RFP for an

expert in cost of service/rate design analysis.

3. Because of the statutory time constraints of rate proceedings MPC has developed a two-phase procurement process which enables it to enter into contracts with qualified consultants for binding hourly rates for a two-year period of time. The selection of a pool of qualified consultants that may be contracted with is accomplished during Phase I of the RFP process. Phase II of the process is triggered when a utility files a rate application. Each of the experts selected in Phase I is then given 10 days to submit a response to a request for competitive sealed proposals responsive to that utility's application. MPC then selects one or more consultant for contract award based on the Phase II criteria contained in the RFP.

4. Pursuant to such process, MPC issued the captioned RFP for "cost of service/rate design analysis for major utilities in the State of Maryland for May 15, 1990 - May 14, 1992," on March 23, 1990. This two phase procurement had as its stated objective the acquisition of contractual services, for a period of two years, to "perform or evaluate embedded and/or marginal cost studies and/or appropriate rate design for any major Maryland utility filing a rate case."

The specifications advised offerors that their obligations under the contract consisted of three parts, to wit:

A. The "major features" of the work, including analysis and evaluation of all cost studies/rate design material submitted by the utility; development of issues; provision of technical support in preparation of discovery material; provision of expert written and oral testimony; and assistance in preparation of post hearing briefs.

B. The mandatory RFP requirements, including disclosure of prior work on behalf of utilities and demonstration of substantial experience and expertise in the areas of cost of service studies; analysis and discussion of proposed rate structures/rate schedules; identification of all rate design issues; and recommendation of rate structures.

C. A "detailed investigation" of the utility's rate application filed with the PSC, including analysis of all present and/or proposed rate structures/rate schedules; identification of all rate design issues; and recommendation of rate structures.

5. Phase I of RFP 90-015 involved evaluation of technical proposals only. Eleven offerors responded and six, including Appellant, were selected.

Phase II, which is in dispute in this appeal, began when Potomac Electric Power Company (PEPCO) filed an application to increase its schedule of rates. The six vendors selected in Phase I were notified by letters dated November 8, 1990 of the rate case filing and invited to submit their Phase II proposals on the cost of service/rate design contract (relative to the PEPCO filing) by November 19, 1990.

Section V of the RFP set forth the evaluation and selection procedure for Phase II pursuant to which the offeror whose proposal was determined to be the most advantageous to the State considering both the technical and financial factors set forth in the RFP would be recommended for contract award. To assist the evaluation of proposals a numerical scoring system was set forth under which technical merit was worth 60% of the total score and cost was worth 40% of the total score.

6. Three vendors timely responded to Phase II by submitting technical and cost proposals responsive to the rate case filing by PEPCO. They were Appellant, Tellus Institute (Tellus), and J. W. Wilson & Associates (Wilson).

7. On November 26, 1990 evaluations of the three vendors technical proposals were performed by Assistant People's Counsel Donald F. Rogers and Theresa V. Czarski, in accordance with the criteria set forth in the RFP. The evaluators individually read, reviewed, compared, and graded the proposals. The final scores were as follows:

	<u>Technical</u> <sup>1</sup>	<u>Cost</u>	<u>Final</u>
Tellus	55.8	40.0	95.8
Appellant	50.4	35.5	85.9
Wilson	45.9	22.4	68.3

Tellus was accorded the highest technical score, lowest cost, and the highest final score.

Although evaluations were performed on November 26, 1990, MPC, because of budgetary concerns, did not make the decision to award a contract until January 10, 1991, after it had performed an analysis of consultant expenditures and commitments as of December 1990. Accordingly, notices of award and rejection were not mailed until January 10, 1991. However, Tellus was allowed to proceed with work on the PEPCO matter prior to January 10, 1991 after the Phase II evaluations were completed.

8. On January 14, 1991, by facsimile, and again on January 16, 1991, by certified mail, Appellant advised MPC that it was protesting the award of the contract to Tellus. In neither letter did Appellant indicate the basis for its protest. On January 17, 1991, the MPC Procurement Officer advised Appellant, by facsimile, of the proper format for filing a protest, including a copy of the pertinent sections of COMAR. By letter dated January 17, 1991, Appellant filed a protest mistakenly addressed to the Board of Contract Appeals (MSBCA), asserting as its basis that ETC is "highly qualified to provide services in electric rate case filings" and "well versed in analyzing rate case filings of the Potomac Electric Power Company." <sup>2</sup>

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<sup>1</sup> The total technical scores of the two evaluations were averaged.

<sup>2</sup> The letter of protest in its entirety stated:

We are notifying you of our protest to the Selection of another consulting firm in the above referenced RFP. On November 8, 1990 the Maryland People's Counsel solicited proposals in which we responded timely to meet the due date of November 19, 1990. We telephoned your office on December 7, 1990 and was informed that a decision had not yet been reached. On January 14, 1991 we received your letter stating that we were not selected to perform

MPC received a copy of this letter by facsimile on January 18, 1991 and the original on January 23, 1991 (forwarded by the MSBCA).

