

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of NEOPLAN USA)	
CORPORATION)	
)	Docket Nos. MSBCA 1186
)	and 1202
Under MTA Contract No.)	
MTA 3-32-1)	

September 18, 1984

Timeliness - Appellant's failure to protest an alleged defect in the solicitation's evaluation formula prior to receipt of proposals was fatal to its right to challenge the formula.

Evaluation of Proposals - An agency's assessment of how its minimum needs most appropriately can be satisfied is a discretionary determination which cannot be disturbed absent a clear showing that it is without a reasonable basis.

Motion For Reconsideration - Although Appellant alleged that the Board committed legal error in applying Federal common law to the protest raised in MSBCA 1186, the Board denied Appellant's motion for reconsideration on this ground. Since relevant Maryland regulations incorporated Federal common law principles, it was appropriate for the Board to look to Federal case law for guidance in resolving the appeal presented.

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OPINION BY CHAIRMAN BAKER

On June 25, 1984, this Board issued a decision sustaining Appellant's appeal in part and remanding the matter to the MTA procurement officer with instructions as to how standardization costs properly should be determined and utilized in the evaluation of bids. See NEOPLAN USA Corporation, MSBCA 1186, June 25, 1984. The MTA procurement officer re-evaluated the bids received under the captioned solicitation pursuant to our guidelines and concluded, on June 26, 1984, that The Flxible Corporation was the low bidder by approximately \$47,302.¹ Accordingly, an award to Flxible was recommended to the Board of Public Works at its meeting on June 27, 1984 and was approved on that date.

By letter dated July 3, 1984, Appellant protested the re-evaluation performed by the MTA procurement officer as being unreasonable. This protest was denied on July 11, 1984. Appellant filed a timely appeal on July 24, 1984 and concomitantly asked for reconsideration of the Board's decision in MSBCA 1186. These matters have been consolidated for purposes of efficient and expeditious resolution.

Findings of Fact (MSBCA 1202)

1. Standardization costs, as described in the captioned solicitation, involve two items of pertinence here.² The first item may be categorized as special tools, i.e., those tools which are necessary to service a competitor's bus and which are not found as part of the MTA's existing tool inventory. The second item is referred to as "repairman training." This encompasses the hourly cost incurred by the MTA while its mechanics are attending class.

2. Pursuant to the Board's decision in MSBCA 1186, the MTA procurement officer re-evaluated standardization costs under the following guidelines:

There is no basis to assume different cost factors for transmission training and tools.

The number and value of tools is a function of the number of repair facilities and mechanics and is not related to the number of buses ordered.

¹The MTA procurement officer, as best we can determine, made an arithmetical error in deriving this figure. It correctly should be \$37,301.75. See Finding of Fact No. 18.

²A third standardization item set forth in the invitation for bids (IFB) was operator training. Since the two low bidders proposed a one hour training course per operator, the evaluation of this item does not affect the competitive position of the parties.

The number of mechanics and operators to be trained is a function of the existing manpower and expertise rather than the number of buses to be ordered.

3. Special tools were evaluated by the MTA as follows:

- a. Transmission Tools - Since Appellant and Flxible offered buses having the same transmission, each bus required the same tooling. Special tools for this transmission were determined to cost \$1,016 per set. Because transmission work was to be performed at each of the five MTA operating divisions, five sets of tools were deemed necessary.
- b. Porta-Power Tools - The porta-power tool was identified in a service bulletin contained in Appellant's proposal and was necessary to replace the A-frame trunnion bushing on Appellant's buses. Appellant later supplemented its proposal to provide a cost for this item of \$1,400 per tool.

By letter dated March 5, 1984, Appellant further apprised the MTA that trunnion bearing replacement was not a routine service procedure. Appellant's experience with 150 similar buses delivered to the City of Philadelphia was that trunnion bearing replacement became necessary on only five buses by the time the fleet average reached 40,000 miles per bus. (See Exh. A to Appellant's response to State Agency Report, MSBCA 1186). For this reason, Appellant's Mr. Bridgens testified that a single porta-power tool would be sufficient for the MTA's maintenance needs. (Tr. 32-33, MSBCA 1186).

The MTA's Mr. Norbert Wagner³ testified that trunnion bearing replacement work would be performed at all five of the MTA's operating divisions. Further, despite Mr. Bridgens projections based on the short operating history of Appellant's vehicles in Philadelphia, it was apparent that trunnion bearings on each of the buses ordered from Appellant clearly would have to be replaced at least once over the 500,000 mile life of the vehicle. Accordingly, Mr. Wagner and the members of the re-evaluation committee concluded that five porta-power tools would be required to properly service Appellant's buses. This tool further was found to be unnecessary to service the Flxible buses.

