BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of FUJITSU BUSINESS COMMUNICATIONS SYSTEMS	)	
	)	Docket No. MSBCA 1779
Under DGS Contract No. AST-EPABX-9209	)	

February 2, 1994

Rejection of all Bids or Proposals - Rejection of proposals and resolicitation is necessary where it is not possible to determine which offeror should be awarded a contract without changing price evaluation criteria after price offers have been exposed.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest, protesting the decision by the Department of General Services (DGS) to reject all proposals in the above and resolicit.

Findings of Fact

1. On January 26, 1993, DGS issued Request for Proposal (RFP) No. AST-EPABX - 9209 soliciting proposals for a five year contract to furnish, install and maintain Electronic Private Automated Branch Exchange (PBX) switching systems.

2. The procurement was conducted under COMAR 21.05.03, Competitive Sealed Proposals. Best and final offers were received from Appellant, Bell Atlantic Meridian Systems (Bell Atlantic), MITEL Telephone Systems, Inc. (MITEL), AT&T, Bell South Communications, Inc. (Bell South) and Ericsson Business Communications, Inc. (Ericsson). The proposals were evaluated and ranked as follows; Bell Atlantic, MITEL, AT&T, Appellant, Ericsson and Bell South. On May 12, 1993, the Board of Public

Works (BPW) approved an award[1] to Bell Atlantic of a contract whose value was estimated by DGS on the Action Agenda submitted to BPW at $10,000,000.00. Debriefings were held after award and Appellant filed a timely protest on May 19, 1993 on several grounds. The protest was denied on June 1, 1993 and Appellant timely appealed to this Board on June 11, 1993. The appeal was docketed as MSBCA 1729.

3. On September 17, 1993, the Board issued its decision in MSBCA 1729 sustaining the appeal in part and remanding the matter to DGS. This decision is incorporated here by reference. The Board found that DGS had used a "Reference Point" scoring method for price that was arbitrary and capricious and offered no rational relationship between the prices offered by the vendors. The Board stated that: "The system devised can not make any reasonable comparison of unit prices offered nor total price offered and ... 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

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[1]DGS now asserts in this appeal that no award was made. The Board finds that an award pursuant to COMAR 21.01.02.01B(8), i.e., "... the decision by a procurement agency to execute a purchase agreement or contract after all necessary approvals have been obtained," had been made. The Board of Public Works had approved an award to Bell Atlantic on May 12, 1993. At the Appellant's debriefing which took place on May 13, 1993, the day after the Board of Public Works' approval, the Procurement Officer expressly stated that an award had been made to Bell Atlantic. Prior to the debriefing, Appellant had complained that DGS had not identified the successful offeror. The Procurement Officer explained that "COMAR does not permit us to disclose the identity of who was selected prior to the contract award. However, I will tell you now..[i]t is Bell Atlantic..." The Procurement Officer believed that an award had been made. Later, by a final decision dated June 1, 1993, DGS rejected Appellant's original protest concerning this procurement. The first sentence of this decision states: "On May 12, 1992, the Board of Public Works awarded this contract to Bell Atlantic." This position was reiterated in the Agency Report filed on July 2, 1993 in MSBCA No. 1729. Section I of this Agency Report entitled STATUS OF THE PROCUREMENT states that: "The contract was awarded to Bell Atlantic Meridian Systems by the Board of Public Works on May 12, 1993." On page 2 of this same Agency Report, DGS again states that "[o]n May 12, 1993, the Board of Public Works ('BPW') approved award of the contract to Bell Atlantic". Page 2 of the Board of Public Work's Action Agenda concerning this procurement reflects award to Bell Atlantic. We therefore, conclude that a decision had been made by DGS to sign a contract with Bell Atlantic. Such a decision constitutes an award under COMAR §21.01.02.01.B(8) and this Board's decision of September 17, 1993 in MSBCA No. 1729 recited as a fact in paragraph 2 on page 2 that "[o]n May 12, 1993 the Board of Public Works (BPW) awarded to Bell Atlantic the contract whose value was estimated at $10,000,000.00." Later, on page 29 of the opinion, this Board held that "an offeror may not, in the face of a bid protest appeal, be allowed to amend its proposal after award." COMAR 21.05.03.06 provides that debriefing shall be "provided at the earliest feasible time after contract award." If an award had not been made, DGS should not have conducted a debriefing. The Procurement Officer during his testimony in this appeal indicated that an award had been made. January 18, Tr. p. 183.