9. The MPC Procurement Officer denied Appellant's protest by final decision dated February 8, 1991 advising that the evaluators graded the proposals using criteria detailed in the RFP and that the consultant chosen had the highest technical score and offered the lowest price. In addition, the MPC Procurement Officer noted that the purpose of Phase I of the procurement was to select "highly qualified" consultants, and that Appellant was selected.

10. On February 19, 1991, Appellant filed an appeal from the Procurement Officer's final decision, alleging that MPC's conduct and decision were a "continuation of its unfair, unjust and discriminatory practices" against Appellant and Mr. Jatinder Kumar, president of Appellant, personally. <sup>3</sup>

#### Decision

The grounds for its protest are articulated in its January 17, 1991 letter. Appellant asserts that it is highly qualified in analyzing and providing services in rate case filings and well versed in analyzing rate case filings of PEPCO. MPC does not dispute such assertion. However, the objective in Phase II of this procurement was to award a contract to the consultant with a

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the required services.

We are highly qualified to provide services in electric rate case filings. And we are well versed in analyzing rate case filings of the Potomac Electric Power Company, which is the utility of concern in the RFP. We are requesting the Maryland People's Counsel not to award a contract until the protest has been resolved.

<sup>3</sup> Appellant's president, Mr. Kumar, also filed an appeal in his individual capacity, which appeal was dismissed by the Board on Motion of MPC on grounds that Mr. Kumar is not an interested party having standing before the Board.

technically superior proposal and competitive cost.

Appellant's proposal, like the two others considered by MPC, was reviewed and evaluated by two evaluators. The following technical scores were given:

	<u>Czarski</u>	<u>Rogers</u>	<u>Avg.</u>	<u>Scaled Score</u> (60% of total)
Tellus	89	97	93	55.8
Appellant	78	90	84	50.4
Wilson	68	85	76.5	45.9

The breakdown of these scores for Tellus and Appellant in accordance with the RFP criteria was as follows:

	<u>Czarski</u>	<u>Rogers</u>	<u>Max. Score</u>
<b>Tellus</b>			
Specific experience	18	20	20
Specific rate case criteria	27	30	30
Issue ID	44	47	50

**Appellant**

Specific experience	14	20	20
Specific rate case criteria	19	30	30
Issue ID	45	40	50

As these numbers reflect, Tellus was scored equal or higher than Appellant in all three areas by both evaluators, except for "issue identification" where Ms. Czarski gave Appellant a one point advantage.

As the Board noted in AGS Genasys Corp., MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 12:

Numerical scoring systems are utilized in an attempt to quantify a subjective process for the purposes of realistic and fair proposal evaluation. Beilers Crop Services, MSBCA 1066, September 16, 1982, 1 MICPEL ¶25. See: ICOS Corporation of America, Comp. Gen. Dec. B-225392, February 10, 1987, 87-1 CPD ¶146; Northwest Regional Educational Laboratory, Comp. Gen. Dec. B-222591.3, January 21, 1987, 87-1 CPD ¶74. In this regard, in a technical evaluation whether a given point spread between two competing proposals indicates significant superiority of one proposal over another depends upon the facts and circumstances of

each procurement and is primarily a matter within a procuring agency's discretion. See: Tracor, Inc., Comp. Gen. Dec., B-180245, May 9, 1974, 74-1 CPD ¶237. The determination of the relative merits of proposals thus is the responsibility of the contracting agency and it must bear the burden of any difficulties incurred by reason of a defective evaluation. Since procuring officials enjoy a reasonable range of discretion in evaluating proposals and in determining which offeror or proposal is to be accepted for award, their determinations are entitled to great weight. In this regard, our function is not to evaluate proposals in order to determine which should have been selected for award as the most advantageous proposal, but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of Maryland procurement law. Accordingly, we will not disturb an agency's determinations regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations. See: Tracor, Inc., supra at 16.

See also Economic and Technical Consultants, Inc., MSBCA 1378, 2 MSBCA ¶184 (1988).

Here, the testimony of the evaluators at the hearing and the other evidence of record indicate that the evaluators reasonably scored the proposals in accordance with their individual judgment and the criteria listed in the RFP. They made a reasonable determination that Tellus was the most technically qualified offeror. <sup>4</sup> Absent arbitrary action, and none is reflected in the record, that determination is not subject to second guessing

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<sup>4</sup> Appellant's price for this proposal was \$11,500. Tellus' price was \$10,210. The total scaled scores on cost are computed as follows:

Tellus	$\frac{10,210}{10,210} \times 40\% = .40$
Appellant	$\frac{10,210}{11,500} \times 40\% = .355$

Adding these scaled scores to the total technical scores yields the following overall results:

	<u>Technical</u>	<u>Price</u>	<u>Final</u>
Tellus	55.8	40.0	95.8
Appellant	50.4	35.5	85.9



by either Appellant or this Board. We thus deny Appellant's appeal on the grounds asserted in its January 17, 1991 letter.