- c. Metric Tools - In its proposal to the MTA, Appellant indicated that metric wrenches and sockets would be required to service the independent front suspension and frame rear suspension. The cost per set was quoted at \$181.75.

The MTA's Mr. Wagner testified that suspension work maintenance is done daily at each of its operating divisions. Often several buses are being serviced simultaneously for suspension problems. Accordingly, the re-evaluation committee

³Mr. Wagner is the MTA General Superintendent for Quality Assurance.

decided to analyze its needs by virtue of the relative size of the fleet to be serviced at each facility. The following analysis was prepared:

<u>Location</u>	<u># of Buses Assigned</u>	<u>% of Fleet</u>	<u>Metric Tool Sets Required</u>
Harford	102	11	2
Kirk	272	29	5
Eastern	173	19	3
Bush ⁴	382	41	7
		Total	17 sets

The 17 sets of tools would be purchased as MTA tools and checked out by mechanics who required them. This analysis ignored the testimony of Appellant's Mr. Bridgens who stated, contrary to Appellant's proposal, that the metric tools were not really necessary to service the suspension.

4. A summary of the Special Tools evaluation appears as follows:

	<u>Appellant</u>	<u>Flxible</u>
Transmission Tools	\$ 5,080.00	\$5,080.00
Porta-Power Tools	7,000.00	0.00
Metric Tools	3,089.75	0.00
Total	\$15,169.75	\$5,080.00

5. In evaluating training costs, the MTA re-evaluation committee examined its past training practices for new bus introductions to ascertain the classifications of employees to be trained and the number of those employees to receive such training. Three classifications were settled on. These were: (1) supervisory personnel, (2) mechanics, and (3) body shop repairmen.

6. The MTA has 45 employees operating in a supervisory capacity within its bus maintenance divisions. The re-evaluation committee concluded that it was essential to train these supervisory personnel so that they, in turn, would be able to instruct, at a later time, those mechanics who would not receive new bus instructions initially.

7. Appellant's proposal included a description of a four hour training class entitled "NEOPLAN Bus Orientation for Maintenance Supervisors." The proposal similarly included a description of a four hour training class entitled "NEOPLAN Bus Orientation for Maintenance Mechanics." The course descriptions for these two classes were identical. Notwithstanding this fact, the MTA re-evaluation committee concluded that its supervisors should be sent to both orientation classes for a total of eight hours of instruction per employee.

8. The Flxible proposal did not separately address supervisor training. The proposal did include the following training which the MTA concluded was requisite for its supervisors:

⁴This location houses two operating divisions.

Construction and Assembly	1.5 hours
Coach Operation	0.5 hours
Use of Parts and Maint. Manuals	0.5 hours

9. The IFB did not state expressly that the cost of training supervisors would be evaluated. Instead the IFB referenced only "repairman" or "mechanical" training as an evaluation factor. The cost of this training was fixed at \$20 per hour which we are told represents the hourly rate with fringes which the MTA would incur while its mechanics were in class. No evidence was presented concerning the responsibilities of a supervisor in the actual repair of a bus or the hourly wage of a supervisor as compared to a mechanic. Nevertheless, the MTA evaluated the cost of training its 45 maintenance supervisors at a rate of \$20 per hour as well.

10. With regard to body repairs on the respective buses, the MTA re-evaluation committee concluded that it would be necessary to train each of its 38 body shop mechanics on Appellant's bus. Appellant recommended a four hour class for this purpose.

Flxible did not recommend body shop training under its proposal, nor did the MTA include such in its evaluation thereof. Within the past two years, the MTA has purchased 161 Flxible buses and its mechanics thus already have been trained with regard to body repairs on that bus.

11. The MTA has approximately 289 class A and B mechanics in its employ. These mechanics work throughout the MTA's five operating divisions, over three shifts, seven days per week.

12. The MTA re-evaluation committee recognized that it could not afford to train all of its mechanics initially. The number of mechanics to be trained is limited by budget constraints and the need to keep five operating divisions fully manned over each shift. Accordingly, the MTA re-evaluation committee concluded that of the 251 mechanics performing work other than body shop repairs, the MTA could afford to train only a third, or 84 mechanics.

