

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF)
PARK.NET, INC.)
) Docket No. MSBCA 2123
Under Department of Natural Resources)
RFP No. MIS00198)

September 27, 1999

Negotiated Contracts (Competitive) - Basis for Award - Where an agency determines prior to award of a contract in a negotiated procurement to relax standards or requirements set forth in the Request for Proposals and such standards or requirements could affect the competitive position of the offerors, the offerors should be given the opportunity to respond to the altered requirements or standards.

APPEARANCE FOR APPELLANT: Richard P. Rector, Esq.
William J. Crowley, Esq.
Piper & Marbury L.L.P.
Washington, D.C.

APPEARANCE FOR RESPONDENT: Christine K. McSherry
Assistant Attorney General
Annapolis, MD

OPINION BY CHAIRMAN HARRISON

Appellant, Park.Net, Inc., timely appeals the denial of its protest on various grounds that the award of a contract to its competitor was improper.

Findings of Fact

1. On June 9, 1998, the Department of Natural Resources (DNR) issued a Request for Proposals (RFP) for implementation of a centralized computerized reservation and registration software application and call center for the State Forest and Park System.
2. The purpose of the new system is to allow park visitors to reserve camp sites, cabins and picnic shelters at any one of 29 State parks by making a single toll-free telephone call instead of contacting individual parks.
3. The deadline for receipt of proposals was July 14, 1998, by which time DNR had received proposals from four (4) vendors: Integrated Communications Services, Inc. (ICS), the Personal Group, Inc. (PGI), Appellant and Biospherics, Inc. (BI).
4. Alphonso Gorham, DNR's Director of Management Services, opened proposals on July 24,

- 1998 in the present of two witnesses. Appellant's proposal was not among those opened.
5. On August 10, 1998, Appellant's President, Andrew Kirkham, telephoned DNR to check on the status of the solicitation. He spoke to Mr. David Rogers, who informed him that a proposal from Appellant had not been received. Mr. Kirkham then called Mr. Gorham and advised him that the Appellant's proposal was delivered and accepted by a DNR employee on July 24, 1998. Upon investigation, DNR discovered that the Appellant's proposal had been placed in another area of DNR's computer room where the unopened proposals had been stored prior to the proposal opening date. The proposal was then distributed to the Evaluation Committee, whose six members either were in the process of reviewing the technical proposals or had not yet begun to review them.
 6. DNR gave each vendor two hours to deliver an oral presentation to the Evaluation Committee. ICS, PGI and Appellant delivered their presentations on August 19, 20 and 26, 1998 respectively.
 7. Appellant's presentation was interrupted by a bomb scare and continued at a local restaurant. The presentation may have concluded prior to the allocated two hours being expended when some evaluators had to leave. It was agreed that Appellant could continue its oral presentation at the site visit at Appellant's headquarters in New York the following day. Not all Evaluation Committee members were present for the site visit at Appellant's headquarters the following day.
 8. The Board finds based on testimony at the hearing that Appellant has not been prejudiced in the evaluation of its proposal by the earlier misplacement of the proposal or the interruption to and possible shortening of Appellant's oral presentation to all of the Evaluation Committee members.
 9. The RFP required submission of technical and financial proposals. The technical proposals were evaluated individually by the evaluators and assigned scores for the offerors' technical responses. The financial proposals were reviewed separately, as required by COMAR 21.05.03.03.A(2). A spreadsheet showing the scores given to each technical proposal was prepared and entered into the record with the names of the individual evaluators redacted. The total scores were as follows:

<u>Offeror</u> ¹	<u>Score</u>
ICS	60.847
Appellant	55.772
PGI	52.824

10. Mr. Gorham, who was one of the evaluators, reviewed the financial proposals. The RFP asked offerors to propose charges to park visitors for call center and internet reservations, cancellations and changes over a three-year period. Appellant's charges were higher than those of ICS. Total costs proposed were as follows.

¹ BI apparently either withdrew its offer or its proposal was found not reasonably susceptible of being selected for award prior to the creation of the total score spreadsheet.