relationship to the objective of the RFP to determine the price most advantageous to the State."

4. The Board also found that the internal DGS scoring methodology employed for scoring the technical and price proposals had the result of making the price of an offer more important than the technical merit of an offer notwithstanding that price was only worth 40% and technical was worth 60% of the overall score of the evaluation criteria set forth in the RFP. The Board also found certain flaws in the scoring of the technical proposals.

5. The Board further found that the offer of Bell Atlantic could not in the face of a bid protest appeal be amended after award to meet material requirements of the RFP relating to redundancy. The Board opined relative to this finding as follows:

> "The doctrine of strict responsiveness does not apply to competitive sealed proposals.
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> The legal obligation t 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 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. Appellant and MITEL disagree and argue if Bell Atlantic can amend its proposal after award they also should be allowed this opportunity. 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." Footnotes omitted.

6. The Board in its September 17, 1993 decision remanded the matter to DGS to re-score the proposals of the other offerors (Bell Atlantic's proposal as discussed above being deemed disqualified because of the Superloop issue) according to the criteria set forth in RFP by rational means believing based on the record then before it that such endeavor was possible. The Board believed that the DGS Procurement Officer had made assumptions that would have allowed for determining the offerors' prices on a comparative basis and that price offers could thus rationally be scored pursuant to the RFP criteria to determine the best total price[2]. However, the testimony

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[2] The Board is aware that the original RFP envisioned prices for single units. By adding these prices together a total price for an offeror can be developed. However, DGS and Appellant both agree that this method leads to an irrational result and does not reflect in a meaningful way a total price most advantageous to the State. The Board agrees. Subsequently, after the bid protest

of the Procurement Officer, who alone scored the price offers, at the hearing of this appeal (MSBCA 1779) revealed that the Procurement Officer had made no assumptions about quantities the State would reasonably expect to consume for any of the items offerors were to submit prices for when he scored the price proposals pursuant to his reference point system. The reference point system was one which would compare the offerors proposed price for an item against a fixed number. The Procurement Officer testified that scoring by this reference point method he:

> "took the vendor price proposed for an item, compared it to a number. In the case, if I recall right, in the case of the base line systems, I compared their price that they proposed against a million, or 100,000. I'm not exactly sure what number it was. And all vendors' prices were compared against that same number.
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> The result from that established a score for that particular item. I then added up the items within baseline and all the other categories, equipment, unit prices, maintenance, cable and all, all those numbers were then added up to arrive at a price score for that particular vendor's prices that they proposed."

The RFP did not set forth any assumptions[3] about price. The RFP identified "several categories that would be considered in price but did not allocate any numbers" for the 40%, 400 points, that price was worth.

After the Board sustained the appeal in MSBCA 1729 the

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appeal in MSBCA 1729 DGS developed a reasonable set of assumptions (as one of the 108 scenarios) of what the State actually expected to consume under the contract. Appellant, as discussed below, agreed that this set of assumptions was reasonable and from those assumptions a total price could be developed for each offeror. However, as noted, those assumptions were made after the bid protest appeal in MSBCA 1729.

[3] The number of items in each category expected to be consumed by the State during the contract.

