

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of R&E Consolidation
Services, Inc.

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Docket No. MSBCA 1375

Under MPA RFP No. 18023-GM

August 19, 1988

Jurisdiction - Maryland Annotated Code, State Finance and Procurement Article ("General Procurement Law") §11-103(a)(2) authorizes the Maryland State Board of Contract Appeals (MSBCA) to hear and decide a contract formation appeal (bid protest) involving a procurement of cargo consolidation services that involves a revenue neutral or revenue generating contract.

Jurisdiction - Maryland General Procurement Law §11-103(a)(2)(iv) which makes the Maryland General Procurement Law applicable at a State transportation facility for the benefit of the public only to the extent required by the Maryland Board of Public Works does not apply to limit MSBCA jurisdiction to hear and decide the instant contract formation appeal. §11-103(a)(2)(iv) applies to vendor, concessionaire type contracts to supply service to members of the public at or using a State facility for their immediate and direct benefit. The General Procurement Law §11-103(a)(2)(iv) therefore does not limit MSBCA jurisdiction over a bid protest appeal that involves an agency's general procurement or services through a revenue generating or revenue neutral contract exercised under its general procurement authority in fulfillment of the agency mission, and that does not provide immediate and direct concessionaire services to members of the general public for their welfare and to fulfill their human needs while using State facilities.

Jurisdiction - General Procurement Law §11-103 generally specifies its applicability to procurements. It expressly lists eight exemptions from the General Procurement Law. The MSBCA will not lightly read in other exclusions that are not explicitly provided for in the General Procurement Law. If the General Procurement Law is susceptible to more than one construction which is reasonable and consistent with common sense with regard to whether the MSBCA has subject matter jurisdiction to hear and decide an appeal of a disappointed offeror's protest of an agency procurement action, the MSBCA applies the construction which will carry out the General Procurement Law's objective and stated purpose to give disappointed bidders an administrative forum for seeking relief of their grievances.

Timeliness - The failure of a purported final agency ^{decision} denying a protest to notify an offeror of its right of appeal to the MSBCA in accordance with the provisions of COMAR 21.10.02.08C is a defective decision that does not start the running of the appeal period so as to bar the disappointed offeror's appeal.

Competitive Negotiation - Technical Evaluation - Mere disagreement with an agency's selection of the successful offeror for contract award under the technical evaluation criteria set forth in the request for proposals is not a basis for overturning an agency's selection decision on the ground that an offeror was not permitted to compete on an equal basis under the RFP. Appellant failed to show, as is its burden, that the selection of the successful offeror based on the evaluation factors or criteria set out in the request for proposals was not made in good faith or lacked a reasonable basis.

Competitive Negotiation - Evaluation Factors - Burden of Proof - A disappointed offeror's burden of proof is to show by credible evidence that it was not afforded fair and equal treatment in evaluation of offers based on the evaluation factors set forth in the request for proposals. It must prove that the selection officials improperly considered aspects of a competing offeror's proposal that were outside the scope of the solicitation's evaluation factors.

Competitive Negotiation - Out-of-State Offerors - Maryland's General Procurement Law generally does not require restriction of competition to Maryland contractors or provide that a Maryland procurement must give a competitive advantage to Maryland contractors.

Competitive Negotiation - Contract Performance - An allegation that a successful offeror will not conform to a contract requirement in part raises an issue of contractor performance under the contract that is not for Board consideration as a contract formation matter. However, an offeror is eligible for award where it is reasonably adjudged capable of providing the requested services in accordance with the plain terms of the request for proposals.

Competitive Negotiation - Agency Internal Numerical Rating System - Maryland General Procurement Law requires that a solicitation (request for proposals) for a contract by competitive sealed proposals, i.e., competitive negotiation, provide a list of the evaluation factors and the relative importance of each factor, including price, that will be used in evaluating proposals. A procurement agency need not set forth the specific numerical scoring system used to evaluate proposals in the request for proposals as long as the request for proposals informs offerors of the evaluation factors that will be used to evaluate offers and their relative importance. This permits offerors to draft meaningful proposals and compete on an equal basis.

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OPINION BY MR. KETCHEN

The Maryland Port Administration (MPA) solicited offers to establish, operate and manage a transportation consolidation service in the Port of Baltimore. Appellant maintains that the highest rated offeror was improperly selected for award. Appellant contends in this regard that MPA did not follow the required competitive negotiation procedures. MPA maintains that the solicitation was conducted properly. However, MPA contends that the Appeals Board lacks jurisdiction over the matter since the Maryland procurement law and regulations expressly do not apply to this revenue generating ("concession") contract. For the reasons set forth below, we deny MPA's motion to dismiss for lack of Board subject matter jurisdiction and we deny Appellant's appeal on its merits.

