BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of FUJITSU BUSINESS COMMUNICATIONS SYSTEMS	)
	) Docket No. MSBCA 1729
Under DGS Contract No. AST-EPABX-9209	)

September 17, 1993

Proposals - Responsiveness
The doctrine of strict responsiveness does not apply to competitive sealed proposals since the agency's needs are not usually described in detail by specifications. However, where detailed specifications are given offers must be responsive to them.

Proposals - Mistake Correction After Award
An offeror may not, in the face of a bid protest appeal, be allowed to amend its proposal after award.

Proposals - Evaluation
Evaluation shall be based on the evaluation factors set forth in the request for proposals.

Proposals - Meaningful Discussions
The test is whether an offeror was provided an opportunity to revise or modify its proposal where the agency conducted discussions or negotiations during the procurement.

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APPEARANCE FOR RESPONDENT:	John Thornton Asst. Attorney General Baltimore, MD
APPEARANCES FOR INTERESTED PARTIES:	Bell Atlantic Meridian Systems J. Snowden Stanley, Jr., Esq. Semmes, Bowen & Semmes Baltimore, MD
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OPINION BY MR. MALONE

This is a timely appeal from a final decision of the Department of General Services (DGS) Procurement Officer's denial of Appellant's protest. Prior to the hearing two of the issues raised by the Appellant namely; (1) the protestors proposal was

evaluated on information not included in the proposal and (2) the systems architecture offered by Bell Atlantic would not synchronously transmit data at NX64 rates were withdrawn by Appellant. The Board having heard testimony, received evidence and argument of counsel addresses the remaining issues.

Findings of Fact

1. On January 26, 1993 the Assistant Secretary for Telecommunications (AST) of the DGS issued Request for Proposals (RFP)[1] No. AST-EPABX - 9202 soliciting proposals for a five year contract to furnish, install and maintain Electronic Private Automated Branch Exchange (PBX)[2] switching systems. A PBX is a switch used for routing telephone calls between a trunk line (carrying multiple calls) and individual telephone sets.[3]

2. The procurement was conducted under COMAR 21.05.03, competitive Sealed Proposals. Best and final offers were received from Fujitsu Business Communications Systems (Fujitsu), Bell Atlantic Meridian Systems (Bell Atlantic), MITEL Telephone Systems, Inc. (MITEL), AT&T, Bell South Communications Systems (Bell South) and Ericsson Business Communications, Inc. (Ericsson). The proposals were evaluated and ranked as follows: Bell Atlantic, MITEL, AT&T, Fujitsu, Ericsson and Bell South. On May 12, 1993 the Board of Public Works (BPW) awarded to Bell Atlantic the contract whose value was estimated at $10,000,000.00.[4] Debriefings were held after award and Appellant

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[1]Request for Proposals are regulated as competitive sealed proposals COMAR 21.05.03. This method is preferred for procurement of human, social, cultural or educational services and real property leases. COMAR 21.05.03.01. This method can be used outside the areas given above with a determination that competitive sealed bidding cannot be used under COMAR 21.05.03.B(1)(2). The record contains no documentation that such a determination was made.

[2]There are two basic telephone switching systems. A PBX system where the user has the switches on their premises in contrast to the centrex where the user routes the calls through the telephone company switches.

[3]This system can also route computer terminal information (i.e. PC's), voice mail, etc.

[4]The RFP stated the expected yearly costs of the contract to be 2.5 million dollars.

filed a timely protest and appeal on the following grounds.

Appellant argues that Bell Atlantic's system does not meet the mandatory redundancy requirements set forth in the RFP for the processor switching matrix and power supply.

The word redundancy occurs several times in RFP. The following is a contextual example of this which appears at page 95;

> Redundancy: This feature shall improve the reliability of the PBX switch by providing redundant circuitry of critical functions such as central processors, local processors, memory, switching network, control, power supplies, etc.
>
> The vendor shall identify on the price sheet with footnotes the function level of each redundancy provided.

Again redundancy is found in the RFP as to the Appendixes at page 45;

> Memory Redundancy and Expansion: The vendor must include in the proposal the amount of memory to be provided with the proposed system and a description of how this memory is used. The vendor must also include the memory redundancy which must be provided and the price thereof. The description of memory redundancy must be shown in Appendix, C-1 and the price must be included in the complete system cost in Appendix D-1.

There is no standard technical definition of redundancy in the telecommunications industry. The term has meaning as it is found in a given technical context. Redundancy is one context may simply mean, a second duplicate back-up component. In another context it would mean that the function offered by one part of a system would be maintained in the event of failure by another different component which has the additional capability to perform a given function. It could mean that there is no single point of failure for an entire system or that if the system fails, it is designed in such a way that

only partial loss of function occurs[5]. The use of this word varies in the context given and it is generally understood in the industry of telecommunications to vary. There is an evolution in this technology which struggles to contain costs and at the same time provide the most reliable systems possible. In the area of procurement, vendors are especially sensitive to definition and want to insure that they offer the level of redundancy sought by the RFP.

Vendors continued to make inquiries of DGS as to the meaning of redundancy during the procurement process. In two separate amendments; these questions and answers were included in the RFP as follows.

> Amendment #1.
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> III.2 <u>System Requirements</u>: The RFP requires that all Baseline Options I-IV be redundant. Traditionally redundancy is not specified or required in systems smaller than 500 lines unless it is a network hub or critical care environment. By requiring redundancy in the Baseline Option I the State will be unnecessarily driving up system costs. Would the State consider making Baseline Option I non-redundant, with an option for redundancy for special environments; i.e., network hub, medical environment, etc.
>
> <u>Response</u>: The State has not and does not intend to "unnecessarily drive up system costs". Many of the smaller systems are in the "critical care environment". All respondents are to bid redundancy for all configurations. The AST and the procuring agency will determine the criticality of this provision during system design.

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[5] This concept of partial failure for redundancy was expressed during the hearing as a degrade in service to an acceptable level.

[question] Does the term "switching matrix" include redundant switching networks, busses, and power supplies to the peripheral shelf level? This would provide for maximum fail safe capability and system up time?

Response: Yes. The proposed systems must be equipped with common control redundancy. This must include redundancy of the processor, switching matrix and power supply.

All peripheral locations must be supplied with UPS and redundancy as required for the main switch locations.