<u>Offeror</u>	<u>Costs</u>
ICS	\$1,263,933
Appellant	\$2,257,713
PGI	\$2,482,502

11. Based upon ICS's higher technical score and the substantial disparity in the charges proposed by the vendors, the DNR Procurement Officer determined to select ICS to perform the work and ICS was so notified on or about October 9, 1998 in a letter dated October 9, 1998 from Mr. Gorham.
12. The Board of Public Works approved the contract on January 27, 1999.
13. Appellant requested and received a debriefing on February 9, 1999 and timely filed a bid protest on February 16, 1999.
14. From the March 23, 1999 denial of the Appellant's protest, Appellant appealed to this Board on April 2, 1999.
15. Requests by counsel for postponements delayed the hearing of the evidentiary portion of the appeal until August 11 and 12, 1999 with argument of counsel being received on September 8, However, ICS has been operating under the contract approved by the Board of Public Works on January 27, 1999 since February 8, 1999 with some preliminary work being performed earlier.

Decision

I. Evaluation of Proposals

Appellant asserts in its protest that its proposal was "buried under a pile of boxes in a closet of office supplies" and was not reviewed until 10 days after the Evaluation Committee had reviewed the other proposals. The record reflects, however, that all of the committee members either were in the process of reviewing the technical proposals or had not begun to review them at the time they received Appellant's proposal. None of the committee members had completed their review of the technical proposals; nor had any of the vendors given their demonstrations to the Evaluation Committee, which occurred on August 19, 20, and 26, 1998. The Board finds that the Appellant was not prejudiced in the delay in forwarding of its technical proposal to the evaluators for their review caused by the initial misplacement of Appellant's proposal.

Appellant asserts that DNR's evaluation of its technical proposal must have been unreasonable because Appellant received lower scores than it believes it should have received as a leader in its field. Specifically, Appellant asserts that the technical scores awarded were unreasonable in four categories: "Proposed approach to meeting/exceeding the technical requirements of the RFP,"² "Offeror/Staff Experience," "Quality of Training Program and Training Materials," and "Economic Benefit to the State of Maryland." The basis for this challenge is the proposition that it should have been given higher scores than it was, because it believes itself to be the "leading provider of campground reservation/ registration/ reporting systems to state, federal and provincial governments." The record reflects that Appellant is a knowledgeable and experienced provider of such services and is in fact an industry leader. However, demonstrating that one is an industry leader does not constitute grounds for finding that an evaluation is flawed.

² Hereinafter "proposed approach."

Of particular concern to Appellant were the scores it received for its "customization required" responses. Appellant argued in its protest and on appeal that it should not have been given lower scores for responding to the RFP with the phrase "customization required," because that was permitted under the terms of the RFP. Appellant's asserts that it should not have been penalized by the Evaluation Committee for allocating only \$25,000.00 for customization of its software. Appellant's President testified that in his opinion that was an adequate allocation and Appellant asserts that the DNR had no rational basis for concluding otherwise. However, three evaluators testified that they gave Appellant low scores or no points for "customization required" responses because they had no assurance from the materials provided by Appellant that Appellant could in fact provide the customized software for the allocated \$25,000.00 and thus the State would not receive the required software or would have to pay more than \$25,000.00.

In evaluating the relative desirability and adequacy of proposals, a Procurement Officer is required to exercise business and technical judgement in his personal review of proposals and receipt of the advise of an agency evaluation panel. Such action involves the exercise of discretion.³ This Board will not second guess or disturb a Procurement Officer's exercise of discretion in the absence of a clear showing that such exercise was unreasonable or arbitrary or constituted a violation of law or regulations. Beilers Crop Service, MSBCA 1066, 1 MSBCA ¶25(1982) at p. 5, citing Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10 (1982) at p. 22. Compare Riggins & Williamson Machine Co., Inc., Comp. Gen. Dec. B-182801, 75-1 CPD ¶ 168 at p. 10; Decision Sciences Corporation, Comp. Gen. Dec. B-182558, 75-1 CPD ¶ 175 at p. 6.

During the debriefing on February 9, 1999, Appellant was advised that it had received 14.81 of a possible 25 points under the "Proposed Approach" criterion and that the greatest shortcoming of Appellant's proposal under this factor was the number of times that the phrase "Customization Required" appeared in the proposal.