Findings of Fact

1. On November 17, 1987, MPA issued a solicitation, Request for Proposals (RFP) No. 18023-GM, for an agreement to establish, operate and manage a transportation consolidation service in the Port of Baltimore (POB).

2. MPA sought proposals from transportation service providers to provide reduced rail and truck transportation costs to POB users who ship cargoes to common destinations by providing an MPA sponsored, port-wide consolidation service to move cargo at rates that are lower than comparable rates at other ports. The consolidation service for shipments

through the POB includes handling of shipments from container yard to the point of rest. MPA's goal in issuing the solicitation is to increase waterborne commerce in Maryland by reducing the costs of transportation through the POB based on an efficiently run, volume-related consolidation service. This MPA sponsored consolidation service will operate pursuant to agreements arranged by the successful contractor with rail and truck carriers for maximum discounts based on volume-related business.

3. MPA estimates that ten thousand (10,000) to twenty thousand (20,000) additional containers annually can be shipped through the POB by rail, if present transportation costs are reduced through the instant competitive process for an MPA sponsored consolidation service based on competitively established rates. The consolidation service provided under this contract will also focus on truck transportation services which are a major mode of cargo transport in the POB. MPA believes that the POB will benefit through the performance of the successful contractor who will act under MPA's sponsorship and use MPA's marketing system, including MPA personnel located in Maryland, elsewhere in the United States and in certain foreign countries, to provide consolidation service to customers at competitive contract rates. Thus cargo will increase through Maryland ports because of reduced costs for such services. In this regard, MPA anticipates cost reductions will occur due to an efficiently run, volume related consolidation service operation based on large volume discount agreements secured by the contractor from rail and truck carriers.

4. The RFP requested offerors to propose a particular operating structure with the two pronged goal of reducing transportation costs for

users of the POB and increasing cargo tonnage through the POB by attracting additional steamship lines and trade users to the POB. The RFP requested offerors to develop a creative marketing and operating approach in their responses to these expressed goals.

5. The RFP stated that measurable and successful experience in the cargo consolidation field is a primary qualification requirement for the contractor. (Agency Report, Exh. 1 (RFP), page 3).

6. The RFP emphasized also that MPA intends to develop a business relationship with the successful contractor in order to make the present system for the movement of international cargo to and from the POB more efficient and less costly to users. MPA thus seeks a contract agreement under which MPA and the successful contractor jointly market the POB and the consolidation service through a number of centers in the midwest, mid-Atlantic and northeast regions of the country in addition to the marketing efforts conducted in Baltimore. The RFP thus states that as part of the contract MPA is to provide an advertising and marketing effort jointly developed with the successful contractor. This marketing effort is to stress MPA's relationship with the contractor and the cost effective consolidation services available when shipping through the POB due to this MPA - contractor relationship. Under this MPA - contractor relationship, MPA is to share MPA sales information with the contractor in order to help it develop additional users of the consolidation service; to provide interim MPA funding (ninety day use of MPA funds) for transportation payments for the contractor's purchase of rail or truck transportation for users of the consolidation service; to assist the

contractor in obtaining office space; to assist the contractor in obtaining maximum discounts from railroads and trucking companies to be passed through to users of the consolidation service; to name the POB consolidation service - - the operating structure to be established under the contract; to provide facilities such as inside and outside storage areas, utilities, etc., if needed; and to designate MPA personnel to work with the successful contractor on a daily basis.

7. RFP, Paragraph 4, page 5, states in pertinent part, as follows:

4. MINIMUM PROPOSALS REQUIREMENTS

A. Term of Contract

A minimum acceptable contract term shall be two (2) years. The contract may be extended for two (2) additional two (2) year periods, or as otherwise agreed to by the parties.

B. Experience

Respondants [hereinafter respondents] must have measurable experience in the cargo consolidation business, preferably [sic] with both rail and truck traffic. Small consolidation service entities are encouraged to consider forming joint ventures or

joint enterprises in order to expand upon their capabilities, thus enabling them to tender a strong offer for the negotiating rights which may be awarded hereunder. All respondents must complete and execute Exhibit "A," attached hereto, "Qualification of Bidder" form and submit same with their offers. Failure of a respondent to fully and properly complete and execute this form shall be cause for rejection of the offer as not responsive.