If a vendor is bidding a switch with a totally distributed architecture, without common central and memory redundancy, the switch must meet the following criteria:

1. Each cabinet[6] must have its own regulated power supply.
2. Each cabinet must have its own software and control unit so that if any one cabinet in the system should fail, the rest of the system will continue to operate at full capacity with the exception of the lines, trunks, and features directly associated with the cabinet which fails.
3. Trunks, tie lines, and FX lines must be capable of being distributed between cabinets, however, the PBX must still function as one totally transparent system.

The questions and answers clearly reveal the process of clarification for the redundancy of the system. DGS requires redundancy for the switching matrix and power supply and

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[6] A cabinet contains several modules or shelves.

Amendment #1 requires this redundancy to the shelf level.
DGS also makes a technical decision as to the system design requirements in Amendment #1 since it describes a switch to be classified either; "...a totally[1] distributed architecture, without common central memory redundancy..." or "...equipped with common control redundancy."
Testimony at the hearing made clear that the Meridian 61 Option I has a design capable of both or either classification depending on its configuration and design.
Vendors continued to inquire as to the needs for a redundant system.

> Amendment #2.
> [question] In Appendix D-2 item 24 and in Appendix D-5 the State requests a price for redundant memory, and Appendix D-2 item 35 requests as price for redundant common control. According to the specification and clarification to vendor's questions, redundancy is to be inherent in the proposed systems. If vendors bid to the specification requirements would this answer be "not applicable or N/A"?
> Response: Appendix D-2 is for Unit Purchase Prices and Appendix D-5 is for Required Features that are not Standard which must be included in the baseline system price. This answer must appear in D-2 and D-5. An N/A would be considered non-responsive.
> [question] In the response to vendors questions item 4 the State acknowledges that switching networks busses and power

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[1] Bell Atlantic's expert would not use the word "totally" to describe this switch.

supplies to the peripheral shelf level should be redundant. The (sic) in sub-item 2 in the distributed scenario, you seem to waive that requirements by saying that an entire cabinet could fail while the rest of the system would keep operating. If redundancy is proposed to the shelf level as it appears you originally specified in your clarification, then a full cabinet would never be effected by a single point of failure. With redundancy to the shelf level only a single port card would be effected. Redundancy to the shelf level will provide the greatest reliability to the State. Could you please clarify if this is what vendors should bid?

Response: The peripheral locations must be supplied with redundancy. The RFP does not ask for redundancy to the "shelf level". Please re-review the response to item 4 in Addendum I.

No objection was made by any vendor as to the use of redundancy being ambiguous in the RFP. The Board finds as a matter of fact the word is not ambiguous and will apply the plain and ordinary meaning of the word given the context in which it is found. Various witnesses used words such as; duplicate, replicate, single point of failure, being reliable as it related to cost, interchangeably for redundancy. Several of the attorneys also offered definitions and counsel for Appellant argued that The American Heritage Dictionary of the English Language (1970) contains the proper definition whereby redundancy is defined as "[D]uplication or repetition of elements in electronic or mechanical equipment to provide alternative functional channels in case of failure."

The Board is cognizant of these various definitions expressed in the record. However, the Board has given redundancy its plain meaning in the context the word is found in the RFP. Appellant also argues that price proposals were not properly evaluated. Additionally Appellant asserts that Appellant's technical proposal was not properly evaluated and the technical score was not proportionally 60% of the overall evaluation. The RFP clearly sets forth the value for technical and price, and the criteria to be used for each section.

The RFP expressed the criteria for evaluation of the proposals as follows;

> IV. EVALUATION AND SELECTION PROCEDURE
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> IV.1. EVALUATION AND SELECTION COMMITTEE
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> All proposals received by the closing deadline will be evaluated by an Evaluation and Selection Committee appointed by the Procurement Officer. The Committee may request additional assistance from any source within the State.
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> The Committee will make recommendations for the award of the contract to the responsible vendor whose proposal is determined to be the most advantageous to the State, considering both the technical and financial factors set forth in the RFP. Technical merit will be given greater value than cost, i.e., the technical portion will account for 60% of the score and the price portion will account for 40%.
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> IV.7. CRITERIA FOR TECHNICAL EVALUATION
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> The technical evaluation will have a greater value than the price proposal portion of the evaluation, i.e., the technical portion will account for 60% of the overall score.
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> IV.4. PRICE EVALUATION
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> Price proposals must be submitted in sealed envelopes, separate and apart from the technical pro-

posals. Price proposals will not be opened or distributed to the Committee for analysis until the initial evaluation of technical proposals is completed. The Committee will determine the total price of the proposals in order to establish a financial ranking of the proposals, from lowest to highest total price.

The RFP also expressed the criteria for price evaluation as follows;

IV.8 CRITERIA FOR PRICE EVALUATION

The price evaluation will have a maximum value of 40% of the overall score. Price scores will be determined by allocating the maximum points possible to the proposal which is reasonably susceptible of being selected for award and is most fiscally advantageous to the State considering all factors outlined in the price proposal. Price scores for others vendors will be proportionately based upon this lowest price offer(s).

The ranking of price required the Committee to determine the total price of each proposal and then rank them each in proportion to the lowest price.

Final overall ranking would reflect the process described in the RFP, as follows;

IV.5. FINAL RANKING AND SELECTION

The Committee will make recommendations for the award of the contract to the responsible vendor whose proposal is determined to be the most advantageous to the State, considering both the technical and price proposal set forth in the RFP. Technical merit will be given greater value than cost.

Finally Appellant asserts that DGS failed to conduct meaningful discussions with Appellant.