The evaluation scoresheets produced by DNR and testimony from evaluators at the hearing confirm that, in fact, Appellant received a lower score because of its use of the term "Customization Required." Specifically, the scoresheets reveal that, for numerous requirements, the evaluators were permitted only a "will comply" (one point) or a "will not comply" (0 points) evaluation. For these requirements, as well as for certain others, the evaluators often found Appellant to be non-compliant (and awarded the proposal zero points) if Appellant used the term "Customization Required."

The RFP expressly provided that submitting a response of "Customization Required" would be interpreted to mean that the offeror "will comply" with the requirement:

For each requirement, the Offeror should choose one of the statements below and provide a short narrative to explain the answer:

³ COMAR 21.05.03.03A(6) provides that while initial evaluations may be made by an Evaluation Committee, final evaluations (including review of the evaluation of the Evaluation Committee) must be performed by the Procurement Officer and agency head or designee.

1) indicate that the Offeror can currently comply with the requirement by typing "IN COMPLIANCE" after the requirement number . . .OR

2) Indicate that the Offeror will comply with the requirement after software modification by typing "CUSTOMIZATION REQUIRED" after the requirement number . . . OR

3) indicate that the offeror is not going to comply with the requirement by typing "WILL NOT COMPLY" after the requirement number.

Appellant argues that by finding its proposal non-compliant in circumstances where it noted that customization would be required, the DNR penalized Appellant for doing precisely what the RFP required.

However, DNR representatives indicated at Appellant's debriefing and evaluators testified at the hearing that they were concerned that Appellant would not be able to complete the customization required without additional charge to the State.

The RFP instructed offerors on how such customization costs should be shown.

If software modification is needed for the Offeror's software to meet the requirement of this RFP, the modification costs should be incorporated into the Offeror's proposed customer transaction service charges as listed on the Bid sheet (Attachment G). Modification costs should not be shown as a separate charge payable by DNR.

Appellant's proposal included the cost for customization as part of its financial model and transaction fees. The total amount included in Appellant's price for customization (\$25,000) was identified throughout the proposal as a "fund for \$25,000. . . which the State of Maryland may use for software customization. . . ." Appellant's President testified that \$25,000 is adequate for the type of customization that would be required to Appellant's system and that Appellant was committing to comply with all requirements for which it noted that customization was required and that if the cost of required customization exceeded \$25,000, then the company would be responsible for such costs.

Evaluation Committee members testified, on the other hand, that they assumed that (i) the customization costs identified by Appellant would be insufficient to cover the modifications required and (ii) that DNR would become responsible for any customization costs beyond those included in Appellant's proposal.

Because the evaluators assumed that the \$25,000 fund might or would be insufficient to cover all customization tasks required, Appellant's response was often found non-compliant

wherever Appellant noted that customization was required. Four evaluators awarded Appellant zero points for all requirements for which Appellant indicated Customization Required/ \$25K Fund Available. The record reflects that evaluator scoring error accounts for approximately half of the difference between Appellant's and ICS's scores under the "Proposed Approach" criterion.⁴ Appellant argues that when the offerors' scores are further corrected to account for the evaluators scoring of requirements for which Appellant noted "customization required/25K fund available," Appellant's proposal would be ranked first in the "Proposed Approach" criterion and likely would be first in the overall technical evaluation. Accordingly, Appellant's argument continues, the technical evaluation was fatally flawed, and this protest should be sustained. However, the scoring error standing alone may not reasonably be said to prejudice Appellant given the total scores received by Appellant and ICS. Its protest must rise or fall on the alleged "customization required" scoring defect.

Based on the record in this appeal we find that Appellant's assertions that it should not have lost points for responding to the RFP with the phrase "customization required" constitutes second-guessing the Evaluation Committee's assessment of its proposal. This Board has previously declined to accept an analogous argument:

DHR told potential offerors at the pre-proposal conference that DHR would not reject proposals as unacceptable if offerors submitted job descriptions of positions in their organization that were

⁴ As reflected in the Technical Evaluation Scoring Summary six evaluators scored the offerors' Technical Proposals, and these evaluators were designated "A" through "F."