Further, respondent shall describe any additional services in which it is engaged which are associated with said consolidation service. For example, advancing port service charges (such as opening and closing fees, drayage, mounting, etc.), split deliveries, filling out partial loads, obtaining special equipment (such as insulated containers or trailers) and arranging for protective service inland.

C. Establishment of Office

It is hereby understood that the establishment of an office with all necessary staffing by the successful respondent, shall be required within ninety (90) days after the award of the contract resulting from this RFP.

D. Qualifications of Bidders

It shall be hereby understood that MPA reserves the right to award this RFP to a respondent possessing practiced experience, expertise and the financial resources who, in MPA's sole judgement [sic] is best qualified to perform the said service with minimal assistance from the MPA. In the event that after review of a respondent's financial statement and/or a "Qualification of Respondent" form MPA discerns weaknesses that could impair a respondent's ability to perform the service, or which would require an inordinate amount of assistance from the MPA, MPA hereby reserves the right to consider the respondent as not responsible and reject the offer submitted hereunder.

Respondent shall also describe short and long term goals, objectives and strategies which would produce new service lanes, improvements in existing service, use of new technology, etc.

E. Business Operations with MPA

Respondents shall detail in the submission of their proposals the particular form of business operation

with MPA they envision will offer the greatest potential for success of the said consolidation service. Further, respondent must present details of their reasoning for proposing the particular business relationship and, importantly, why such a form would be potentially the most successful and in the best interest of the POB and MPA.

8. The RFP, page 7, also requires the following:

6. RFP SUBMISSION REQUIREMENTS

All respondents [hereinafter respondents] must furnish with their technical offers, in detail, the following items. Technical offer submissions which do not provide information required below shall be held by the procurement officer as not responsive and rejected on that basis.

- A. Describe the particular business relationship proposed in accordance with Clause 4, Paragraph E. above and the length of contract desired. (2 year minimum required).
- B. Respondents must detail the proposed method of compensation remitted to the MPA resulting from operation of the consolidation service to and from the POB. Describe in detail the extent of MPA

assistance, if any, need [sic] for advanced funding of transportation payments based on container volumes of 5,000, 7,500, 10,000, 12,000, 15,000, 20,000, and 25,000 containers per the first year's operation and the percentage, or other method of compensation resulting from the performance of the services described herein, which shall accrue to MPA. (PLEASE NOTE EXHIBIT "B") [Part of RFP]

- C. Specific and detailed commitments which will result in marketable reductions of normal transportation costs to and from the POB and the effect of such reduction in cost on the rates presently offered to customers of the POB.
- D. Describe proposed rate and marketing plans, in detail, to attract new cargo to the POB. New cargo is hereby defined as cargo presently not shipped thru the POB. Also note any specific commitments which will result in new business for the POB.
- E. Provide a resume of the qualifications, experience, capabilities and successes of the company under which the proposal is tendered, noting locations of present operations.
- F. Execute and return with proposals the attached

Proposal, Procurement and Contract Affidavits.

- G. Describe a proposed plan of action, financial commitment for implementation, including staff which would insure a smooth, efficient start-up of the service. In addition, detail what would be expected of the MPA during the start-up, first and subsequent years of operation.

9. The RFP, page 8, sets forth the following criteria for evaluating proposals:

7. EVALUATION CRITERIA

The evaluation criteria set forth below are intended to be the standards by which each proposal shall be found acceptable to the MPA and shall be measured and rated. The said evaluation criteria are listed in their order of priority, in terms of the MPA's project goals. The MPA hereby reserves the right to evaluate, at its sole discretion, the extent to which each proposal received, compares to the said criteria and to each other.

The recommendation of the selection committee shall be based on the evaluations using the following criteria:

- A. The proposed business operations between respondent

[hereinafter respondent] and the MPA and the quality, comprehensiveness and completeness of the reasoning for proposing the particular form specified in the proposal; and

- B. Total respondent estimated, initial cost on a per box basis for providing value added transportation service to various specified locations (Note: see form marked Exhibit B) [Part of RFP]; and
- C. Qualifications, experience, innovative ideas and fiscal strength of the respondent; and
- D. Marketing plans or commitments for attracting new cargo to the POB; and
- E. Extent of revenues, or basis for computing same, which will be remitted by the successful respondent to the MPA as a result of the consolidation services performed hereunder.