All of the issues raised by Appellant were timely

protested and appealed to this Board. The Procurement Officer's finding that Appellant had waived its right to protest the price scoring issue is not supported by the record. No one knew or should have known the methods used by the Procurement Officer since they were kept secret, even during debriefing. It was not until the appeal and subsequent discovery that the details of the price scoring issue should have been known to a reasonably diligent bidder. The plain, unambiguous language of the RFP requires <u>price</u> to be scored <u>not</u> the unexpressed <u>price score</u> method devised by the Procurement Officer. As late as the debriefing, an offeror was not told that a price scoring method was used not expressed in the RFP and was led to believe that the best price would obtain the 400 possible points. The following is an excerpt of the debriefing;

> *"Bill Bowser: There was 244 individual price items that were evaluated within the RFP price sheets.*
>
> *Brad Lenane: Each one had a certain weight to it.*
>
> *Bill Bowser: Within the sections. There was a relative score established within each of the 4 categories.*
>
> *Brad Lenane: In terms of the weighing. So each thing had a weight assigned to it. Baseline was say 10 percent. I'm just pulling figures out of the air.*
>
> *Bill Bowser: I don't want to get into the details on how we did that.*
>
> *John Thornton: All you are required to tell him, he is required to give a summary of the rationale, selection, decision and the recommendation.*
>
> *Brad Lenane: I guess I'm asking the rationale for what went into the pricing model.*
>
> *Bill Bowser: there were 4 categories. That was the rationale. We looked at 4 specific categories*

within the pricing group, baseline, the unit pricing, the maintenance and all the other items that we could fairly compare. Within each of those categories we established, obviously, a best price (emphasis added).

Brian Stowers: The relative weight, so our 141 points score.

Bill Bowser: Was in relative weight to the 400. In other words when you added up the score of the 4 categories.

Brian Stowers: You gave the top 400.

Bill Bowser: The top 400 and then your score was proportionately based on that 400, based on your score.

The RFP clearly requires that prices be proportionally awarded to other prices based on their relationship to the lowest price offered which would receive 400 total points; not on some other unexpressed price scoring method.

The Board will now address the issues remaining before it beginning with redundancy.

3. Bell Atlantic offered in its proposal the standard Meridian 1 system option 61[8] DC in response to the Baseline System Option I[9] requested in the RFP.

Although complex and technical some basic understanding of the PBX switch matrix, processor, memory and regulated power supply must be had in order to follow the factual and legal

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[8] This model 61 switch is manufactured by Northern Telecom who published as many as 14 volumes of technical data concerning the abilities and possibilities of the switch.

[9] There were four (4) baseline options requested from the vendors. The redundancy issue as to the Superloop Network card was limited to Option I.

The baselines requested in the RFP were Option I (200 lines), II (500 lines), III (1500 lines), and IV (4000 lines).

arguments of the parties.

The Board finds that the switch model 61 offered by Bell Atlantic is a common control type as opposed to one with a totally distributed architecture without common control and memory redundancy. The RFP technical requirements assumed that switches being offered would either rely on a total distributed architecture, without common control and memory redundancy or a system with common control redundancy for the processor, switching matrix and power supply. The experts disagree on how to exactly describe the Bell Atlantic 61 model. Bell Atlantic provided a description in the record of the model being a "distributed architecture" organized around three functional partitions including common redundant control processing units (CPU) and independent redundant memory nodes with the use of one "or more Superloop Network Cards." Bell Atlantic's expert states the model 61 has characteristics of both types of switches. The record also contains details of how the model 61 can be "divided" or "directed" or "designed", with "switch paths" to "custom design the system load right down to the station card level." In other words, if requested, the model 61 can be installed and wired[10] (within the limitations inherent in its components) so that several shelves (modules) can be dedicated in such a manner as to control the affect of component failure and thus be highly reliable and therefore, it is suggested, redundant.

The RFP requires redundancy to the shelf level not the node level.[11] The standard method of wiring the model 61 would therefore result in two shelves and all their attendant nodes being dedicated to a single Superloop. Consequently if there is no second Superloop in place and the single Superloop

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[10] The components are dedicated to other components in the system design which can affect the area of failure within the system to meet redundancy requirements.

[11] The node level is also described as the card level.

fails, under the standard model 61 wiring, two shelves would fail. Bell Atlantic offered the standard model 61, not a custom version and so while the model 61 could be wired (i.e. designed) in such a way as to limit damage as to one or more shelves (or parts of shelves) dedicated to a single Superloop, the overall affect of the number of nodes affected would remain the same. The system model 61 can not therefore be made redundant within the context of the RFP without two Superloop network cards per one (1) unit of baseline Option I. The Board finds that the reference to "shelf level" given in Addendum #2 response #30 is to the "single port card" question given in question #30. This response clearly refers offerors to item 4 in Addendum I which unequivocally requires redundancy to the shelf or module level. The very manner in which the question and answer are framed reflect a standard wiring of model 61, since, if the model 61 switch with one Superloop was custom wired where only parts of shelves were dedicated to it, then failure to an entire shelf becomes an impossibility[12] since by custom wiring no entire shelf would be dedicated on one Superloop. The Board must find the meaning of the RFP within the plain, ordinary, and unambiguous context in which it is given. Necessarily when a question is asked and answered in regards to the requirement of redundancy to the shelf level, it is in the context of the standard model not a custom model. In this way, evaluators can reasonably check the models offered against the RFP and other models. Bell Atlantic clearly offered the Standard[13] Meridian 1 Option 61. The model 61 then can be consistently and meaningfully evaluated based on the standard description and technical

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[12] In the event the regulated power supply unit serving the Superloop Network Card would fail, however, all of the shelves dedicated to that Superloop would also fail.

[13] The RFP repeatedly requires information based on the standard components manufactured.

information available from Northern Telecom its manufacturer. This switch is offered with one Superloop Network Card. The standard is described in Northern Telecom literature and is information generally available in the industry. The Superloop Network Card was offered at a discount but is not a trivial, inconsequential amount and affects in a material way the systems redundancy as to the switching matrix. The retail cost of this item is $3,500.00.

4. The RFP required that, "the proposed systems must be equipped with common control redundancy. This must include redundancy of the processor[14], switching matrix and power supply." The parties generally agree that the standard Meridian 61 switch offered is redundant under any definition as to the Superloop (switching matrix) requirement <u>if</u> two Superloops are offered for this switch. The Superloops and their associated Controller Cards are the essential elements of the switching matrix. The parties also agree that the switch Central Processor Unit (CPU), Random Access Memory (RAM) is redundant under any party's definition. The Board agrees and finds that the switch is redundant in all other aspects as offered and now addresses the remaining redundancy issues of the Superloop (and associated Controller Card) and the regulated power supply.