The error under the "Proposed Approach" criterion which accounts for roughly half of the 3.66-point difference between Appellant and ICS under this criterion occurred as follows. One of the evaluators (Evaluator A) misrecorded ICS's "Proposed Approach" score on his "Evaluation Total Sheet" by erroneously recording 20.492 points rather than the 10.272 points that should have been recorded.

Evaluator A assigned ICS a total of 428 points under that criterion, which was then multiplied by the weighting factor of .024 for a total score of 10.272. On that same sheet, however, Evaluator A also recorded a "Grand Total" score of 20.492 for ICS under three criteria: "Proposed Approach," "Marketing," and "Training."

When Evaluator A subsequently attempted to transfer these scores to the Evaluation Total Sheet he misrecorded the score for the "Proposed Approach" criterion, erroneously giving ICS the "Grand Total" score of 20.492 rather than the correct score of 10.272. This erroneous score of 20.492 was then transferred to the Technical Evaluation Scoring Summary where it inflated both (i) ICS's "average" score under the Proposed Approach criterion and (ii) ICS's "total" technical score.

When Evaluator A's error is corrected, ICS's "Average Score" for the Proposed Approach" criterion declines from 18.47 to 16.76. This calculation error as noted accounts for approximately 1/2 of the technical evaluation differential between ICS and Appellant under the "Proposed Approach" criterion. We emphasize that the record reflects that this error was unintentional.

The record further reflects that the individual evaluator's scores were internally consistent. For instance, Evaluator A tended to give scores either at or well above the average score, while Evaluator B tended to give scores either at or below the average score. Nor was there disparity in the total point score evaluation of the technical proposals. The totals on the technical scores for all proposals fell within a 10-point range. The record does not support any theory of a deliberate attempt by the evaluators to eliminate Appellant from competition. Nor may the scoring by the Evaluation Committee be declared suspect simply because the record reflects Appellant to be a "leading provider" of campground reservation systems. The subjective determinations of procuring officials (i.e. evaluators) are entitled to great weight, and mere disagreement with their judgement is not sufficient to show that the evaluation was unreasonable. Ags Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987), at pp. 12-13.

vacant in lieu of resumes of actual persons who would do the work . . . Appellant thus unreasonably assumed, if it did, that it could receive maximum possible scores on the "Assigned Key Personnel" criteria based solely on job descriptions of positions rather than resumes of actual persons who would do the work, although it was permitted to cast its offer in this manner.

In any event, evaluation of proposals in a competitive negotiation procurement is a matter for the agency Procurement Officer's sole discretion based on the advice of an agency evaluation panel if used. We may act to overturn a Procurement Officer's determination to award to an offeror he deems the most qualified based on an RFP's evaluation criteria only if he acts unreasonably, abuses his discretion, or fails to follow a legal requirement in making the award: [citations omitted]. Appellant has the burden of proof to establish that the DHR Procurement Officer failed to meet the required standard.

United Communities Against Poverty, Inc., MSBCA 1312, 2 MSBCA ¶144(1987), at pp. 9-10.

While the RFP herein allowed respondents to use the phrase "customization required" it does not follow that a proposal was entitled to the maximum possible score for that response. Likewise the assertion that the Evaluation Committee had no rational basis to determine that the \$25,000 allocated by Appellant for customization of its software was insufficient is not supported by the record. The record reflects that the evaluators had reasonable concerns that Appellant's funding for customization purposes was insufficient and their scoring reflected such concern.⁵ Such differences of opinion will not suffice to show that the evaluators acted unreasonably, abused their discretion or failed to follow a legal requirement.

Appellant also argues that the Evaluation Committee "demonstrat[ed] a significant — yet unsupported and — unsupportable — preference for the ICS proposal." It bases this assertion on its contention that it should have received higher scores than it did, based on its experience as a leader in the provision of campground reservation services and that ICS should have received lower scores than it did. However, such a claim of bias must be supported by more than inference or supposition:

Bias will not be attributed to procurement officials based on inference or supposition. B. Paul Blaine Associates, Inc., MSBCA 1123, August 16, 1983, at p.13. However difficult it may be to prove the subjective motivation of State procurement officials, an Appellant seeking to establish that its competitive position was affected by discriminatory actions nevertheless carries the burden.