13. Utilizing the training courses set forth by Appellant and Flxible in their respective proposals, the MTA re-evaluation committee concluded that repairman training should be evaluated as follows:

<u>Appellant</u>	<u>Flxible</u>
64 hours/mechanic ⁵	36 hours/mechanic
at \$20/hr. = \$1280/mechanic	at \$20/hr. = \$720/mechanic
84 mechanics at	84 mechanics at
\$1280 = \$107,520	\$720 = \$60,480

⁵Appellant's training course consisted of 72 hours of classes. Subtracting the four hours of specialized body shop repair and four hours of supervisor training, each mechanic thus would undergo 64 hours of training.

14. The MTA's previous efforts at new bus introduction training had not been as ambitious as that projected for the captioned procurement. The 1982 purchase of Grumann buses, for example, resulted in approximately 1806.5 manhours of mechanical training for which records had been kept. The MTA's Training Coordinator, however, testified that the Grumann training documentation did not include body repair instruction, supervisory training, or training pertaining to certain floor problems being experienced at the time.

15. Similarly, 1983 new coach training on the Flexible buses, as documented by the MTA, totals 1238 manhours to date. Existing documentation, however, does not reflect certain door control training provided at the Eastern Avenue garage and supervisory training. Instruction still is being provided to MTA mechanics relative to the 1983 Flexible buses and hence the total manhours of training recorded to date is said to be nonrepresentative of the full training effort required.

16. The MTA's decision to train one-third of its mechanics was influenced by an experimental training program introduced at the Eastern Avenue bus garage in 1983. There, 50% of the MTA mechanics were trained on the new Flexible buses being delivered. The MTA found it was able to cover all shifts with mechanics during the training period and that from a quality control standpoint, subsequent repairs to Flexible buses were performed properly and on time. The benefits to be derived from such a large scale training program thus weighed heavily in the re-evaluation committee's assessment of training needs.

17. Although the MTA's allocation of budget resources for training purposes increased in 1982 and has remained high, the available funding for training has diminished since then. The record, however, does not indicate precise MTA spending limitations or budget appropriations for the years 1982-1984.

18. Based upon the recommendations of the MTA re-evaluation committee, the MTA procurement officer determined Flexible to be the low evaluated bidder as follows:

	<u>Appellant</u>		<u>Flexible</u>	
	<u>Unit Cost</u>	<u>Total Cost</u>	<u>Unit Cost</u>	<u>Total Cost</u>
Buses	\$142,350	\$11,388,800	\$149,562	\$11,964,960
Delivery	1,640	131,200	512	40,960
Subtotal	<u>\$143,990</u>	<u>\$11,520,000</u>	<u>\$150,074</u>	<u>\$12,005,920</u>
LCC Fuel	173,812	13,904,892	168,086	13,446,880
Subtotal	<u>\$317,802</u>	<u>\$25,424,982</u>	<u>\$318,160</u>	<u>\$25,452,800</u>
Special Tools		15,169.75		5,080
Training		117,760.00		62,730
Total		<u>\$25,557,911.75</u>		<u>\$25,510,610⁶</u>

⁶As noted earlier, this figure correctly should total \$25,520,610.

Decision - MSBCA 1202

Appellant initially contends in its "Memorandum In Support of Appeal" (MSBCA 1202) that the life cycle cost evaluation was unreasonable in that the MTA assumed a fuel cost of \$1.50 per gallon. Assuming, arguendo, that this is true, Appellant has waived its right to raise the issue by failing to file a protest on this ground prior to the date of the MTA's receipt of technical and price proposals. Clearly, any unreasonableness of the \$1.50 per gallon fuel price when compared to present fuel costs was apparent to Appellant at the time it prepared its proposals. See COMAR 21.10.02.03A; compare International Business Machines Corp., MSBCA 1071, August 8, 1982.

We further note that the evaluation of life cycle costs was addressed neither by Appellant in its July 3, 1984 protest nor by the MTA procurement officer in his July 11, 1984 final decision. Accordingly, it is not a matter which appropriately is before us. Compare The CTC Machine & Supply Corporation, MSBCA 1049 (April 20, 1982).⁷

The remainder of this appeal arises out of the MTA procurement officer's re-evaluation of standardization costs as mandated by this Board's decision in MSBCA 1186. This re-evaluation was limited to a consideration of special tool costs and training costs. Although Appellant challenges the reasonableness of each determination made by the MTA procurement officer pertaining to these cost factors, we will confine our consideration to "repairman training." If the MTA procurement officer's re-evaluation was reasonable as to this factor, examination of the remaining standardization factors is unnecessary.⁸

⁷In CTC, this Board recognized that the need to expeditiously decide an issue may require that we assume jurisdiction over matters not raised initially with the procurement officer. However, where the State would be prejudiced by such action, the Board will not exercise its administrative discretion in this manner. Here, the MTA clearly would be prejudiced by the consideration of an issue which was not presented in a timely manner to its procurement officer.

