

Findings of Fact

1. On April 15, 1983, the Maryland Department of General Services (DGS) issued a notice to contractors soliciting technical and price proposals for the installation of an energy maintenance system at Salisbury State College. A similar notice was published at 10:9 Maryland Register 837 (April 29, 1983).

2. The notice to contractors apprised potential bidders that (1) plans and specifications¹ were available at DGS, (2) a mandatory pre-bid conference would be conducted on May 17, 1983, (3) "bids" would be due on June 2, 1983, and (4) award would be based upon consideration of the following:

<u>Item</u>	<u>Weight</u>
Price proposal	40%
Evaluation of similar completed projects	20%
Service capabilities	20%
System architecture	20%

3. A special form for the submittal of pricing was included in the specifications package obtained by prospective bidders. This form required a base bid, a price for ten "add alternates", unit prices for analog input and output points, digital input and output points, building metering and a price for an annual full-service contract. The base bid was to include:

. . . all necessary labor and materials to install a complete and operable system as described in the contract documents. The base bid shall include the Central Processing Unit, peripherals and related work in the Maintenance Building; the complete transmission system for all buildings; all work required for the control of points designated by "X" on the point charts for Holloway Hall, Caruthers Hall, Devilbiss Hall, Maggs Physical Activities Center, Blackwell Library; interface of Delmarva Power and Light Company's main electric meter at Holloway Hall annex; and station protectors and grounding of all buildings indicated on Drawing M-2.

The alternates were to include the additional price for all work involved in providing certain designated control points at various buildings.

4. A separately bound technical proposal also was required to be submitted with sufficient information to establish that ". . . both the system design and . . . [the Contractor's] qualifications meet the performance requirements of . . . [the] specification." Exh. 1C, p. SB-2. Specifically, this technical proposal was to address:

¹The term "specifications" is used broadly to include the instructions to bidders, general conditions, and other contract requirements.

. . . Future expansion capability, proposed system configuration, testing and checkout procedures, system operation/human engineering, without vendor assistance be able to add or delete points, calculation routines, modify existing program parameters and write customized control and monitoring strategies in a high-level computer language formatted in English language.

See Exh. 1C, p. SB-2, ¶F.

5. Contract General Conditions ¶2.01 is entitled "Award of Contract" and provides, in pertinent part, as follows:

A. The award of the contract, if it be awarded, will be within the time specified in the proposal and will be to the lowest responsive, responsible bidder whose proposal complies with all the requirements prescribed . . .

6. The specifications further contained a section entitled "Contractor's Qualifications" which apprised prospective bidders as follows:

A. The following paragraphs constitute reasonable and measurable criteria for evaluating the minimum qualifications of the contractor for this procurement.

B. It is the express intent of this procurement to provide a contract to a general contractor (hereinafter referred to as the contractor) who shall have the background, capabilities and experience to provide and maintain a complete and operational Central Control and Monitoring System (CCMS). The contractor shall be a manufacturer of automatic temperature controls and the developer of the Central Control Center hardware and software. The contractor shall be thoroughly experienced in providing the complete installation and proper operation of the CCMS, including, but not limited to design, installation and maintenance of: the Central Control Center, software, data/signal transmission systems, field interface devices and interfacing of all CCMS equipment, sensors and controls, central processing unit, memory units and peripheral devices, communication links and data acquisition panels with existing and modified or augmented existing control systems. After the installation, the contractor shall be responsible for the debugging and calibration of the CCMS, including all software, and the maintenance of the CCMS during and after the warranty period. In order to provide a satisfactory procurement, experience in the electronics sector is required, and applicants experience in the environmental control sector is considered imperative.

C. The contractor shall have a successful history in the design, installation, and maintenance of solid-state, computer-controlled systems similar in size and performance to that specified herein and shall have at least three (3) successful working systems of a comparable size and complexity in operation for at least one year using CRT and software routines functionally

similar to those outlined in these specifications. None of the three (3) successful working systems may be within the contractor's own building complex.

In order to be considered similar in size and complexity to the subject procurement, at least one of the successful working systems shall include a system with remote buildings of a range of environmental control systems complexity similar to the buildings in this procurement, all of which shall be connected to the Central Control Center.

The software routines described in these specifications shall have been included in the successful working systems. The contractor must have demonstrated a capability having the credentials to develop the software routines designated as future programs.