5. The switching matrix offered by Bell Atlantic model 61 has only one Superloop Network Card and is not redundant as offered. Bell Atlantic in preparing its bid <u>intended</u> to offer two Superloop's but failed to have this information expressed in its proposal. Bell Atlantic in reviewing its proposal discovered that the prices offered[15] did not add up and that some error existed in its proposal prior to offering its best

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[14] The record indicates the processor was redundant within the meaning of the RFP and was not an issue in this appeal.

[15] The parties have requested that the actual offered prices remain confidential.

and final offer. However, Bell Atlantic rather than finding the reason for the error simply added the unexplained amount to its general discount category at the end of the price proposal. No one could have known from the face of the proposal the action taken by Bell Atlantic. The DGS technical evaluators failed to find this non-responsive aspect in the technical data and it was not until after the protest and discovery in this appeal that Bell Atlantic discovered the transpositional error in its proposal. Bell Atlantic's proposal fails to meet the technical minimum requirements for switching matrix redundancy for its Meridian I Option 61 for Baseline I without the second Superloop Network Card. The cost of this card is not trivial or inconsequential and directly affects the quality of the product offered. The error by Bell Atlantic was innocently made in the rush and complexity of preparing the offer.

6. The RFP also requires redundancy as to power supply. The power supply referred to is the regulated power supply unit which regulates the power as it enters the modules of the switch to purify, (i.e. keep constant or even) the power.

7. Bell Atlantic offered a regulated power supply unit for each individual module (i.e. shelf) of the switch. These regulated power supply units are supplied with power in sets of two from two Global Power Distribution Units (PDU) (i.e. circuit breakers). These PDU's are supplied separately from one battery bank which is served power from two rectifiers (converting AC to DC current) which in turn are supported by one power conditioner which receives AC power from an original source (i.e. BG&E).

8. The Board finds that power supply as used in the RFP includes only the regulated power supply unit not the entire source of power supply. There is only one regulated power supply unit for each module (shelf) of the switch, there being six (6) in all. Appellant argues that in the event there is a power

surge[‡] (i.e. lighting strike) the PDU should cut power as any circuit breaker would. However, in the event the circuit should not break during a power surge, the regulated power supply unit would not stop the surge and a substantial part of the switch would fail. The expert testimony on this point is inconclusive. The experts did not uniformly testify and one in fact did not know if the regulated power supply did, or did not have the capacity to act as a circuit breaker. The testimony does not demonstrate whether the regulated power supply can or can not act in a redundant capacity to the PDU.

9. The technical evaluators made no express statement to the Procurement Officer as to the redundancy of the regulated power supply offered by Bell Atlantic. Since the evaluators made no express statement, the Procurement Officer inferred that Bell Atlantic's regulated power supply unit met the redundancy requirement. The technical evaluators did not testify. DGS relied upon Bell Atlantic's expert witness who concluded the offering of Bell Atlantic was redundant for regulated power supply in contrast to Appellant's expert who testified it was not redundant. The Procurement Officer is not technically knowledgeable to a level necessary to determine if the regulated power supply unit was in fact redundant and therefore correctly relied upon his technical evaluators. The Board can not determine from this record if the technical evaluators overlooked the redundancy capabilities of the Meridian 61 in regards to its regulated power supply unit or if they considered it and found it to be redundant. The record does support and this Board finds that the Procurement Officer received no expression from his evaluators on this subject and took their silence as a finding that the Bell Atlantic regulated power supply unit was redundant.

[‡] The record makes clear not only surges but other fluctuations in power such as "brown outs"can affect the system and has used power surge in the opinion for illustrative purposes.

10. The proposals were divided into two parts; technical and price. The technical proposal was evaluated separately by seven evaluators. Each category of the technical proposal was to be given a rating by the evaluator of Superior, Above Average, Average, Below Average, or None, by placing an X mark. Each evaluator was given two proposals at a time to grade. The evaluators were not told how many points would be awarded for any given item nor how many points would be reflected by placing an X under any of the six (6) categories, Superior to None. The Procurement Officer decided to award 5.0 points for Superior, 3.7500 points for Above Average, 2.5000 points for Average, 1.2500 points for Below Average and 0.0000 points for None. These points were then added to develop the vendor point score. Only the Procurement Officer knew of the method of point scoring for the technical evaluation. The Procurement Officer decided to award points for the items as follows; 25% or 150 possible points for general requirements; 20% or 120 points for maintenance and support; 15% or 90 points for documentation; 10% or 60 points for contractor supplied training; 10% or 60 points for telephone system requirements; 10% or 60 points for telephone system configurations, and 10% or 60 points for other considerations. A total of 600 points could be assigned to a vendor or a total of 4200 raw score was possible. The RFP required technical to be 60% of overall scoring and price to be 40% of overall scoring. In the abstract the total possible evaluation must equal 100% of the RFP. The technical scoring section is divided into the above listed categories and a percentage of importance and corresponding number of possible points is listed for each category within the technical section. The percentages listed are percentages adding to 100%, but this 100% is related to the technical section only not the overall RFP. The number of points however, when added equalled 600 representing 60% of the overall RFP. The RFP is structured so that the offerors know in advance the importance of each eval-

uation criterion (i.e. technical and price) as well as sub-criterion (i.e. categories within technical and price). The Procurement Officer by not normalizing the points of the technical section as they relate to 60% (i.e. 600 points) of the RFP changed the weight of the evaluation criterion. Similarly, using a price scoring method which does not rationally determine the relationship of the prices offered as to which is most advantageous to the State dilutes and distorts the actual prices offered and does not reflect a scoring or evaluation of prices to reflect 40% overall as required by the RFP. The RFP requires that the total technical point score be 60% of the total proposal score when compared to 40% for price. However, when the vendors technical points were totaled they were not normalized against the 600 (or 60%) points possible but were simply added to the price scores. The price scores however were normalized against the total 400 (i.e. 40%) points possible. This had the affect of weighing the technical and price scores differently from the 60% to 40% relationships required by the RFP. In effect, price became as important as or more important than technical. The chart below shows the summary of the actual scores used;

PROPOSALS	TECHNICAL SCORE (600 PTS. MAX)	PRICE SCORE (400 PTS. MAX)	TOTAL SCORE (1000 PTS. MAX)
BELL ATLANTIC	345	400	745
MITEL	200	303	503
AT&T	333	163	496
FUJITSU	350	141	491
ERICSSON	282	171	453
BELLSOUTH	280	125	405