⁵ The three evaluators who testified at the hearing were mid- to high-level DNR employees knowledgeable and experienced in park service operations, technology and procurement.

Baltimore Motor Coach Company, MSBCA 1216, 1 MSBCA ¶94(1985), at p. 8. Appellant has not met the burden based on the record herein.

Appellant's arguments concerning favoritism and bias and unfair scoring disregard the unavoidably subjective nature of an evaluation process, and the discretion accorded to the agency. That process is entitled to deference. This Board will not substitute its judgement for the agency's in evaluating proposals.

II. Waiver of Requirements

Appellant next alleges that DNR waived certain requirements of the RFP that had a dramatic and prejudicial impact on the price evaluation and that if the offerors had competed on an equal basis with regard to the waived requirements, or if those requirements had not been waived for ICS, the offerors' price proposals likely would have been very similar.

The RFP advised offerors that the State would have installed at State expense certain ISDN (dedicated) lines by the fall of 1998 and provided that offerors should inter alia, install and maintain, at the offeror's expense, ISDN equipment necessary to connect from the DNR headquarters to the offerors' call center. In addition, the RFP required that the offeror be responsible for all operational communications expenses, including ISDN-related expenses, between the remote locations and the call center.

In response to these ISDN requirements, ICS stated that it was "IN COMPLIANCE" and briefly described the basis for the compliance. Similarly, in its Technical Proposal, Appellant also stated that it was "IN COMPLIANCE" and briefly described the basis for the compliance.

In addition, Appellant identified an alternative solution that would use internet-based communications rather than dedicated ISDN lines. Appellant asserted internet-based communications provided a "more cost effective" solution for connectivity between the DNR and remote parks, and Appellant stated that it would welcome the opportunity to discuss such alternatives with the DNR and identify potential cost-savings opportunities that may be available.

Appellant also addressed the possibility of cost savings associated with waiver of the ISDN requirements in its Financial Proposal, promoting the alternate solution of using an Internet Service Provider as "a much more cost effective alternative to the ISDN solution envisioned in the RFP." Appellant explained:

If the State of Maryland would permit Internet-based communications, this could allow us to significantly reduce the cost of this project. By providing local-dialing access to an in-state Internet Service Provider, the telecommunications costs to support the parks would be significantly reduced, by-passing any long-distant charges that may be associated with ISDN. As well, the costs for establishing a dedicated communications link to the State's Tawes Building in Annapolis could also be eliminated. Further, the costs for the state to upgrade the communications equipment used by the

parks could also be eliminated, as we would propose to utilize the existing 33kbps modems.

* * *

Given the structure required for this response, we have not included these options in our bid. However, we are interested in discussing our alternatives with the State.

Appellant again raised the issue of an ISDN waiver during its Demonstration/Site visit on August 26-27, 1998. At that time, the DNR responded that they understood that ISDN was not Appellant's preferred approach and that they similarly understood that it was Appellant's position that an ISDN approach was not as cost effective. ICS apparently also raised the issue with the DNR during their site visit, as reflected in an internal DNR e-mail dated September 14, 1998.

So far both companies we have visited, ICS and Appellant do not want to use our ISDN lines. Both say they can be most cost effective with Internet. They say the lines are just as reliable.

Appellant asserts that DNR violated State procurement regulations, which prescribe the action that an agency should take when it determines that its requirements should be clarified and/or had changed from those set forth in the original RFP:

If discussions indicate a need for substantive clarification of or change in the request for proposals, the procurement officer shall amend the request to incorporate the clarification or change.

COMAR 21.05.03.03C(3)(a).

However, the record does not reflect that offerors needed clarification; only that they desired to use an allegedly more cost effective internet communications approach rather than the ISDN approach provided for in the RFP. The State, however, is not required to change its minimum needs or requirements as it perceives them because offerors prefer another approach. Compare Admiral Services, Inc., MSBCA 1341, 2 MSBCA ¶159(1987). See COMAR 21.04.01.03 and .04.