⁸As the Board found in its decision in MSBCA 1186, Appellant's total bid for 80 buses, when evaluated for life cycle costs, was \$27,818 less than the Flexible bid. The MTA's evaluation of standardization costs, however, resulted in Appellant's total bid being adjudged higher than that of Flexible by \$37,301.75. This meant, of course, that Appellant's standardization costs were determined to be approximately \$65,120 more than Flexible's. The breakdown is as follows:

Special Tools	10,089.75
Body Shop Mechanics	3,040.00
Supervisors	4,950.00
Subtotal	<u>\$18,079.75</u>
Mechanical Training	47,040.00
	<u>\$65,119.75</u>

As is apparent, if the mechanical training evaluation is reasonable, Flexible becomes the low bidder by nearly \$20,000, regardless of the appropriateness of the remaining standardization evaluations.

The MTA's determination regarding the number of mechanics to be trained represents that agency's assessment of how its minimum needs can most appropriately be satisfied. This Board will not disturb such a determination unless there is a clear showing that it was without a reasonable basis. Compare Interscience Systems, Inc., B-205458, March 9, 1982, 82-1 CPD ¶220 at p. 2; Remington Rand Corporation, et al., B-204084, May 3, 1982, 82-1 CPD ¶408 at p. 8.

Here, the evidence demonstrates that the MTA must staff five bus garages with mechanics, 24 hours per day, seven days per week. More importantly, the MTA must maintain its buses pursuant to this schedule so that service to the public may be reliable and timely. The classroom training proposed both by Flxible and Appellant effectively would reduce the number of mechanics available to the MTA to meet its daily work requirements. In addition to this allocation of work force to classroom training, the number of mechanics available on a daily basis further would be diminished by vacation schedules and illness.

Aside from manpower considerations, the MTA further recognized that funding would not permit the immediate training of all 251 mechanics who perform bus repairs other than body work. Accordingly, the MTA's objective was to train that number of mechanics sufficient to enable repairs to be made on the new buses ordered, at all five bus garages, at any time of day, without disrupting the MTA's daily operations.

The MTA here concluded that by training one-third of its mechanics on the new coaches to be ordered, it could assure continued and competent maintenance and remain within its training budget. Appellant contends that this is unreasonable in view of the fact that the MTA has never seen fit to engage in such extensive training in the past, while always managing to keep its buses running.

A total of 84 mechanics are to be trained pursuant to the MTA's plan. This constitutes approximately 17 mechanics per bus garage,⁹ or approximately six mechanics per shift at each garage. By training six mechanics per shift on the workings of the new buses, the MTA will be assured that service skills will be available continuously despite work absences due to vacation or illness. Despite the past practice of the MTA in training fewer mechanics on the workings of new buses, this anticipated training schedule does not appear excessive.

For the foregoing reasons, therefore, we cannot say that the MTA procurement officer acted unreasonably in concluding that it would be necessary to train one-third of the MTA's bus mechanics on the workings of the new buses to be ordered. Accordingly, the award to Flxible, as low evaluated bidder, was proper.

Motion For Reconsideration - MSBCA 1186

Appellant initially contends that in the absence of an IFB formula for determining standardization costs, an award could not be made based upon the evaluation of such costs. The Board, therefore, is said to have erred in remanding the appeal back to the MTA procurement officer to ascertain the number of mechanics to be trained and the total number of tools to be purchased.

At pages 31-32 of our decision in MSBCA 1186, we found that none of the bidders had objected to the propriety of the evaluation factors prior to submittal of their respective technical and price proposals. Given this finding, both the MTA and Flxible have requested a denial of the motion for reconsideration on the ground of timeliness.

COMAR 21.10.02.03A states, in pertinent part, as follows:

Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. . . .

The issue raised, therefore, is whether the absence of a formula containing the number of mechanics to be trained or tools to be purchased was apparent prior to the submittal of technical and price proposals.