10. The proposals were received and opened on December 21, 1987.

11. MPA evaluated the proposals received and conducted negotiations with offerors until February 4, 1988 when MPA determined to award the contract to ITOFCA Consolidators, Inc. ["ITOFCA"] as the successful offeror. In scoring the proposals MPA weighted the first three

evaluation criteria on the basis of an absolute value of 4. The fourth criteria was weighted at 3 and the fifth criteria at 2. Evaluators judged how well each proposal met the five criteria on a scale of one to ten with ratings of 9 or 10 considered superior. The ratings by each evaluator for each evaluation criteria were multiplied by the respective weighted value for each criteria. The weighted scores for each evaluator arrived at in this manner were averaged with the following results out of the maximum possible 170 points available:

<u>Offeror</u>	<u>Total Average Score</u>
ITOFCA	147
R&E Consolidation Service, Richmond Transportation Company and Tomorrows Transportation (a consortium) (Appellant)	132
The HUB Group, Incorporated	127

12. Appellant was debriefed regarding the procedures for selecting the successful awardee on February 10, 1988.

13. Appellant filed a protest with the MPA procurement officer on February 16, 1988 and supplemented its protest on February 20, 1988. Appellant raised the following protest issues:

"Part One

a) Itofca (sic), Inc. has no meaningful business presence in the State of Maryland and more specifically, the Baltimore Metropolitan Area, while R&E Consolidation Service, Inc. and its associates has (sic) a substantial presence and currently represents approximately 57% of the existing traffic. Itofca's (sic) absence and R&E's substantial presence would indicate that:

- A. Itofca (sic) has no present relationship with local carriers while R&E does have excellent relationships with the necessary providers of service.
- B. Itofca (sic) and not R&E would require a significant start-up time and long period of time thereafter in order to generate significant performance.
- C. R&E and not Itofca (sic) maintains recognized, harmonious relationships with local Custom House brokers, foreign freight forwarders, steamship lines, local haulers and particularly with high quality local short haul truckers which are in short

supply in the area.

- b) You advised that Itofca (sic) offered exclusivity as part of their package which impressed the Selection Committee. We firmly believe that irrespective of assurances, written or otherwise, that you may receive to the contrary, Itofca (sic) maintains and will continue to maintain East Coast offices in the Philadelphia and Norfolk areas which will be in competition with Baltimore while R&E offers no such possibility of conflict.'
- c) Your action in selecting an out of state firm threatens the economic existence of the R&E family comprising 150 people and their dependents with a payroll in excess of \$3,000,000.'
- d) R&E had shown by performance not promises what it is capable of accomplishing.'
- e) The debriefing revealed that your [sic] were impressed with a computer demonstration presented by Itofca (sic) without any inquiry as to the computer capability and operational (not conjectural) success of the in-place R&E system so that a valid comparison could be made. We make this protest with the specific advice from you that the Selection Committee investigated other matters outside the confines of the submissions and oral presentation.'

- f) R&E played a major role and pioneered door to door intermodal service for over 17 years in the area and offers a wealth of experience, contacts, and above all proven services in the areas which are the subject of this contract.'

"Part Two

- a) 'The debriefing indicated that all offerors were not accorded fair and equal treatment with respect to opportunities for discussion, negotiation and clarification of proposals.'
- b) 'The evaluation rating system utilized was not presented to R&E Consolidation Service, Inc. until the time that the oral presentation was made.'
- c) 'The evaluation rating system as presented at the debriefing did not rate the value of proposals in relation to each other based upon presence and performance in the Port area at the time of the proposals.'
- d) 'The evaluators did not grant R&E Consolidation Service, Inc. equal opportunity to address areas submitted by Itofca (sic) which were considered to be of significance by the evaluators and were not requested as part of the

specifications for the RPF.'

14. In a letter of February 19, 1988, to Appellant, in response to its verbal inquires regarding MPA's administrative process to respond to Appellant's bid protest the MPA procurement officer outlined an appeal process within MPA based on the premise that the subject matter of the instant solicitation is not covered by Maryland's General Procurement Law, Md. Ann. Code, State Finance and Procurement Article, Division II ("General Procurement Law").

15. The MPA procurement officer issued his decision denying Appellant's protest on March 2, 1988. In addition to denying each issue raised by Appellant, the MPA procurement officer's decision specified the above described internal MPA procedure for appeal of the procurement officer's decision as follows:

"This letter shall represent the final procurement officer's determination in this matter. In the event that R&E Consolidation Service, Inc., wishes to appeal this determination it may contact the office of the Maryland Port Administrator, Mr. David A. Wager to schedule the date and time for such an appeal within ten (10) days from the receipt of this final procurement officer's determination."¹

¹ It should be noted that with respect to a procurement officer's decision issued by an agency pursuant to the General Procurement Law, §11-137 provides:

"(d) Review of officer's decision, - (1) Unless otherwise provided by regulation, the procurement officer's decision shall be reviewed promptly by the

16. On March 17, 1988, Appellant noted its appeal to the Appeals Board. The issues Appellant raised in its March 17, 1988 notice of appeal generally reiterate the issues addressed by the MPA procurement officer's decision of March 2, 1988.