11. It is clear the price scores were normalized or adjusted so that the lowest price score received 400 points the second lowest a number of points proportional to the lowest being 303 points and so on as required by the RFP. However, it is the lowest price <u>not</u> the lowest price score, which must be

proportional to the 400 points available. The best technical score was not normalized or adjusted to reflect its proportionality as to the 600 points available for the technical part of the overall scoring. The chart below demonstrates the affect of normalizing the technical scores to reflect 60% of overall scoring;

CATEGORY OF POINT TOTALS	POINT MAXIMUM	ERICSSON	AT&T	FUJITSU	BELLSOUTH	BELLATL	MITEL
FINAL TECH SCORE	600	482	570	600	478	592	342
FINAL PRICE SCORE	400	171	163	141	125	400	303
GRAND TOTAL	1000	653	733	741	603	992	645

Fujitsu's overall score for example is increased from 491 to 741. The Board finds that the scores for technical and price must be each adjusted within their respective ranges to maintain the 60%/40% relationship required by the RFP.

12. The Procurement Officer alone scored the price sections of the proposal and acted, in fact, as the Committee required to evaluate prices under the RFP. The Procurement Officer in a good faith attempt to fairly and equally score the prices of the vendors devised a mathematical program where for each unit price offered by the vendors in any given category, that price would be divided into the number 1 (i.e. 100 or 100,000) to arrive at a price score number. These price score numbers were then added together for a total price score. These totals were then adjusted proportionately against the 400 total points available for price where the lowest price score received 400 points and a price score half as low as that lowest price score would receive 200 points (i.e. 50% of the points awarded the lowest price) and so on for all price scores. The Procurement Officer made certain assumptions in

dividing the actual offered unit prices into the arbitrarily[17] selected number 100 (or 100,000 depending on the item). One assumption was that no vendor would offer a unit price below $1.00. Another assumption was that for expensive items, price variation would be inconsequential (i.e. all vendors would offer substantially similar prices for expensive items). The Procurement Officer then tested the scoring method using these assumptions and was satisfied that the system complied with his needs. This price scoring method is not expressed in the RFP. The Procurement Officer decided to devise this method since the RFP asked for unit prices only, not extended prices. Prices for 1 PBX option 1, 2, 3, and 4 were given up to 100,000 possible points for each option and all other unit price items were each given up to 100 possible points. Thus the RFP required the offerors to offer prices for mainte-

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17 The Procurement Officer selected 100 and 100,000 since this would limit the number of decimals. No statement is given as to the reason for dividing the price into 100 in regards to evaluating the prices themselves.

EXAMPLES OF THE PRICE SCORE METHOD

#1	100,000	÷ $100,000.00	=	1.0
	100,000	÷ $200,000.00	=	.5
	100,000	÷ $400,000.00	=	.25
	100,000	÷ $800,000.00	=	.125

Total Actual Price Difference $700,000.00
Total Price Score Difference .875 Points

#2	100	÷ $100,000.00	=	00000.001
	100	÷ $1,000.00	=	00000.100
	100	÷ $1.00	=	100.000
	100	÷ ¢0.01	=	10,000.000
	100	÷ 0.0	=	000000.000
	100	÷ N/A	=	000100.000
	100	÷ -$100,000.00	=	000000.001

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maintenance,[13] cost of 9 foot long handset cords, single phones, outdoor jacks, redundant memory, etc. with a total of 100 possible points for each. DGS in structuring its RFP did not determine the estimated number of units reasonably expected under the contract so that extended prices could be determined. Since the pricing did not allow for extended prices no total price of each proposal could be determined.

13. The RFP required the price Committee to determine the total price for each proposal and then rank these from the lowest price to highest price so that the vendor could be awarded a score from 400 points (i.e. 40%) for the lowest price and a proportional number of points as that price related to the lowest price all in accordance with the requirements expressed in the RFP.

14. The scoring of price required by the RFP was not performed since the price Committee never determined the total price offered by each proposal. The price scoring method is flawed. The results of using the method devised by the Procurement Officer result in unexpected, unpredictable and arbitrary numbers of price scores. The price scoring systems flaws became obvious when; the relationship of points for prices under $1.00 are evaluated, when expensive items receive prices substantially different, when the notation N/A (i.e. not applicable - this item included elsewhere) is treated differently from a price of $0.00, and where a credit or negative price number is offered.

15. The Procurement Officer assigned 100 Reference Points for Unit Purchase Prices. The expectation was a vendor offering the assumed lowest price of $1.00 would receive the highest number of points (i.e 100) for that unit since $1.00 divided by 100 is 100. However, when a vendor offers the same unit in theory

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[13] The RFP provided for unit prices for 30 consecutive days of maintenance for each type of described item under Maintenance Charges.

for ¢.25 the vendor receives 400 points since ¢.25 divided by 100 is 400 and a ¢.10 item receives 1000 points and ¢.01 received 10,000 points. All of this occurs when 100 points per unit item was expected to be the maximum number of points. A similar capricious result is obtained when the more expensive item prices are evaluated under this method.

16. The RFP requested four (4) Optional Baseline Systems contrasted in one respect from the lowest number of telephones Option I to the highest number of phones per system Option IV. The Procurement Officer assigned 100,000 possible Reference Points for each Option unit price. A low price of $57,469.00 received 1.740069 points and a higher price of $113,951.00 received 0.877570. In effect where one system of Options offered are fifty thousand dollars less than another system, the difference in awarded points is eight tenths of a single point.[19] The record does not contain the reason this price scoring system was used to evaluate the price most advantageous to the State. At the hearing, counsel for DGS argued that the method was arbitrary but that an arbitrary method was allowed under the General Procurement Law expressing this view during argument as, "Arbitrariness, in an of itself, is not a bad thing. Any -- what's -- what's bad is when arbitrariness is unfair." (Transcript 3-173).

However, the Board finds that this arbitrary method does not rationally reflect the price most advantageous to the State.

17. Various vendors entered N/A on their unit price sheets to indicate there was no charge for this unit item as that unit was included at no additional cost in the price of another item. Similarly some vendors indicated this no additional charge with $0.0. The Procurement Officer awarded N/A entries 100 points and $0.0 entries as 0.000000 points since $0.0

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[19] A price of $660,332.000 received 0.151439 points and a corresponding price $851,998.00 received 0.117371. Here a price difference of $191,666.00 receives only 0.034068 points.

divided into 100 is 0.000000. A separate decision to award 100 points for N/A was made since the computer program could not divide N/A into 100.