Appellant contends that it did not formally protest prior to the submission of its proposals because it believed that standardization costs would be negotiated prior to the opening of price proposals. Based on later negotiations conducted with the MTA, Appellant further anticipated that standardization costs would be calculated by multiplying the 72 hours of instruction recommended in its proposal by the specified \$20 per manhour cost to the MTA to arrive at a mechanical training cost. Tool costs were to be calculated by respectively multiplying the actual cost of a porta-power tool, metric tools and transmission tools by the number of sets of each which

⁹We realize that the bus divisions may not be equal in fleet size and that the number of mechanics working at each may vary. However, for purposes of analysis, this figure is realistic.

Appellant agreed to provide in its proposal. Operator training was to be calculated by multiplying one hour of recommended instruction by the \$15 per hour rate specified in the IFB.

The problem with Appellant's explanation, however, is that it ignores the uncertainty which existed prior to the submittal of proposals. The IFB clearly indicated that award would be made based, in part, on an evaluation of the costs the MTA would incur both in training its bus operators and mechanics and in the purchase of tools unique to the offered bus. Essential to the computation of a total bid price, therefore, was some statement of the number of mechanics and operators to be trained and a listing of the tools presently within the MTA's inventory. This information, of course, was missing from the IFB. Notwithstanding this rather obvious dilemma, neither Appellant nor any other bidder sought to determine the necessary criteria, despite the fact that later negotiations or clarifying discussions concerning the technical proposals were not mandated by the IFB.¹⁰ The only rational explanation for this oversight was that each bidder must have assumed that the MTA would ascertain its quantity needs as to tools and training during the review process and uniformly apply them in the evaluation of bids. In the absence of a timely protest or inquiry along these lines, we conclude that all bidders believed that the process was fair so long as the training and tool requirements reasonably were determined.

Appellant now tells us that despite its failure to inquire or protest prior to the submittal of technical proposals, it subsequently was led to believe by the MTA that only the cost of 72 hours of mechanical training would be included in computing its evaluated bid and that if it had known

¹⁰Contract Special Requirements §1.1.10 (Part I) ¶D, page 11 of 17, stated as follows:

The committee shall complete its evaluations based on the experience and best judgment of each member. . . .

* * *

The Procuring Agency shall have the right to determine the validity of all data submitted and to either accept, reject or interpret such data as the members of the committee may deem appropriate. However, if in the judgment of the committee any estimated expected cost does not appear to be justified by the supportive materials or is not in keeping with the Procuring Agency's documented experience, or the intended meaning of any Supportive Material is in doubt; the bidder shall be requested by telephone and confirming written request to provide additional supportive materials and/or clarifications. The bidder shall have five (5) full working days subsequent to his receipt of the confirming written request to submit a reply. In no case will any estimated cost be changed during the evaluation process. . . .

that a substantially higher total would be assessed, it would have protested. However, the 72 hour program of instruction set forth in Appellant's technical proposal represented the time deemed necessary to train one mechanic. We do not accept as credible Appellant's contention that it understood the MTA to be assessing only this cost. While the IFB certainly could have been more clear, we cannot see how any experienced businessman would have construed the IFB or the MTA's statements made after receipt of proposals as evidencing an intent to evaluate only the cost of training a single mechanic and a single bus operator. This approach simply would not have been representative of the standardization costs to be incurred by the MTA and would have constituted a meaningless exercise.

For the foregoing reasons, therefore, we find that Appellant had a duty to inquire as to the number of mechanics and operators to be trained prior to the submittal of its proposals and that its failure to do so constituted a waiver of its right to protest on this ground. DASI Industries, Inc., MSBCA 1112, May 5, 1983; compare Dryden Oil Company, MSBCA 1150, July 25, 1983.

Assuming, arguendo, that Appellant's protest properly was preserved, the Motion for Reconsideration still must fail. Appellant has contended only that the Board improperly utilized Federal common law in interpreting and applying the requirements of Maryland's procurement law. In this regard, Appellant argues that Federal regulations do not mandate the evaluation of bids based on "objectively measurable criteria" and, hence, decisions based on such regulations are of no significance to the instant dispute. For the following reasons, however, we disagree.