D. The contractor shall submit with his bid technical, operational, and economic data and information on the CCMS contracts in the range that he has installed that are comparable in size and complexity to this procurement. Data and information on a minimum of three (3) and a maximum of ten (10) projects shall be submitted. Data and information shall be concise, but sufficient for reviewing engineering personnel to determine if the experience is applicable to the subject procurement. The names and telephone numbers of the individuals at the facilities who are responsible for the operation and maintenance of the completed systems shall be provided and the engineer and college personnel shall be given the right to contact these individuals

7. A "pre-bid" conference was conducted on Tuesday, May 17, 1983. Attendance at this meeting was stated in the solicitation to be a condition precedent to the right to submit a bid and have it considered.

8. On June 2, 1983, bids publicly were opened by DGS. Appellant's representatives were present at the bid opening.

9. Appellant's price for the base bid and first two alternates was \$182,084. This was the lowest bid received for this work. M & E bid the same line items at \$218,350.²

10. The technical proposals and bids initially were evaluated by Downes Associates, Inc. (Tr. 105). Downes Associates earlier had been selected by DGS to design the project and prepare the contract documents. (Tr. 94).

²Contract price properly should be determined based on the work to be included therein. Thus, where the pricing of alternates is requested in the bid documents only those alternates actually to be awarded with available funding are to be considered in determining the low bid. P. Shnitzer, Government Contract Bidding, pp. 407-410 (1st Ed. 1976). Here the proposed award was for the base bid items and the first two alternates.

11. The evaluation procedure was described in a document prepared by Downes Associates as follows:

The price proposals were evaluated based on a weighted scoring methodology, allowing a maximum of 40 points for the price proposal.

An evaluation sheet was prepared for each of the other three categories to be weighed in the evaluation. A maximum of 20 points was allowed for each category. Independent evaluations of these three categories were made of each proposal by an electrical engineer and a mechanical engineer from Downes Associates, Inc. The two engineers reviewed their evaluations and agreed upon a concensus (sic) score for each of the three categories.

The scores for each of the four categories were then totaled for each bidder

Exh. 2A, p.4.

12. In order to evaluate price, Downes Associates conducted a weighted analysis wherein the base bid and first seven alternates were considered to be most beneficial to the State. Of the 40 maximum points obtainable in the evaluation of price, 32 points were assigned to these items. Weighting factors then were assigned based upon the engineer's estimate for these items as follows:

	<u>Factor</u>
Base bid	19.9
Alt. #1	2.5
Alt. #2	1.8
Alt. #3	1.8
Alt. #4	1.2
Alt. #5	1.2
Alt. #6	2.7
Alt. #7	0.9
Total	<u>32.0</u>

Alternates 8 through 10 were considered less desirable to the State in view of funding limitations which in all likelihood would preclude acceptance thereof. Accordingly, these latter alternates were assigned nominal weight factors of 0.5. The unit prices were assigned weight factors of 1.2 each and the service contract was assigned a factor of 0.5. This breakdown was not disclosed in the solicitation nor was it described at the pre-bid conference.

13. Price scores were obtained by dividing the low price submitted for each line item by each offeror's price and multiplying by the weight factor. Under this procedure, price was evaluated as follows:

<u>Offeror</u>	<u>Points</u>
Appellant	36.61
Electro-Mechanical Systems (E-M)	34.05
M & E	30.93
MCC Powers (MCC)	25.50

14. Technical proposals were evaluated by Downes Associates as follows:

<u>Offeror</u>	<u>Similar Completed Projects</u>	<u>CCMS Architecture</u>	<u>Service Capability</u>	<u>Total</u>
E-M	4	5	3	12
Appellant	15	8	14	37
M & E	20	20	20	60
MCC	20	20	20	60

15. Combined technical and price scores were as follows:

<u>Offeror</u>	<u>Total</u>
M & E	91
MCC	86
Appellant	74
E-M	46

16. Downes Associates recommended award to M & E based on the foregoing evaluation. In view of the available funding of \$218,589, it further was recommended that the contract include only the base bid work plus add alternates 1 and 2.

17. In evaluating the technical proposals, Downes Associates relied wholly upon the written submittals and did not seek clarification or amplification from the bidders.