17. The Appeals Board deferred further proceedings when it was informed following the docketing of Appellant's appeal that Appellant had the opportunity to receive further review of its protest within MPA in a meeting with the MPA Administrator on March 29, 1988 to be followed by a final agency decision by the MPA Administrator. (See Finding of Fact No. 15).

18. Following the meeting with the MPA Administrator on March 29, 1988, MPA issued a decision on March 30, 1988 over the MPA Administrator's signature. The decision affirmed the MPA procurement officer's denial of Appellant's protest. The MPA Administrator's decision did not inform Appellant of any right to appeal the MPA Administrator's decision to this Appeals Board.

procurement agency head and the head of any principal department listed in §8-201 of the State Government Article of the Code (or equivalent unit of State government) of which the procurement agency is a part.

(2) The reviewing authority may approve, disapprove, or modify the decision, or may resubmit the complaint, with appropriate instructions, to the procurement officer who shall proceed under the provisions of paragraph (c)(1) of this section. A decision of the reviewing authority approving, disapproving, or modifying the decision of a procurement officer is the final decision of the procurement agency."

MPA's nominal appeal procedure for review of a decision is the same as the internal agency review procedure mandated by the General Procurement Law, §11-137.

19. Following the MPA Administrator's decision of March 30, 1988, the Appeals Board considered Appellant's appeal filed on March 17, 1988 as if it had been filed within ten days of the MPA final agency decision issued on March 30 pursuant to the General Procurement Law, §11-137(d)(2) and COMAR 21.10.02.08 C. See: Maryland New Directions, Inc. MSBCA 1367 (June 9, 1988). In this regard, COMAR 21.10.02.08 C provides that a final decision under the General Procurement Law shall contain a paragraph that states substantially as follows:

"This is the final decision of the procurement officer. This decision may be appealed to the Maryland State Board of Contract Appeals. If you decide to make such an appeal, you must file written notice of appeal to the Appeals Board within 15 days, [10 days] from the date you receive this decision."²

Decision

I. Appeals Board Jurisdiction

MPA moved to dismiss the appeal for lack of Appeals Board subject

²The General Procurement Law, §11-137(f)(1)(i) currently provides that an offeror may appeal the final action of a procurement agency to the Appeals Board "within ten days after notice of a final action as to a protest regarding the formation of a contract and, in which case, the Appeals Board shall decide the case expeditiously giving it precedence over other matters before the Appeals Board; . . ."(Underscoring added).

matter jurisdiction. MPA maintains that the instant solicitation is exempt from the Maryland General Procurement Law pursuant to §11-103(a)(2)(iv). MPA contends that the instant procurement is for services for the benefit of the public that will generate revenue for Maryland at a State transportation facility that has not been designated by the Board of Public Works pursuant to General Procurement Law §11-103(a)(2)(iv) as being subject to the General Procurement Law's requirements. The particular section MPA points to states in full as follows:

§11-103 Applicability; notice by procurement agency; modification or waiver of requirements.

(a) In general. - This Division II applies to:

(1) every expenditure by a State agency under any contract except to the extent that:

(i) the State agency or procurement is expressly exempted under this subtitle; or

(ii) the State agency was expressly exempted, as of June 30, 1986, from some or all provision of this article in accordance with a statutory provision that is not in this article;

(2) every procurement by a State agency, even if any resulting contract will involve no State expenditure and will produce revenue for the State, for services that are to be provided:

(i) at a State facility, including a State school, hospital, institution, or recreational facility, for

the benefit of State officials, State employees, or students;

(ii) at a State hospital or institution, for the benefit of clients or patients;

(iii) at a State recreational facility, for the benefit of the public; or

(iv) at a State transportation or State higher education facility, for the benefit of the public, to the extent required by the Board; and

(3) procurement by a State agency on behalf of another governmental agency or any other entity.

(b) Exceptions - Except as provided in subsection (e) of this section and §§11-154 and 11-172, this subtitle does not apply to:

(1) procurement by a State agency from:

(i) State agencies;

(ii) political subdivisions of this State or their agencies;

(iii) any governments, including other states, the federal government, and other countries;

(iv) agencies or political subdivisions of other governments; or

(v) bistate, multistate, bicounty, or multicounty governmental agencies; and

(2) procurement for purposes of direct resale or remanufacture and subsequent resale in support of enterprise activities.