Procurement Officer working with others at DGS developed various models pursuant to a "straw man" methodology which made assumptions about quantity, extent and duration of equipment, parts and maintenance in order to determine which offeror offered the best total price for the State. This testimony is set forth at pp. 96-104 of the January 19, 1994 transcript of the hearing of this appeal which is incorporated herein by reference. The Procurement Officer admitted that the original reference point scoring method that he used would not determine an offerors total price in a meaningful way.[4] Appellant's expert witness in telecommunications was also of the opinion that the original reference point system used by the Procurement Officer would not determine an offerors total price in a meaningful way. However, as noted, this scoring system was not identified in the RFP and therefore offerors could not have objected thereto.

7. By letter dated October 15, 1993, DGS notified all offerors that it had "rejected all proposals under COMAR 21.06.02.01 and 21.06.02.02C" and that DGS would revise the RFP and solicit new proposals. Appellant timely protested this action and timely appealed to this Board upon denial of its protest.

Decision

COMAR 21.06.02.02C provides in pertinent part as follows:

> C. Rejection of All Bids or Proposals.
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> (1) After opening of bids or proposals but before award, all bids or proposals may be

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[4] The Board of Public Works agenda item for this procurement reflects a total estimated cost for the procurement of $10,000,000 for five (5) years. How DGS developed this estimate is not reflected in the record. Also not reflected in the record is how the expected yearly purchases under the contract of 2.5 million dollars as stated in the RFP was developed. While the Procurement Officer had made no assumptions about quantities to determine price, he testified that others had developed assumptions. January 19, Tr. pp. 103-104.

rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:

(a) The absence of a continued need for the procurement;

(b) The State agency no longer can reasonably expect to fund the procurement;

(c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;

(d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

(e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;

(f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or

(g) All otherwise acceptable bids or proposals received are at unreasonable prices.

Pursuant to the specific language of the above the basis for the DGS rejection of proposals may only be upheld if DGS can establish that no award was ever made. The Board has found, however, that an award was made. See Finding of Fact No. 2, Footnote 1.

On page 15 of the Agency Report, in this appeal, DGS maintains that "this Board's decision on Fujitsu's first protest nullified any award. Therefore, DGS was permitted to reject proposals under COMAR 21.06.02.02C." (Emphasis in the original). However, COMAR 21.06.02.02C by its plain and unambiguous terms, authorizes a

rejection of all bids only "[a]fter opening of bids, but before award." Because an award had heretofore been made to Bell Atlantic, this section of COMAR does not apply. There is no authority in the General Procurement Law or COMAR which authorizes the rejection of proposals after the award and a subsequent successful bid protest appeal.[5] Accordingly, we must reject DGS's

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[5] We believe this to be a case of first impression. The only case alleged by either counsel to resemble the facts herein is this Board's decision in Machinery and Equipment Sales, Inc., MSBCA 1171, 1 MSBCA ¶70 (1984). This case was cited by counsel for DGS. Co-Counsel for Appellant stated that he had researched the General Accounting Office cases back to 1972 to see if there was a case where an agency made a determination to cancel a procurement following a successful protest and could find none. In Equipment Sales, supra, the Board concluded that the agency could cancel the solicitation and resolicit as a result of an earlier decision on a bid protest concerning the solicitation; noting that:

> 3. On September 21, 1983, this Board issued an opinion detailing the confusion which existed as to the procurement method selected by DGS and concluded that:
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> > . . . DGS may not award a contract to M&E under a competitive sealed bid procurement in that Appellant [Johnson Controls, Inc.] and not M&E was the lowest responsive and responsible bidder. Further, even if it reasonably could be established that a competitive negotiation was intended, the procedures followed were so defective as to have affected the ability of the offerors to compete equally. Accordingly, any award to M&E is impermissible under the captioned solicitation.
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> Johnson Controls, Inc., MSBCA 1155 (September 21, 1983), p. 15.
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> 4. Appellant filed a timely motion for reconsideration on October 21, 1983 alleging that it had not had an opportunity to present evidence as to (1) whether Johnson was a responsive bidder and thus entitled to an award under competitive sealed bid principles and (2) whether the proposal submitted by Johnson was sufficiently acceptable to warrant further negotiations under competitive negotiation principles. This motion was denied on November 30, 1983. See Johnson Controls, Inc., MSBCA 1155 (November 30, 1983).
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> 5. Shortly after receiving the Board's September 21, 1983 decision in Johnson Controls, Inc., the DGS procurement officer apprised Appellant that he was going to reject all bids and resolicit.