18. Appellant as to item C-1 also listed a reduction credit or discount of $10,472.00 which was erroneously treated by the Committee as an additional cost where in fact a credit or negative number was actually offered. This is contrasted to another vendor expressing no additional charge for the item by "N/A" and who received 100 points. The vendor offering a negative amount (i.e. a credit) received .009549 points. The Board finds no rational basis for awarding such price score points based upon the actual prices offered by the vendors for these items as required under the language set forth in the RFP.

19. The Reference Point scoring method is arbitrary and capricious and offers no rational relationship between the prices offered by the vendors. The system devised can not make any reasonable comparison of unit prices offered nor total price offered and, while devised in good faith by the Procurement Officer, is so flawed that it can not be described as a score or scoring method within the RFP. The scoring method for price used by DGS bears no rational relationship to the objective of the RFP to determine the price most advantageous to the State. While the system treats all offerors the same, all the vendors' price offers are arbitrarily evaluated and must be re-scored under the RFP. The RFP requires total price for each proposal be determined which in turn is the price to be used to determine a proportionate price score of the 400 possible points for price.

20. Appellant further argues that it should receive additional points as to its offer for item B-8 requiring a statement of guarantee that Appellant will cover <u>any</u> damage due to lighting and power surges to equipment installed under this contract. If such protection cannot be guaranteed, then the vendor was to describe the protection methods and hardware that will be

provided and included the price in the baseline system prices.

21. Appellant provided a B-8 response which offered a standard gas tube protection for power surge along with general language that they would cover any damage but then added, "<u>with the provision</u>" which qualified the offer. Appellant went on to offer in a document (not requested) described by Appellant as D-9 an optional lighting and surge protection packages for additional substantial cost per Option level. In this D-9 Option Appellant offered a guarantee without condition for any damage. The B-8 item unit price was added by the Procurement Officer to the optional unit price in D-9 to obtain a price reflective of the guarantee sought by the RFP. Appellant contends the addition of this cost is incorrect. We disagree. Appellant's own witness testified that the gas tube surge protector carries a limited guarantee for damage and that only the more expensive optional surge protection offer in D-9 would cover "any" damage. The addition by the Procurement Officer of the more expensive D-9 option was correct to meet the minimum guarantee needs of the B-8 section of the RFP. No evidence was offered as to the cost impact of not including the gas tube protector listed in B-8 when the D-9 option is selected and will not be considered by this Board.

22. The procurement method selected by DGS requires that qualified offerors reasonably susceptible of award be fairly and equally accorded opportunity for discussions, negotiations, and clarifications of proposals. The Procurement Officer shall establish procedures and schedules for conducting discussions. This is done to obtain the best price, facilitate an advantageous contract and assume full understanding of the requirements, proposals and ability to perform. The DGS fulfilled its obligation under the record before this Board. While it is problematical that silence from the Technical Committee is assumed to mean that no problems were discovered in the offers this was the method used. In this technical procurement the Procurement Officer relied absolutely upon his technical staff

and in a candid statement admitted he was without technical expertise to know if a problem existed in the proposals without input from the technical evaluators.

23. In the instant procurement, for example, the issue of Superloop redundancy was not discovered by either the vendor or the technical evaluators until the protest process revealed it, notwithstanding that discussions were fairly and equally conducted.

24. Appellant further contends that there were items within the technical evaluation which were not subject to being ranked and were in effect, fill in the blanks. The Board has reviewed each of these items against the argument of Appellant that there is no rational basis possible for scoring these certain items within the technical evaluation. Concerning these items we find as follows:

Item B-7 requests a statement that the vendor will guarantee compliance with certain EIA/TIA standards. This item is satisfied with a response Yes or No and is not rationally suspectable as being scored Superior, Above Average, Average, Below Average or None.

Item B-11 request the FCC Registration Number and Interconnection Device Requirements number for each baseline system. This request is satisfied with the vendors identification numbers and is not rationally susceptible as being ranked. The vendor either has the numbers or it does not.

Item B-3 requests a guarantee that the equipment offered is standard new equipment and the latest model in compliance with all sections of the RFP. A response that the vendor will comply is sufficient and this item B-3, by itself, is not susceptible of being scored.

Item C-6 and its attendant sections A, B, and C requests the vendor to complete forms in regards to the system features for the matrix. The form lists by item; system features as required, miscellaneous requirements, not applicable, standard and optional. The vendor was to give the page, section and

paragraph to support the determinations as to the matrix offered. These forms are fill in the blank and are not reasonably susceptible of being scored since whether or not the matrix technically complies is scored elsewhere. These C-6 listings are requested as a guide for easy reference.

Item B-17 requests vendors to make a general statement to comply with a section of the RFP as to warranty. A statement that they will meet those requirements is sufficient and this item is not reasonably susceptible of being scored.

Item B-23 requests a statement that the vendor will comply to maintain and update equipment and cable assignment records. This item is not reasonably susceptible of evaluation and requires only a Yes or No response. It does not request how the records are to be maintained or otherwise request a description of what is being offered which would be susceptible of evaluation. A Yes or No response is all that is requested.

Item B-13 requests a statement of intent to comply with supplying documentation which requires a Yes or No response. No method or detail as to how the vendor would comply was requested.

Item B-16 requests a statement as to a guarantee that the vendor will provide a full-time person for day to day maintenance and/or administration of the installed equipment which is satisfied with a Yes/No response. No request for a description of the person, his/her training or expertise was requested.

Item A-1 is a request for the proposal to provide a table of contents. This item is not reasonably susceptible of scoring. The vendors either comply or they do not.

Item B-1(1) requests the vendor to fill in the blanks on a mandatory pre-proposal conference response form to give the name of the vendor, its address, company representative, telephone number, none of which information is reasonably susceptible of being scored in any meaningful way as regards

to the technical evaluation subject to the RFP.

Item B-2 requests vendors to use the DGS standard Performance Bond which is either used or not used and is not reasonably susceptible to a technical score.