We recognize also that this is a procurement under COMAR 21.05.03 (Procurement by Competitive sealed proposals) where the agency's understanding of its minimum needs may be somewhat undefined. However, in this instance the RFP advises offerors that by the fall of 1998 the State at its own expense will have installed ISDN lines and that offerors should (not must) install and maintain at the offeror's expense certain ISDN equipment that would be compatible with what the State already had in place. We therefore deny Appellant's appeal on grounds that the State was required to amend the RFP to provide for internet type equipment installation only because of the stated preference of two of the offerors.

We next address Appellant's related allegation that the State waived the ISDN require-

ment for ICS and intended to do so during the evaluation period prior to award and execution of a contract with ICS.

“It is fundamental that an agency may not solicit quotations on one basis and then make award on another basis.” See Honeywell, Inc., MSBCA 1317, 2 MICPEL ¶148, at p. 10 (1987) (quoting Discount Machinery and Equipment, Inc., B-220949, 86-1 CPD ¶193). To the contrary, when an agency’s needs change such that a material discrepancy exists between the statement of work issued in the RFP and the agency’s actual needs, the RFP should be amended to reflect the most current and accurate information available. See Honeywell, Inc., at p. 10. As the U.S. General Accounting Office (GAO) stated in W.D.C. Realty Corporation,

It is a fundamental principal of government procurement that competition be conducted on an equal basis, that is, offerors must be treated equally and be provided a common basis for the evaluation of the preparation of their proposals. . . . The Federal Acquisition Regulation (FAR) . . . requires the government to issue a written amendment whenever the scope of work or solicitation requirements are relaxed, increased, or otherwise modified. . . Thus, contracting agencies must treat all offerors fairly and equally.

B-225468, 87-1 CPD ¶248, at p.5 (citations omitted).

The requirement for an agency to amend a RFP when its needs change might apply even if receipt of one particular proposal resulted in the agency’s desire for a different approach. See Rix Industries, Inc., B-241498, 91-1 CPD ¶165. In Rix Industries, Inc., the GAO observed:

[W]e have previously found that where an agency, after the receipt of offers, determines that an alternate approach not contemplated under the RFP is as acceptable as or more desirable than the approach called for under the RFP, the agency must either amend the RFP or engage in appropriate discussions with the offerors in order to allow all competitive range firms an opportunity to compete on a common basis.

91-1 CPD ¶165, at p. 6.

The record herein reflects that after ICS was identified as having submitted the winning proposal the ISDN requirements were abandoned in favor of the internet-based communications that ICS and Appellant preferred to use. DNR argues, however, that the agency’s acceptance of such an alternate solution is not a “waiver” of a requirement nor otherwise prejudicial to other offerors or inappropriate. In the Agency Report DNR advises that:

ICS has utilized some alternate solutions to the technical proposals included in the RFP, but those solutions were devised and proposed after the contract was awarded to ICS. For instance, ICS is using an internet service provider for the primary communication

link from DNR's remote locations to the ICS call center, instead of ISDN phone lines. However, this use of an alternate technical solution does not constitute a waiver of any requirement of the RFP, because there were no mandatory requirements in the RFP for specific technical solutions.

Agency Report, at 9.

We have noted that offerors were advised by the RFP that they should provide ISDN links not that they must do so. However, we agree with Appellant that the concept of impermissibly waiving or relaxing technical specifications for one offeror, to the prejudice of other offerors, does not apply exclusively in the context of "mandatory" requirements. If the record reflects that an offeror would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements or standards we would find prejudice to exist were such offeror not given the opportunity to respond to the altered requirements or standards. See Honeywell, Inc., supra at p. 10.

The record reflects that both Appellant and ICS preferred to use an internet solution rather than ISDN. However, notwithstanding their desire, they proposed an ISDN solution and their proposals were evaluated on the basis of their proposed ISDN solution. An evaluator (who was responsible for preparing the RFP) testified that he prepared a proposed contract modification reflecting his belief that the ISDN requirements would have to be formally waived. The document provided:

1. DNR will waive the ISDN requirement as stated in the RFP A-21 AND A -22. The Vendor will not be required to use the DNR ISDN phone lines. But the Vendor will continue to be responsible for the communication expenses generated by the operation of the central reservation system.
2. It is further agreed that the Vendor may use an Internet Service Provider (ISP) for the primary communication link from DNR remote locations to the Vendor's call center and that dial up modems will be an acceptable backup to an ISP.
3. It is further agreed that after a six months trial period of ISP use, DNR may revisit the issue of ISP communication. If the ISP communication method has proven to be not acceptable or reliable, a DNR acceptable communication method must be installed by the Vendor within two months.