It appears that no award was made in the above, the Board of Public Works on June 29, 1983 having approved an award to Machinery & Equipment Sales, Inc. subject to resolution of the protest filed by Johnson Controls, Inc.. See Johnson Controls, Inc., MSBCA 1155, 1 MSBCA ¶¶ 60, 65 (1983). If no award, in fact, had been made rejection and resolicitation was appropriate due to the many defects in the original solicitation. If award had been made then the appropriate legal remedy becomes more difficult to pinpoint, particularly if the procurement was an RFP rather than an IFB. However,

position on this issue. Nevertheless, we will discuss the merits of the various reasons asserted by DGS for the rejection of proposals.

A. MSBCA Decision of September 17, 1993.

In the DGS rejection notice of October 15, 1993, the vendors were told that "[t]he reason for rejection is to revise the Request for Proposals and solicit new proposals in response to the decision of the Maryland State Board of Contract Appeals." COMAR requires in §21.06.02.02.C(2) that "[a] notice of rejection of all bids or proposals shall be sent to all vendors that submitted bids or proposals, and it shall conform to §B(2)." Section B(2) states that "[t]he notice of cancellation shall... (b) Briefly explain the reason for cancellation." COMAR §21.06.02.02B(2)(b).

The only reason set forth in the notice is that the cancellation is "in response to the decision of the Maryland State Board of Contract Appeals." The decision of the MSBCA did not order DGS to reject all proposals and begin a new solicitation. The Board remanded the matter back to DGS for re-scoring on a rational basis pursuant to the criteria set forth in the RFP. Rejection of all proposals is not consistent with such decision. Accordingly, we reject the DGS' citation of this Board's decision as a proper reason for rejection of all proposals under COMAR 21.06.02.02C. However, as discussed below we will deny Appellant's appeal herein because it cannot be determined from the record which offeror should have been selected under this RFP.

B. Appeals in the Court System

DGS' next articulated reason for rejection of all proposals

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we believe that the principles outlined in Equipment Sales and Johnson Controls, which must be read in conjunction with Equipment Sales, would authorize rejection of an RFP and resolicitation, even after award, in the context of bid protest appeals where the contracting agency is not sure whether it is conducting a procurement under competitive sealed bid or competitive negotiation principles and requirements because there can be no assurance concerning what competitive guidelines, if any, the agency used to select the winner.

involves concern about appeals in the Court system. At a meeting on November 5, 1993 held at Appellant's request to which all other offerors were invited the vendors in attendance were told that the reason for rejection was that Bell Atlantic was going to appeal this Board's decision of September 17, 1993.

The purported rationale relating to fear of judicial appeals was articulated in DGS' written Determination to Reject All Proposals dated October 15, 1993. This determination states as part of its rationale that *"[t]he Department cannot consider Bell Atlantic Meridian Systems in a re-scoring evaluation without Fujitsu Business Communication Systems taking legal action. The Department cannot exclude Bell Atlantic Meridian Systems from further consideration without that company taking an appeal. Any attempt to re-score proposals would require making assumptions that could affect the outcome, making it possible for any unsatisfied bidder to protest against the re-scoring. Therefore, any attempt to continue the procurement is likely to result in continued litigation."* COMAR 21.06.02.02C does not set forth judicial appeals as a reason for rejecting all proposals. The General Procurement Law provides that decisions of the Board of Contract Appeals are subject to judicial review. Accordingly, we reject DGS's argument that the potential for judicial review (appeal) or continued litigation justifies rejection of proposals and resolicitation.