25. The Board finds as a matter of fact that the items listed above were not capable of being technically evaluated since they request information or statement of compliance which may be supplied by either a Yes or No response or fill in the blank. While several of these items could have had a rational basis for evaluation if the request had asked for other information capable of evaluation; no such additional information was sought. For example, where one vendor lists its FCC number, the seven evaluators give varying scores. There is no reason given in the record what the rational basis for ranking an FCC number could possibly be. Consequently the technical scores for these items have no rational basis and are arbitrary and capricious.

26. The Procurement Officer also assigned a number of points possible for each item.[20] These points also bear no rational relationship to other technical items. The Board does not find that, for example, there is any rational relationship between listing the name of the vendor and the vendor providing a description of the storage technology employed by the vendors proposed switch. The cumulative affect on the technical scores given for these items which are not reasonably susceptible of technical evaluation, is to dilute the value of the other technical items which are properly and reasonably subject to the objectives given for technical evaluation in the RFP.

Decision

A. Superloop Issue

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[20] The Procurement Officer's program for scoring these technical items provided for a Yes/No score of 2.5 or 5.0 depending on the item.

The doctrine of strict responsiveness does not apply to competitive sealed proposals.

The legal obligation to perform in exact conformity with detailed specifications is not usually present in a competitive negotiation procurement since the agency's needs are not usually described in detail by specifications. See Systems Associates, Inc., MSBCA 1257, 2 MICPEL 116 (1985). However, where detailed specifications are given they must be responded to by the offeror. Herein, the awardee's proposal does not meet the minimum requirements for the RFP in regards to the Superloop network card (and attendant Controller Card) since to be redundant within the meaning of the RFP two Superloop network cards must be provided. The omission by Bell Atlantic of the second Superloop network card should have been discovered during the negotiations - discussions phase of the procurement. If the omission had been discovered during negotiations the Bell Atlantic offer would have been susceptible of being corrected making the Bell Atlantic proposal reasonably susceptible of being selected for award. However, despite the good faith efforts of Bell Atlantic and DGS an innocent mistake leaves the Bell Atlantic proposal non-responsive. This is a case of first impression for the Board where a mistake in an RFP is alleged after award where no price change is requested.

Bell Atlantic argues that while the second Superloop network card is not expressly provided for in the Bell Atlantic offer, other sections of its proposal make a general statement that it will comply with the technical requirements of the RFP. The Board is not persuaded by this argument.[::] This would leave the door open after award for further amendments and negotiations which conceptually is inconsistent with bringing negotiations to an end fairly and equally for all proposers. Clearly; no further amendments can be made to an RFP after award within the negotiation process

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[::] Bell Atlantic's specific reference to one Superloop on its equipment list defines for purposes of its offer what Bell Atlantic actually was offering to comply with concerning the technical requirements for switch redundancy of the RFP.

contemplated by COMAR. COMAR reflects how unlikely such a scenario is by the fact that the section for competitive sealed proposals contains no mistake in proposal after award section as compared to procurement under invitation for bids.

The Board notes COMAR 21.05.03.03E provides for confirmation of proposals, before an award has been made: "When before an award has been made, it appears from a review of a proposal that a mistake has been made, the offeror should be asked to confirm the proposal. If the offeror alleges a mistake, the procedures in COMAR 21.05.02.12 are to be followed." Under COMAR 21.05.02.12D a mistake after award can be remedied if a determination is made that it would be unconscionable not to allow the mistake to be corrected. Thus, in the COMAR regulations governing competitive sealed proposals mistakes prior to award only are expressly addressed in contrast to the sealed bids regulation section, where mistakes after award can be corrected.

Bell Atlantic argues since they seek no increase in price, their amendment as to the Superloop is not prejudicial to other vendors.[22] Appellant and MITEL disagree and argue if Bell Atlantic can amend its proposal after award they also should be allowed this opportunity.[23] Weighing the need for public confidence in procurement against the inadvertent error of an offeror involving a material element of the RFP we believe COMAR dictates the result that an offeror may not, in the face of a bid protest appeal, be allowed to amend its proposal after award.

B. Regulated Power Supply Issue

This Board will not substitute its judgment on a technical determination for that of the agency where their determination has some rational basis. As a general rule where compliance with

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[22] Since the mistake is not trivial and does materially affect the quality of the product offered it can not be a minor irregularity under COMAR 21.06.02.04.

[23] Appellant and MITEL base their arguments on federal regulations and interpretive decisions which allow such a result.

specifications is an issue, Appellant bears the burden of demonstrating that the expressed technical judgment of the procuring agency is clearly erroneous. The factual determination as to whether any product conforms to specifications primarily is a matter within the jurisdiction of the procuring agency and the Board will not substitute its judgment for that of the agency in the absence of a clear showing that the agency acted unreasonably or otherwise abused its discretion. Where there is a difference of expert technical opinion, the Board will accept the technical judgment of the procuring agency unless clearly erroneous. Beckman Instruments, Inc., MSBCA 1412, 3 MICPEL 204 (1989).

The Board has before it a conflicting record as to the regulated power supply. While the Board could come to a reasonable conclusion other than that of the agency it will not do so as to the regulated power supply issue of redundancy. The Board must give weight to the expertise of the DGS technical panel of evaluators who may have had other information available which would lead a reasonable mind to conclude that Bell Atlantic's regulated power supply did in fact meet the redundancy requirement of the RFP. This Board will defer to the technical judgment of the unit even though the evaluators did not testify since there is some articulated rational basis for the DGS decision given by the Bell Atlantic expert witness at the hearing.

C. Scoring of Evaluation Factors Issues

Evaluation factors must be made based upon the criteria recited in the RFP.[24] Generally in a competitive negotiation it

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[24] COMAR 21.05.03.03 Evaluation of Proposals, Negotiations and Award.

A. Evaluation. The evaluation shall be based on the evaluation factors set forth in the request for proposals and developed from both the work statement and price. Technical proposals and price proposals shall be evaluated independently of each other. Numerical rating systems may be used but are not required. Factors not specified in the request for proposals may not be considered. Initial evaluations may be conducted and recommendation

is required that the solicitation document (RFP) inform offerors of the broad scheme of scoring that the procuring agency intends to use to evaluate proposals and give reasonably definite information as to the relative importance of particular factors to be used in the evaluation of proposals in order to permit fair and equal competition. See Mid Atlantic Vision Service Plan, Inc., MSBCA 1368, 2 MICPEL 173 (1988).