This proposed modification was not utilized. The record further reflects that there is no written contract modification to ICS's contract reflecting ICS's implementation of its "alternate solution." DNR advised at the hearing of the appeal that no such modification exists and stated that the alternate solution had been implemented by oral agreement with ICS and that there had

been no adjustment in the contract price.

Thus, although ICS proposed to be "IN COMPLIANCE" with the ISDN requirements and presumably included the cost of such compliance in its fixed-price offer, and although proposals were evaluated on the basis of the ISDN requirements, DNR has allowed ICS to implement a different internet technical solution, without any reduction in contract price and without changing the preferred ISDN solution set forth in the contract.⁶ Has such action violated the General Procurement Law or COMAR Title 21 or was the Appellant prejudiced by the relaxation of the ISDN approach outlined in the RFP? It is the position of DNR that such action constitutes a matter of contract administration beyond the scope of this Board's jurisdiction over contract formation disputes.

Had such relaxation occurred after the Board of Public Works had approved the contract (which provided for the ISDN solution) with ICS, and ICS had then been allowed to implement a less expensive internet solution we would in all probability, based on this record, deny the appeal since matters of contract administration beyond the legitimate scope of the Board's bid protest jurisdiction would be involved. An exception to this probable outcome would be a record that demonstrated, as this record fails to do, that it was the State's intention at the time the evaluations were conducted to permit implementation of an internet solution after determining the winning offer based on the ISDN standard.

However, this record does reflect that only days (at most a week or two) after the Procurement Officer accepted the evaluator's evaluations and concluded based on those evaluations that the contract should be awarded to ICS (and several months before such contract was presented to the Board of Public Works for approval), the Procurement Officer determined to permit ICS to proceed with a less costly substitute internet solution.

Award (at all relevant times herein) is defined to mean the transmission by the procurement agency, after all required approvals have been obtained, of either the executed contract or written notice of award to the selected contractor. COMAR 21.01.02.01(8). The Board of Public Works was required to approve the award of the subject contract. Herein ICS was notified it was the selected vendor and permitted to substitute an internet solution before the Board of Public Works approved the award of the contract. Thus, at the time permission for the substitution was granted the conditions for award set forth in COMAR (i.e. Board of Public Works approval) had not been met. The record reflects that the proposals were evaluated based on one set of criteria (ISDN) and that at the time award was recommended to the Board of Public Works by the Procurement Officer, DNR proposed to allow the contractor to perform the work based upon another set of criteria (i.e. the substitute internet solution). DNR issued the RFP based on its belief that offerors should base their proposals upon integration with existing ISDN lines. However, during the award process, DNR determined that DNR's minimum needs could be met by a less expensive alternative.

COMAR 21.05.03.04 requires that a determination recommending award be based on price and the evaluation factors set forth in the RFP. Since the record reflects that provision of

⁶ The RFP is part of the contract.

an ISDN solution constitutes a material part of the RFP, both as to technical and cost offers, the Procurement Officer could not have had assurance at the time she waived the ISDN requirement that offerors had been competing on an equal basis unless she called for best and final offer(s) under COMAR 21.05.03.03D based on an amended RFP that provided for an internet solution as an alternative to ISDN. In this procurement technical merit was given greater value than cost (60%/40%). Based on the record herein we find that one may not determine with certainty that Appellant could not have submitted an offer based on a cheaper internet solution that would have been determined to be the most advantageous offer considering both technical merit and price.

The appeal is thus sustained.

Wherefore, it is Ordered this 27th day of September, 1999 that the appeal is sustained.

Dated: September 27, 1999

Robert B. Harrison III
Chairman

I concur:

Randolph B. Rosencrantz
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 2123, appeal of Park.Net, Inc. under Department of Natural Resources RFP No. MIS00198.

Dated: September 27, 1999

Mary F. Priscilla
Recorder