C. Revision of Requirements

DGS' October 15, 1993 written Determination states the "Department also believes that it would be helpful to revise the Request for Proposals to clarify certain matters and to confirm the State's requirements in order to eliminate all foreseeable grounds for dispute." However, the Determination makes no mention of shelf level redundancy as being a reason for rejection. This reason is given in the Procurement Officer's decision and DGS maintains in the Agency Report that it rejected all proposals to avoid the "increased costs that the State would have unexpectedly incurred as a result of the Board's decision that the RFP required redundancy to the shelf level."

During the prior proceedings before this Board in MSBCA 1729, DGS maintained that Bell Atlantic's Meridian One Option 61 met DGS' redundancy requirements. DGS and Bell Atlantic maintained that Bell Atlantic's Option 61 for Baseline I actually contained two

Superloop cards, even though only one was on the bid form, and that this was satisfactory to DGS and met its redundancy requirements. This Board agreed with DGS that a custom version of Option 61 containing two Superloops met the RFP's redundancy requirements. However, as noted in Finding of Fact No. 5 supra the Board found that Bell Atlantic's offer omitted the second Superloop Card and weighing the need for public confidence in procurement against a material error in a proposal discovered after award concluded that an offeror may not, in the face of a bid protest appeal, amend a proposal after award.

DGS now asserts that it does not want redundancy to the shelf level as that term is articulated in the RFP and interpreted by this Board and, therefore, wishes to reject all proposals and resolicit. In the absence of a successful bid protest appeal, when a determination is made after award that an item is not required, we find that the appropriate remedy under the General Procurement Law and COMAR is to eliminate the item pursuant to the termination for convenience clause which must be included in all State contracts or by the vehicle of a contract modification where appropriate.

Here of course there is no contract to terminate or modify. Bell Atlantic never executed a contract because the award to Bell Atlantic was found in MSBCA 1729 to be in violation of the General Procurement Law and such finding has not been overturned. Nevertheless, we reject reading this reason that DGS does not now desire redundancy as first articulated in the Procurement Officer's decision and Agency Report into the October 15th Determination or Notice to Vendors.

The RFP contemplates that the State will not purchase a higher level of redundancy than that which is appropriate under the circumstances. In Addendum 1 to the RFP, DGS was asked about making Baseline I non-redundant. The vendor submitting the question complained that by bidding redundancy in Baseline I the State was "unnecessarily driving up system costs." The State responded to this question as follows:

> The State 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.

While the RFP asked vendors to bid redundancy, the State could later modify the level of redundancy during system design so as to save costs. The RFP did not require the State to purchase more redundancy than what it needs. The RFP did require the vendors to bid redundancy, with the State later determining what level of redundancy is needed. This Board did not in its September 17, 1993 decision require the State to actually purchase a certain level of redundancy.

Offerors who in good faith submit proposals at some expense should be able to rely on the terms of the RFP as expressing the actual desires of the State based on well thought out goals and objectives.

D. Re-scoring Difficulties

Although re-scoring difficulties were not mentioned in the October 15, 1993 Notice to Vendors nor in the October 15th Determination, DGS asserted in the Agency Report (and at the hearing of this appeal) that it came up with "108 different, valid, reasonable scoring scenarios". These re-scorings were completed prior to the October 15, 1993 decision to reject all proposals.[6] Having completed the re-scoring, DGS provided vendors with a synopsis thereof as an attachment to the denial of Appellant's protest on November 17, 1993. Most of the varying re-scoring scenarios center around how to evaluate price.[7] DGS' original

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[6] The record contains conflicting testimony concerning whether the re-scorings were completed prior to October 15, 1993. Compare January 18, Tr. 156-157 with January 18, Tr. 176-177.