(c) University College overseas programs. - This subtitle does not

apply to procurement by the University of Maryland for University College overseas programs if the University adopts regulations that:

(1) establish policies and procedures governing procurement for University College overseas programs; and

(2) promote the purposes stated in §11-102 of this subtitle.

(d) Maryland Stadium Authority. - Except to the extent provided by §13-718 (2) of the Financial Institutions Article, this Division II of this article does not apply to the Maryland Stadium Authority. (Underscoring added.)

MPA thus maintains based on General Procurement Law §11-103(a)(2)(iv) that the instant solicitation involves a no cost or revenue generating agreement under which the successful contractor charges shippers for the consolidation services it renders and may return a percentage of its fees to the State. It is agreed that because revenue may accrue to the State from this type of contract arrangement, the contract type is sometimes designated "a concessions contract." MPA thus argues that the instant concessions contract is to be performed at a State transportation facility, the POB. It allows that the services are for the benefit of the public but it avers that this procurement is not covered by the General Procurement Law because the Maryland Board of Public Works has not promulgated regulations specifying that it is subject to the General Procurement Law as required by §11-103(a)(2)(iv). We disagree with MPA's conclusion.³

³There are peripheral questions concerning whether this contract is to be performed "at a State transportation facility" since the contract will be performed beyond the understood limits of the POB. This issue was not argued

The Board is agreed that the contract involved here is not a concessions contract, as that term is understood and in common parlance, within the meaning of §11-103(a)(2)(iv). Our focus initially is on what the Legislature meant when it added "for the benefit of the public" regarding those procurements at State transportation facilities that the Board of Public Works is to designate as being covered by the General Procurement Law. In this regard, §11-103(a)(2)(iv) may be ambiguous.⁴ In a broad sense all contract procurement actions by the State are generally for the benefit of the public. We, therefore, believe the Legislature had

by the parties and is not the basis for our decision. It is also important to note that performance of this contract may involve use or expenditure of State funds notwithstanding representation of parties' counsel to the contrary. (See Findings of Fact Nos. 6 and 8.)

'In the 1988 code revisions related to Maryland's procurement law undertaken with the aid of distinguished private and governmental members (Procurement Revision Review Committee) the Revisor's Note to the bill to revise the procurement code, that was introduced and read for the first time on January 13, 1988, stated with respect to General Procurement Law §11-103(a)(2)(iv) as follows:

"In item (3)(iv) [General Procurement Law, Section 11-103 (a)(2)(iv)] of this section, which makes this Division II applicable to services for the benefit of the public at State transportation or higher education facilities, the words 'unless exempted by the Board' are substituted for the former words 'to the extent required by the Board', for clarity. This substitution is called to the attention of the General Assembly. The Procurement Revision Committee notes that the former words were ambiguous since they could have been interpreted to mean that this Division II applied to the services specified under item (3)(iv) of this section only if the Board expressly required this Division II to apply." (Underscoring added).

In the procurement code revision bill read the second time on January 27, 1988, the Procurement Revision Review Committee suggested to change to Section 11-202 ("Scope of Division - In General") (3)(iv) to read "as required by the Board" instead of "unless exempted by the Board" and to the Revisor's Note, in pertinent part, to state " . . . the words 'as required by the Board' are substituted for the former words 'to the extent required by the Board,' for clarity."

something specifically in mind when it refers to "for the benefit of the public" in §11-103(a)(2)(iv). Using the plain meaning approach to interpreting this statutory language, we believe the Legislature meant §11-103(a)(2)(iv) to cover contracts involving concessionaire type vendors that serve members of the public directly when they are using the State's public transportation facilities. See: Solon Automated Services, Inc., MSBCA 1117, 1 MSBCA ¶74 (1984). An example is a food service facility located at an airport. Similar types of services we believe were envisioned by the Legislature in §11-103(a)(2). Thus each subpart of §11-103(a)(2) describes services to be provided by concessionaire type vendors directly to members of the public incidental to their visits to and use of the various types of State facilities delineated in §11-103(a)(2). That is, this statutory provision applies to individual members of the public who use a State facility, who directly pay the vendor for the service, and who receive a direct and immediate benefit from the service vendor. In this regard, §11-103(a)(2)(iv) must be read in conjunction with §11-103(a)(2) in an overall context.