Appellant states that the term "objectively measurable criteria" is derived from the American Bar Association's Model Procurement Code and that the Code envisioned a formula approach to the evaluation of bids. The absence of such a formula thus is said to be fatal to any competitive sealed bid or multi-step procurement where award is to be made to the low evaluated bidder.¹¹

¹¹Proposed Regulation R3-202.14.4 as drafted by the Model Procurement Code Project states in part that ". . . [e]xamples of such [objectively measurable] criteria include, but are not limited to, transportation cost, and ownership or life cycle cost formulas." The commentary to this proposed regulation illustrates this principle as follows:

The following is an example of objectively measurable criteria as applied in evaluating a bid. Two bids are received on ballpoint pens. The Invitation for Bids provided that bid prices per dozen pens would be evaluated by dividing the bid price per pen by thousand feet of writing. Bidder A bids 60 cents per dozen pens and it is determined by testing that A's pen writes 9,000 feet. Bidder B bids 72 cents per dozen pens and B's pen writes 12,000 feet. Bidder A's bid is evaluated to be 5/9 cents per thousand feet while Bidder B's is 1/2 cents per thousand feet, clearly lower. The contract would be awarded to Bidder B at 72 cents per dozen pens.

From the foregoing, Appellant concludes that a precise formula is mandatory.

Although the Legislature did not adopt the Model Procurement Code in enacting Maryland's procurement law, it did utilize the recommendations contained therein as a starting point. Model Procurement Code §3-202(5) is of particular relevance to this dispute and states as follows:

Bid Acceptance and Bid Evaluation. Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Code. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids. (Underscoring added).

Commentary three to this proposed statutory language likewise is significant and provides that:

The bid evaluation may take into account not only acquisition costs of supplies, but the cost of their ownership which relates to the quality of the product, including life cycle factors such as maintainability and reliability. Any such criteria must be set forth in the Invitation for Bids to enable bidders to calculate how such criteria will affect their bid price.

Consistent therewith, the Maryland Legislature expressly defined the term "evaluated bid price" to mean ". . . the dollar amount of a bid after bid price adjustments are made under objective measurable criteria, set forth in the invitation for bids, which affect the economy and effectiveness in the operation or use of the product, such as reliability, maintainability, useful life, and residual value." Md. Ann. Code, Art. 21, §3-101(e). (Underscoring added).

Although the term "objective measurable criteria" similarly does not appear in any Federal regulation that we are aware of, it long has been a requirement of Federal competitive sealed bid and multi-step procurements that evaluation factors be set forth in the IFB in an objectively measurable way. This Federal standard, in fact, was set forth at page 31 of our June 25, 1984 decision in MSBCA 1186 as follows:

The "basis" of evaluation which must be made known in advance to the bidders should be as clear, precise and exact as possible. Ideally, it should be capable of being stated as a mathematical equation. In many cases, however, that is not possible. At the minimum, the "basis" must be stated with sufficient clarity and exactness to inform each bidder prior to bid opening, no matter how varied the acceptable responses, of objectively determinable factors from which the bidder may estimate

within reasonable limits the effect of the application of such evaluation factor on his bid in relation to other possible bids. By the term "objectively determinable factors" we mean factors which are made known to or which can be ascertained by the bidder at the time his bid is being prepared. Factors which are based entirely or largely on a subjective determination to be announced by representatives of the contracting agency at the time of or subsequent to the opening of bids violate the principle for the reason that they are not determinable by the bidder at the time his bid is being prepared.

The Model Procurement Code and hence Maryland's Procurement Law, thus have incorporated existing Federal common law principles. For this reason, it was appropriate for this Board to look to the Federal common law for guidance in interpreting and applying Maryland's procurement law and regulations. Compare Solon Automated Services, Inc., MSBCA 1046, January 20, 1982 at p. 23, rev. on other grounds; University of Maryland Baltimore County Campus v. Solon Automated Services, Inc., Misc. Law Nos. 82-M-38 and 82-M-42 (Cir. Ct. Balto. Co. Oct. 13, 1982); compare Dewey Jordan, Inc. v. Maryland National Capital Park and Planning Commission, 258 Md. 490, 265 A.2d 892 (1970). Since Federal common law would permit award of a contract under facts identical to those here, Appellant has not demonstrated legal error in our decision.

In denying Appellant's motion for reconsideration, therefore, we again conclude that while the procurement was far from perfect, a contract properly was awardable to Flexible under Maryland law. Whether it was prudent, or otherwise desirable, to award this contract and whether it would be fiscally advantageous to exercise those contract options calling for the purchase of up to 160 additional buses are matters outside the scope of our inquiry and more appropriately subject to the business judgment of the MTA procurement officer and his agency head.