[7] As to technical scores DGS asserts in its Agency Report in this appeal that "DGS never wanted technical scores normalized because it gives technical scores greater weight than DGS intended." DGS asserts that normalizing technical scores (e.g., awarding 600 points to the vendor offering the best technical

price scoring method was rejected by this Board in MSBCA 1729 as not being rational and as making an offerors' price proposal more important than its technical proposal. DGS has now put forth numerous scenarios which make varying assumptions about what it will purchase or consume. By varying the assumptions, different price scoring results are obtained.

DGS also maintains in the Agency Report in this appeal that the prices offered by four of the vendors, including Appellant, are "unacceptably high". High prices were not mentioned in the October 15, 1993 Notice to Vendors or in the October 15, 1993 Determination to Reject All Proposals; nor were they mentioned in DGS' November 17, 1993 denial of Appellant's protest. This issue was first raised in the Agency Report. A determination that prices were to high may, of course, be made in hindsight. However, this post award, post bid protest denial determination that prices were to

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product) as directed by this Board, "gives far greater weight to technical merit than is warranted or was intended." However, a reading of the RFP shows clearly that technical merit was more important than price.

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.

Furthermore, the RFP in Section IV.8 stated that "price evaluation will have a maximum value of 40% of the overall score." Conversely, Section IV.7 required that "the technical portion will account for 60% of the overall score." Unless the best technical score is normalized to 600 or some other method that will maintain the 60%, 40% balance is devised it is impossible to fulfill the stated objective of giving price a "maximum value of 40%". DGS apparently now wants to reject all proposals and cancel the procurement in order to make price more important than technical merit rather than the 60/40 technical-to-price ratio set forth in the RFP.

high raises concern about the validity of the price scoring methods developed and employed by DGS after this Board's September 17, 1993 opinion and whether the prices of the various offerors can be reasonably determined by DGS. The Procurement Officer testified that the reference point system originally employed was deficient and that a "straw man" approach using assumptions was developed after the Board issued its decision in MSBCA 1729. The determination of unreasonably high prices, however, along with the evidence concerning 108 allegedly rational scoring scenarios leads the Board to conclude that price cannot be scored reliably pursuant to the criteria set forth in the RFP even after the development of assumptions by DGS to realistically determine the offerors' prices on a comparative basis to determine the best price to the State.

Appellant argues, however, that looking at DGS's scoring under the assumptions developed, it is apparent that Appellant won. Of the 108 scoring methods, Appellant notes it won 40 of them - more than any other vendor. Appellant argues that the only reason for rejecting all proposals is to avoid awarding the contract to it, stating its belief that this was done in retaliation for prevailing on its prior protest.

Appellant maintains that looking at the price scoring done by DGS, it is apparent that it should be declared the victor. Appellant argues that of its 108 scoring scenarios, DGS's only apparent effort to ascertain lowest prices rather than lowest price score is set forth in Exhibit D attached to the Agency Report.

Appellant asserts that taking the normalized price scores from Exhibit D and adding them to the technical scores under Technical Option 3 as set forth in the Agency Report[8] reveals that it won this procurement. Indeed by using these two documents set forth in

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[8] This option, is part of Exhibit K attached to the Agency Report. This Board ordered that certain items were not capable of technical evaluation in the September 17, 1993 decision. Technical Option 3 appears to remove these items from consideration, yet maintains the percentages in the RFP and gives technical an overall 60% weight.

the Agency Report Appellant prevails with the highest number of points.

	Technical	Price		Total
ATT	556	299	=	855
BellSouth	474	282	=	756
Ericsson	474	303	=	777
Mitel	314	366	=	680
Appellant	600	281	=	881

Appellant asserts it prevails under this scenario even though its total price is calculated by DGS at 28 million, several million dollars higher than the total price of the other offerors.

Appellant also presented evidence from an expert in telecommunication with experience in procurements of this nature in both the private and public sectors. This expert gave testimony which was not rebutted that Appellant's actual total price was 20.6 million; i.e, more than six million less than the 28 million shown on Exhibit D. This six million plus dollar differential was primarily due to DGS erroneously determining Appellant's price for baseline maintenance and erroneously including a price for lighting and surge protection in calculation of Appellant's price.