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

However, as noted offerors should be informed of the broad scheme of scoring to be employed and given reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other. See B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MICPEL 58 (1983).

The Procurement Officer's exercise of discretion in evaluating the relative desirability and adequacy of proposals will not be disturbed unless unreasonable, arbitrary, or a violation of law or regulations.

Award of a contract is to be made, under competitive negotiation procedures, to a responsible offeror whose proposal offers the greatest advantage to the State, considering price and other evaluation criteria set forth in the request for proposals. See Beilers Crop Service, MSBCA 1066, 1 MICPEL 25 (1982).

In evaluating price proposals herein, the Procurement Officer was required to consider all pricing factors set forth in the request for proposals. The offeror who submitted the lowest evaluated price was entitled to receive a proportionally higher price rating than his competitors.

Further, the RFP provided that the technical score must be 60% of the overall score and price the remaining 40%. This was not adhered to as a matter of fact and this failure violates the

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for award made by an evaluation committee. Final evaluations, including evaluation of the recommendation evaluation committee, if any, shall be performed by the procurement officer and the agency head or designee.

evaluation criteria. (COMAR 21.05.03.03A.)

The technical scores as they relate to categories which are not susceptible of being scored are arbitrary and capricious. The technical evaluators had no reasonable basis to score on a rated system the items described in the finding of fact above for which no meaningful evaluation could be made. The effect of awarding qualitatively points for providing basic information such as name, address and FCC ID number bears no rational relationship to other technical items such as storage capacity of the PBX memory. An attempt to qualitatively score these items is inconsistent with the objectives stated in the RFP to determine technical merit and are arbitrary and capricious.

The point scoring method for price devised by the Procurement Officer is flawed and the results obtained have no rational relationship to the objective of the RFP to determine the price most advantageous to the State. The method does not reflect the goals and objectives stated in the RFP and results in an unexpected, arbitrary and capricious ranking of the vendors price proposals. The total price for each proposal must be determined by the Committee under the RFP. The total prices are then to be awarded points proportionally to the lowest total price which was to receive 400 points (i.e. 40%) for price. The RFP must be evaluated according to the criteria stated in the RFP.

Similarly the technical section must reflect 60% of the overall scoring. DGS failed to normalize technical scores to reflect 60% overall value which is a flaw which requires re-scoring in accordance with the RFP.

The following items of the technical proposal were not reasonably susceptible of evaluation; B-7, B-11, B-3, C-6, B-17(1)(2), B-23, B-13, B-16, A-1, B-1(1)(2), B-2, and B-8(1)(2).

The record contains no rational basis the evaluators could have used for grading these items and consequently the scores were arbitrary and diluted the overall technical score required by the RFP.

It is required by the General Procurement Law that the scoring

method have some rational basis to obtain the goals expressed in the RFP. We disagree with DGS that an arbitrary system of scoring in competitive sealed proposals may be appropriate. All evaluation systems used in RFP's must have some articulated underlying rationale which relates to the expressed objectives given in the RFP.

D. Meaningful Discussions Issue

Concerning Appellant's protest that it was not afforded the right to meaningful discussions we find DGS fulfilled the requirements of COMAR 21.05.03.05D as to discussions and negotiations. In an RFP it is incumbent upon both the agency and the vendors to voice their concerns about what is in fact being offered and what is being sought. Under the facts of this case all of the required notices and procedures were in place and fairly carried out. If a state agency conducts discussion 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. Here the record does not support Appellant's contention that it was not afforded a meaningful opportunity in discussions to amend its proposal. Compare, Transit Casualty Company, MSBCA 1260, 2 MICPEL 119(1985). The test is whether an offeror was provided an opportunity to revise or modify its proposal. Compare, Baltimore Motor Coach Company, MSBCA 1216, 1 MICPEL 94 (1985).

It is problematic where the Procurement Officer does not have the technical background to see or know himself what the real meaning of the proposals is and at the same time, act as an intermediary between vendors and the technical evaluators. The possibility something will be lost in the translation is very real. However, Appellant was aware of this and protested after the results of the process.

As noted above we have found the Procurement Officer correctly included in the baseline price the additional cost offered by Appellant in D-9 surge protection. The Appellant offered a conditional guarantee in its item B-8 which did not fully respond to the guarantee requested.

The Procurement Officer's decision to include the D-9 cost in Appellant's baseline price for item B-8 thus will not be disturbed by this Board.

Conclusion

We have found that the scoring of the price technical proposal was arbitrary and the 60%, 40% balance between technical and price as set forth in the RFP was not maintained. A remand to correct these deficiencies through a re-scoring is necessary. We have also opined that amendment of Bell Atlantic's technical offer should not be permitted.

The parties were subject to a confidentiality Order in this appeal. The Board has not made a ruling on any particular document as to whether it, in fact, was or should be properly protected under the Order. The Board suggested that counsel review the documents and attempt to agree on the documents and methods for any alleged confidential documents. Counsel did agree on the documents and method for the alleged confidential documents and to this extent, (no party making any objection and no specific ruling having been requested) this Board to most expeditiously hear the appeal has not interfered with the agreements of counsel. These documents at the hearing were marked confidential, placed into an envelop conspicuously marked confidential and sealed. At the end of the hearing to prevent the transcript from being broken into sections, (i.e. confidential and non-confidential), with agreement of all counsel, the record transcript was marked in its entirety confidential. This marking should not reflect any ruling by this Board as to a factual or legal conclusion of confidentiality but simply reflect the unopposed, unanimous request of counsel.

Where, it is this 17th day of September 1993 ordered that the appeal of Appellant is sustained in part as described above and the matter is remanded to DGS for action consistent with this Decision.

Dated: 9/17/93

Neal E. Malone
Board Member

I concur:

Robert B. Harrison III
Chairman

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule B4 Time for Filing

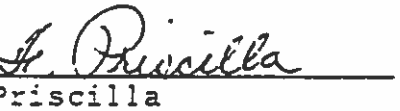
a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1729, appeal of Fujitsu Business Communication Systems under DGS Contract No. AST-EPABX-9209.

Dated: September 20, 1993



Mary F. Priscilla
Recorder