18. With regard to the "bidder qualification" requirements set forth in the solicitation, Downes Associates considered M & E to be "one and the same" as Barber-Colman. The parties have stipulated, however, that M & E is not a manufacturer of automatic temperature controls and has not installed three working systems of comparable size to the one required here.

19. M & E is the exclusive representative for Barber-Colman in the Baltimore-Eastern Shore area. (Tr. 88). Its employees are trained by Barber-Colman and it is not permitted to bid a job without prior approval by Barber-Colman. (Tr. 58).

20. Barber-Colman met the qualification criteria set forth in the solicitation.

21. On June 7, 1983, the DGS project manager met with Downes Associates representatives and the Director of Physical Plant at Salisbury State College to review the evaluation of the proposals. (Tr. 76). The DGS project manager, impressed by the evaluation procedure, concurred in the recommendation presented to him. (Tr. 83).

22. On June 17, 1983, a sales engineer for Appellant called the DGS project manager to inquire as to the progress of the evaluations. The sales engineer, Mr. John Zander, testified that he was informed at this time that M & E had a higher score and probably would be recommended for award. (Tr. 70).

23. By letter dated June 22, 1983, Appellant apprised the DGS Secretary that it was protesting the proposed award to M & E. The basis for this protest was stated as follows:

Johnson Controls, Inc. is the bidder to whom the procurement should be awarded, (sic) because we submitted the lowest price and that (sic) we are more qualified than any other bidder in all the factors which the invitation to bid indicated would be weighed.

(Exh. 5). This letter was forwarded by the Secretary to the appropriate procurement officer for consideration. Exhs. 5A, G.

24. Appellant's Mr. Zander wrote the DGS project manager on June 22, 1983 requesting that a meeting be scheduled for June 24, 1983. (Tr. 86). During this meeting, Appellant asked permission to review its competitors' technical proposals. Permission was denied at that time.³

25. By final decision dated June 30, 1983, the DGS procurement officer denied Appellant's protest on the ground that the evaluation procedure reasonably determined M & E to have submitted the most advantageous proposal to the State under the criteria set forth in the solicitation.

26. A timely appeal was taken from the foregoing final decision.

27. On June 29, 1983 the Board of Public Works approved the award to M & E subject to the resolution of this protest.

³COMAR 21.05.03.03G provides that the register of proposals shall be open to public inspection only after award of the contract. This provision, however, is applicable to negotiated procurements.

28. On July 13, 1983, a debriefing⁴ was conducted at the request of Appellant. At this time, Appellant first learned of the weighting formula applied by Downes Associates in evaluating price. Appellant also learned the identity of the comparable installations referenced by M & E in its proposal.

29. By letter dated July 18, 1983, a second protest was filed by Appellant wherein it was alleged that (1) M & E was not a responsible bidder, and (2) the evaluation procedure as to price was defective.

30. Although a final decision was not issued as to the second protest, DGS addressed both protests in its agency report and does not object to the Board's jurisdiction on this basis. (Tr. 4, 7).

Decision

Preliminarily, we consider the issues raised by M & E as to the propriety of Appellant's appeal. In this regard, M & E contends initially that the form of the appeal notice was defective in that it did not comport with the requirements of COMAR 21.10.07.02. The foregoing regulation specifically requires a notice of appeal to contain a statement of the grounds for appeal and specify the ruling requested from the Board. Appellant's appeal letter did neither and M & E submits that the appeal therefore should be considered defective and untimely.

While the Board recognizes the potential problems created when appellants fail to adhere to the requirements of COMAR 21.10.07.02, such an omission is not fatal to an appeal. Obviously the interested parties must be given fair notice of the grounds for appeal and the requested ruling so as to prepare a defense. However, where confusion exists, the proper remedy is to request a more definite statement of the grounds for appeal immediately upon perceiving a problem. In this manner the rights of the parties are protected and the proceedings are not delayed unduly.

Here the basis for Appellant's appeal adequately was stated in its written comments to the Board. Copies of these comments were served on all interested parties prior to hearing and an opportunity to respond was provided under Board rules. Accordingly, neither M & E nor DGS was surprised.