Examples of vendor run concession contracts for the public's benefit that we believe §11-103(a)(2) is intended to cover include laundry machines or soft drink machines at a State university (Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10(1982), Solon Automated Services, Inc., MSBCA 1117, MSBCA ¶74(1984)); food services provided for pay to employees and to visitors at state hospitals and state office buildings (Custom Management-Ogden Food Service, MSBCA 1086/MSBCA 1090, 1 MSBCA ¶28 (1982)); food services provided on a concessions and revenue basis to students at State educational facilities (Quaker Cuisine Services, MSBCA

1083, 1 MSBCA ¶23(1982), to users of State park facilities (e.g., canoe rentals from a vendor on a concession basis, see §11-103(a)(2)(iii)). Concessions maintained for the benefit of the public using State run public facilities under §11-103(a)(2) may also include limousine services for hire by travelers using BWI airport (Baltimore Motor Coach Company MSBCA 1216, 1 MSBCA ¶94(1915)). We believe that when the Legislature passed and expanded the Division II applicability section of the General Procurement Law it clearly meant to embrace our prior decisions which held that the Legislature in passing Maryland's omnibus procurement law in 1981 intended Maryland procurement law to be broad in scope as to its coverage. In this regard, the Legislature defines procurement in a very broad sense as follows:

"(z) Procurement. - (1) Procurement means the process of leasing real property as a lessee and the process of buying, leasing as lessee, purchasing, or otherwise obtaining any supplies, services, construction, construction related service, architectural services, or engineering services."⁵

We recognize, however, that the Legislature in the General Procurement Law, effective July 1, 1987, with regard to State

⁵Examination of "procurement" as used in §11-103, particularly in §11-103(b), which lists express exemptions from the General Procurement Law, shows that the Legislature meant the term to have a broad connotation. In §11-103(b) use of the term "procurement" to be limited only to contracts that generate revenue for the State as distinguished from contracts involving expenditures would clearly be unreasonable.

transportation facilities elected to place in the Board of Public Works the authority to designate those vendor concession contracts serving the needs of members of the public directly at State transportation facilities that should be subject to the provisions of the General Procurement Law.

However, the solicitation for a services contract here on appeal does not involve a vendor concessionaire type contract for the benefit of the public at a State transportation facility within the meaning of §11-103(a)(2)(iv). We interpret that section in the light most favorable to Appellant since MPA brings the motion to dismiss for lack of Board jurisdiction. See: McLean Contracting Company, MSBCA 1288 (June 15, 1988); General Procurement Law, §11-102. In this regard, the contract is for a service that MPA seeks in order to provide reduced rail and truck transportation costs in the POB for the express purpose of increasing the volume of cargo tonnage through the POB by attracting additional steamship lines and trade users to the POB. (Agency Report, Exh. 1.) The MPA thereby hopes to enhance the POB's viability relative to competing ports of call. This effort by MPA is certainly praiseworthy and within MPA's express mandate. However, the service contract MPA seeks does not have the attributes of a vendor concessionaire contract as being one to provide accommodations to the individual members of the public during their use of a State facility. It thus is not designed to provide members of the public with those amenities for their personal comfort and use incidental to their presence on and use of State facilities. Rather the instant service contract is to serve an essential MPA goal to enhance the use of the POB by making the POB function more efficiently and at transportation rates developed by competition and provided to commercial cargo

transportation entities. For these reasons the Board concludes that the instant contract is not a vendor concessionaire contract within the meaning of the General Procurement Law §11-103(a)(2)(iv).

The appeals Board on its own motion also raised a related jurisdictional issue as follows:

When Md. Annotated Code, State Finance and Procurement Article went into effect on July 1, 1987, did the Legislature by the applicability section, i.e., §11-103(a)(2), exclude a class of contracts (including the subject matter of the proposed contract before the Board on appeal) from the coverage of the General Procurement Law (Md. Annotated Code, State Finance and Procurement Article, Division II)?

We think not. As we have said before,

"A cardinal rule of statutory construction is that statutes should be construed to effectuate the Legislature's intent. Holy Cross Hospital of Silver Spring, Inc. et al. v. Health Services Cost Review Commission, 283 Md. 677 (1978); Suburban Uniform Company, Division of Big Boy's Army and Navy Stores,

Inc., MSBCA 1053, March 19, 1982. In so doing, a statute should be interpreted, if possible, according to its plain language with words presumed to be used in their ordinary and popularly understood meaning unless there is reason to believe from the face of the statute that its words were intended to have some other meaning. Drews v. State, 224 Md. 186, 167 A.2d 341 (1961); Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956). 'In final analysis, in construing any statute requiring construction, courts must consider not only the literal or usual meaning of words, but their meaning and effect in light of the setting, the objectives and purposes of the enactment, with the real intention prevailing over the literal intention even though such a construction may seem to be contrary to the letter of the statute. (citations omitted).' State v. Fabritz, 276 Md. 416 (1975); see also Wilson v. State, 21 Md. App. 557, 567 (1974); Bickel v. Nice, 173 Md. 1, 192 A. 777 (1937)."