Appellant's February 19, 1991 appeal to this Board articulated an issue which was not expressly raised in its protest filed with the Procurement Officer. Appellant's January 17, 1991 letter of protest stated only that ETC is "highly qualified to provide services in electric rate case filings" and is "well versed in analyzing rate case filings of the Potomac Electric Power Company" as the basis for its protest. However, Appellant's February 19, 1991 appeal asserted that specific post evaluation events or occurrences were evidence of institutional bias by MPC.<sup>5</sup> These events were (1) that it took MPC two months to award a contract after receipt of proposals (2) that MPC awarded the contract in the face of the protest and (3) that Tellus commenced work prior to award of the contract.

In its appeal Appellant characterizes these events as: "surprising," "suspicious," "misleading," contrary to law and without authority. MPC disputes these characterizations.

1. "Surprisingly and suspiciously, the MPC issued the decision on January 10, 1991, .... To our knowledge, MPC has never taken about two months to make a decision."

The award/rejection letters were mailed to all bidders on January 10, 1991, even though evaluations of the proposals had been completed by November 26, 1990. As testified to at the hearing, the reason for the delay was that MPC was then seriously concerned with budgetary matters. Due to an extensive case load

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<sup>5</sup> Bias was not asserted as a ground of protest in Appellant's letter of January 17, 1991. We cannot determine from the record when Appellant became or should have become aware of the events described in Appellant's appeal. By the time of the hearing of the appeal, however, it was too late to protest such matters. See COMAR 21.10.02.02; COMAR 21.10.02.03; COMAR 21.10.02.10. Protests are required to be initially filed in timely fashion with the procurement officer, not this Board. Such matter has not been considered by the procurement officer, and is untimely thus requiring dismissal of the appeal.

in FY 1990 (e.g., the \$350 million BG&E Calvert Cliff Nuclear Power Plant Outage case), a significant percentage of FY 1991 funds were encumbered by FY 1990 contracts, leaving a shortage of funds for 1991 contracts, such as the instant one. Concerned about this situation, Mr. John Glynn, the Peoples's Counsel, ordered a thorough budgetary analysis of all consultant contracts as of December 31, 1990. Only upon completion of that analysis by Ann Sistek, MPC Administrator and the Procurement Officer herein, did Mr. Glynn authorize award of this contract. The appropriate notices were then mailed accordingly.

2. "On February 8, 1991, twelve days before February 20, 1991, the due date of submission of the testimony by the selected contractor, the MPC rejected ETC's protest. In this rejection letter, the MPC misleadingly refers to ETC's protest addressed to the Board but does not refer to the protest filed to MPC on January 17, 1991."

Appellant's protest dated January 17, 1991, was mistakenly addressed to John Glynn, People's Counsel, at the Maryland State Board of Contract Appeals. The Procurement Officer nevertheless accepted this protest and denied it in a timely manner after reviewing the evaluation process and verifying that the consultant chosen offered a technically superior proposal at the lowest cost.

3. "In spite of our protest and request, MPC awarded the contract contrary to COMAR 21.11."

COMAR 21.11. is concerned with small business procurements and is inapplicable to this protest and appeal. Assuming, from the context of the sentence, that Appellant intends to refer to COMAR 21.10.02.11 "Awards of Contracts Pending Protest and Appeals," MPC made its decision to proceed with the award and execution of this contract pursuant to Subparagraph (B)(1) of that section of COMAR. The schedule set by the PSC in the PEPCO rate case demanded that the consultant's work not be stayed pending the result of the bid protest appeal. As noted by Appellant, the due date for submission of expert testimony was February 20, 1991. We find in view of this tight schedule that

technical evaluation and do not reflect on the integrity of the process. The evaluators testified at the hearing as did the procurement officer concerning all aspects of Appellant's protest and appeal.

Nevertheless, we must dismiss Appellant's appeal on grounds of alleged bias for procedural reasons, since an allegation of bias was never raised with the procurement officer and may not now be considered.

Accordingly, the appeal is denied.

Dated: *April 19, 1991*

*Robert B. Harrison III*  
Robert B. Harrison III  
Chairman

I concur:

*Sheldon H. Press*  
Sheldon H. Press  
Board Member

*Neal E. Malone*  
Neal E. Malone  
Board Member

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1572, appeal of ECONOMIC & TECHNICAL CONSULTANTS, INC., under Office of People's Counsel RFP 90-015.

Dated: April 19, 1991

*Mary F. Priscilla*  
Mary F. Priscilla  
Recorder