M & E next contends that the July 13, 1983 meeting between Appellant and DGS representatives was impermissible and improper because it came after the final decision on the original protest had been issued. Such a meeting is said to represent an ex parte communication and an attempt to improperly influence the decision-making and procurement process of the State. We disagree. In this instance, COMAR 21.05.03.06 provided Appellant the right to a debriefing since the award was based, in part, on factors other

⁴COMAR 21.05.03.06 provides that when a contract is awarded on some basis other than price, unsuccessful offerors shall be debriefed upon their written request. The purpose of the debriefing is to apprise unsuccessful offerors of the areas in which their technical proposals were weak or deficient and furnish the basis for the selection decision. This procedure thus is inapplicable to and inconsistent with competitive sealed bid procurements.

than price. The July 13, 1983 meeting, therefore, was not conducted to review the procurement officer's final decision, but rather to apprise Appellant as to the areas where its technical and price proposal was weak or deficient and also to furnish Appellant with the basis for the selection decision. The meeting, thus, was proper and consistent with Maryland's procurement regulations.

M & E further argues that the July 18, 1983 letter from Appellant's attorney to the procurement officer constituted an ex parte communication with the procurement officer in contravention of the Maryland Administrative Procedure Act. We again disagree. The July 18, 1983 letter notified the DGS procurement officer of new grounds for protest which allegedly were discovered during the debriefing. Such a letter is the required vehicle for raising a protest and was entirely proper. See COMAR 21.10.02.02.

We now turn to the substantive issues raised by Appellant. In essence, Appellant questions whether M & E was a responsive and responsible bidder and further alleges that, regardless of this determination, it was entitled to an award as the low bidder. DGS maintains that it properly evaluated bids pursuant to the criteria set forth in the solicitation and that M & E reasonably was determined to have submitted the proposal most advantageous to the State. DGS admits, and the record so establishes, that factors other than price were considered. (Tr. 13).

In a competitive sealed bid procurement, award is made, if at all, to the responsible and responsive bidder who submits the lowest bid price or evaluated bid price. Md. Ann. Code, Art. 21, §3-201 (g); COMAR 21.05.02.13A. In determining the lowest bidder, COMAR 21.05.02.13B further provides that:

. . . Bids shall be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the invitation for bids. Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the lowest bidder. . . .

It is essential to understand that in competitive sealed bid procurements, the determining factor for award is price. The low bidder may not be bypassed for one who is considered more responsible or for one who offers a superior product. COMAR 21.05.02.13C., compare P. Shnitzer, Government Contract Bidding, supra at p. 405. Thus, in evaluating bid price, only factors set forth in the solicitation and affecting the State's costs may be considered. Compare 52 Comp. Gen. 997 (1973). Cost factors are considered objectively measurable if ". . . they are made known to or can be ascertained by the bidder at the time his bid is being prepared."⁵ 36 Comp. Gen. 380, 385 (1956).

Competitive negotiation, on the other hand, is to be used by an agency where award cannot be made on the sole basis of price or evaluated price. See COMAR 21.05.01.02B(1). It is necessary in such procurements to consider and

⁵Examples of such factors are (1) the administrative cost of making multiple awards, (2) maintenance and operating costs, and (3) transportation costs. For summary of cases involving these factors, see R. Nash and J. Cibinic, Federal Procurement Law, Vol. I, pp. 292-294 (3rd Ed. 1977).

evaluate technical and/or management proposals along with price to determine which proposal overall is most advantageous to the State. The review of these non-cost factors involves the exercise of judgment which necessarily is subjective. B. Paul Blaine Associates, Inc., MSBCA 1123, August 16, 1983, pp. 15-16.

Before a contract may be awarded by competitive negotiation, the procurement officer, with approval of the agency head or his designee, shall make a written determination that competitive sealed bidding cannot be used. COMAR 21.05.03.01B.; COMAR 21.01.02.27. Thereafter, a request for proposals (RFP) is prepared which sets forth all factors to be considered in the evaluation process. COMAR 21.05.03.03A. Where award conceivably is to be made without negotiations, i.e. on the basis of the original proposals, a statement to this effect must be included in the RFP. COMAR 21.05.03.02A(3). Generally, however, negotiations shall be conducted with all responsible offerors in order to:

- (a) Promote understanding of the procurement agency's requirements and the offeror's proposals; and
- (b) Facilitate arrival at a contract that shall be most advantageous to the State, taking into consideration price and other relevant evaluation factors set forth in the request for proposals.

COMAR 21.05.03.03C(2).