Notwithstanding Appellant's unrebutted expert testimony that its actual offered price was more than six million dollars less than its price as evaluated by DGS and that such actual price would make it a clear winner pursuant to the criteria of the RFP we must deny its appeal. DGS argued that it was impossible from the record to determine whether the application of the same evaluation criteria to the other offerors' price offers as were applied in the various evaluation of Appellant's prices would not also result in a decrease in the other offerors' prices.[9] We agree with DGS that one cannot tell from the record whether other offerors' prices

[9] The record pertaining to the DGS re-scoring by the "straw man" method only reflects with minor exception the individual prices offered by Appellant for the various required items for the four baseline system options and unit, maintenance and options pricing.

would decline except as to the lighting and surge protection evaluation performed by DGS which improperly added millions to Appellant's price.[10]

Since it cannot be determined from the record with absolute certainty who won, the appeal must be denied. Anything less than mathematical or absolute certainty concerning the winner upon a re-scoring when proposals are required to be re-scored to see if compliance with the criteria set forth in an RFP can be achieved we believe would undermine public confidence in State procurement.

However, even if the record herein enabled one to determine the winning offer with certainty in the instant appeal there is yet another and more fundamental cause for concern which we find requires rejection of all proposals and a resolicitation. The RFP noted that price was worth 40% of the total evaluation for a total of 400 points. DGS thus complied with the requirement of the General Procurement Law (State Finance and Procurement Article §13-104) that an RFP include a statement of the factors, including price, that will be used in evaluating proposal and the relative importance of each factor. See COMAR 21.05.03.03; Mid Atlantic Vision Service Plan, Inc, MSBCA 1386, 2 MSBCA ¶173(1988).

Prior to initial receipt of price proposals in this procurement the Procurement Officer testified he had determined a scoring method to determine price based on a reference point system. This system was not set forth in the RFP. After remand from the Board of Contract Appeals, DGS developed a new method referred to as a "straw man" to attempt to determine on a rational basis, consistently applied, what any given offerors' price actually was to realistically determined the price most fiscally advantageous to the State. To permit an agency to change its price scoring methodology after the offerors' prices are exposed, even though presumably undertaken as a result of a bid protest appeal to

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[10] Light protection was only an item that pertained to Appellant and would not have affected the evaluation of the other offerors' prices.

attempt to comply with and correct major flaws in the RFP, we believe would significantly undermine confidence in public procurement. Assumptions should have been determined before the due date for price proposals concerning how an offerors price would be determined under the criteria expressed in this RFP. If a material revision of these assumptions is made after prices have been exposed (even when done as the result of a bid protest appeal) then we believe that rejection of all proposals and a re-solicitation is necessary in order to maintain public confidence, since at the least there is an appearance that the price scoring can be manipulated by altering the assumptions. Where the agency develops an RFP with scores based on total price, the agency must develop assumptions prior to opening of price proposals. Here the RFP clearly required a finding of total price. This can only be determined in a rational way by making assumptions on what will be consumed or purchased to calculate the total price of each offeror. Since the record reflects that this calculation cannot reliably be made it cannot be determined in fact that Appellant (or any other offeror) submitted the winning offer. Therefore rejection of all proposals is appropriate under the General Procurement Law.

For the foregoing reasons we deny the appeal.

It is therefore ORDERED this 2nd day of February, 1994, that the appeal is denied.

Dated: February 2, 1994

Robert B. Harrison III
Chairman

I concur:

Neal E. Malone
Board Member

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 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1779, appeal of **FUJITSU BUSINESS COMMUNICATIONS SYSTEMS Under DGS Contract No. AST-EPABX-9209.**

Dated: February 2, 1994

Mary F. Priscilla
Mary F. Priscilla
Recorder