It is unclear from the record what type of procurement was intended by DGS. The Contract General Conditions stated that an award would be made to the responsive and responsible bidder who submits the lowest bid. This indicates that a competitive sealed bid procurement was intended. However, the solicitation also required bidders to submit bound technical proposals with sufficient information to establish that it could meet the performance requirements of the specification. Bidders likewise were apprised that these technical proposals would be evaluated as to (1) the performance of similar completed projects, (2) the service capability of the contractor, and (3) CCMS architecture. The foregoing subjective factors, along with price, were to be considered in the award of the contract. This, of course, is consistent with a competitive negotiation procurement.

DGS' counsel in his agency report stated that the instant procurement was a competitive sealed bid. The record similarly is devoid of any written determination that a competitive negotiation was necessary and authorized. In direct contradiction, however, DGS apprised the Board of Public Works, in seeking approval of this contract, that a competitive negotiation procedure was used. (Exh. 14).⁶

⁶Exhibit 14 is the action agenda prepared for the Board of Public Works approval of the instant procurement award. The procurement method was indicated by the typewritten words "competitive sealed bidding." The latter two words, however, manually were scratched out and the handwritten word "negotiation" was substituted. No explanation has been offered for this change.

Assuming, arguendo, that this indeed was a competitive sealed bid, an award to M & E is not permissible under Maryland law since M & E was not the low bidder. The evaluation factors set forth in the solicitation were neither price related nor objectively measurable and could not be used to deny an award to Appellant once it established itself as a responsible bidder. While the evaluation process may reasonably have led to the conclusion that M & E was offering a superior product and service, it did not establish that M & E was doing so at the lowest price to the State.

Even if the record were clear that a competitive negotiation was intended, a number of deficiencies still are evident. Aside from the apparent failure by DGS to obtain authorization to conduct a competitive negotiation, there was no statement in the solicitation as to whether negotiations would be conducted with all responsible offerors. The Downes Associates engineers who evaluated the technical proposals for DGS made no effort to seek, through negotiation, clarification or amplification of the technical proposals submitted. The failure to hold negotiations, without notice, especially was unfair to Appellant in that it consistently was downgraded in areas where the engineers were unsure of what was intended. (Tr. 109, 110, 119). This lack of detail in Appellant's proposal was not due to a lack of diligence, but rather to confusion as to what it needed to establish. In this regard, Appellant's witnesses testified that they understood the proposal to be necessary only to establish responsibility. Further, had they fully understood the process, Appellant's witnesses stated that supporting documentation could have been provided. (Tr. 21-22). Accordingly, we conclude that the absence of a statement pertaining to negotiations, particularly in view of the confusing nature of this procurement, affected competition and therefore constituted a fatal defect in the process.

Aside from the adverse effect of this procedure on Appellant's competitive position, we further are concerned that it did not facilitate arrival at a contract that was most advantageous to the State. In this instance, DGS selected a contractor whose price was 20% higher than Appellant's based on the evaluation of technical factors by its consulting engineer. This is not objectionable per se in a competitive negotiation procurement provided that a contracting agency reasonably determines, based on evaluation factors set forth in the solicitation, that the price difference is offset by technical superiority. However, here the Downes Associates engineers made no effort to flesh out the technical proposals submitted to assure themselves that M & E truly was offering a product and service superior to Appellant's. Instead they mechanically downgraded proposals for lack of detail or clarity. This, in our view, is not reasonable or consistent with the principles enunciated in COMAR 21.05.03.03C(2). While there may be procurements where negotiations cannot be conducted due to exigencies of time or other factors, notice of this fact in solicitations will at least apprise offerors that their proposals must be complete and fully documented in order to assure proper evaluation. Without this notice, any evaluation procedure is rendered meaningless and arbitrary. Compare National Graduate University, B-203089 (November 19, 1981), 81-2 CPD ¶408.

In summary, DGS may not award a contract to M & E under a competitive sealed bid procurement in that Appellant 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.

In resoliciting this work, care should be taken to (1) state the minimum contractor's qualifications in such a manner as to indicate that factory representatives and the manufacturer whose product it will install shall be considered the same entity for evaluation purposes, (2) indicate whether negotiations will be conducted, (3) expressly state whether DGS separately will evaluate the contractor's qualifications and, if so, how they will be weighed, and (4) indicate any formula which will be used to evaluate price.

For the foregoing reasons, the appeal is sustained to the extent indicated.