Solon Automated Services, Inc., supra, MSBCA 1117, 1 MICPEL ¶71 (1984) at 3.

Section 11-103 of the General Procurement Law generally states the applicability of Maryland's procurement law. It now exempts eight classes of procurements. However, it is argued that the instant contract implicitly was intended to be exempt from the requirements of the General Procurement Law because it is not a type of procurement that easily can be pigeonholed into those categories of procurements mentioned as procurements pursuant to General Procurement Law §11-103(a)(2). We cannot agree. "Where a statute expressly provides for certain exclusions, others should not be lightly read therein by implication, for if the Legislature intends other exclusions it is so easy to add them to the already-named explicit ones." State Insurance Commissioner v. Nationwide, 241 Md. 108, 117(1965)." Solon Automated Services, Inc., MSBCA 1117, 1 MICPEL ¶14 at 5. We adhere to the view expressed in Harbor Island Marina v. Calvert Co., 286 Md. 303 (1979) at 311 that "[i]f the statute is susceptible of more than one construction which is [sic] both reasonable and consistent with commonsense, then we should apply the construction which will carry out its object and purpose." (Citations omitted).

The Legislature expressly has not exempted the type of services called for in the RFP which is the subject of appeal under any exempted contract class or type of contract, and it is easily within the broad definition of procurement set forth under §11-101(z) of the General Procurement Law. In this regard, "the rule of construction eiusdem generis, . . . does not require that a general provision in a statute be limited in scope to the precise or identical things and items previously specifically named, nor does it apply when the context manifests a contrary intention. Black's Law Dictionary (4 ed.); 28 C.J.S., Eiusdem,

p. 1049." State Insurance Commissioner v. Nationwide, 241 Md. 108 (1966). As we alluded to above, examination of §11-103(b) uses "procurement" in the broadest possible context when exempting certain contracts from coverage of the General Procurement Law. We believe with regard to §11-103(a) then that it is inappropriate for this Board by administrative fiat to add to that list of exclusions from the General Procurement law by interpretive, secondary rules of statutory construction where a reasonable reading of §11-103 is that the Legislature intended generally to encompass a service contract of the type here involved within the coverage of the General Procurement Law and where the thrust of the General Procurement Law from its inception has been to provide a remedy for disappointed bidders who believe they are treated unfairly in the award of State contracts. On a more detailed level, we find that §11-103(a)(2)(i) covering procurements at a State facility, with the "including" language read as a nonexclusive description or example of what is covered by that subpart, reasonably encompasses the instant contract within its terms.

In any event the Legislature has passed an omnibus procurement law and stated that it is to be liberally construed to effectuate fairness and justice to those using the procurement system. General Procurement Law §11-102; COMAR 21.01.01.04. On the other hand, it has not anywhere specifically excluded the instant contract type from coverage of the General Procurement Law. As to this issue regarding a class of contracts it is argued are not covered because not expressly included within §11-103(a)(2)(i)-(vi) we, therefore, need not strain to decide that the instant contract plainly is a procurement of services with the intent and purpose of it to enhance the economic viability of the POB for Maryland.

It is thus a procurement contract included within the General Procurement Law and thus subject to the competitive requirements of the legislatively mandated procurement system as well as our jurisdiction to decide procurement issues under that system. See generally: Cable Antenna Systems, B-220752, 86-1 CPD ¶168 (1986).

MPA also argues that Appellants appeal on March 17, 1988 of the final procurement officer's decision it received on March 3, 1988 was untimely because not filed within ten days and thus the Board does not have jurisdiction. We find for Appellant on this issue. Consistent with its position on the other issues that the instant solicitation is not a procurement subject to the General Procurement Law, the MPA's final procurement officer's decision denying Appellant's protest did not contain a notice of a right of appeal to this Appeals Board within ten days of issuance of the final agency procurement officer's decision as required by the General Procurement Law §11-137(d)(2).⁶ We have held under similar circumstances that failure of the final agency decision denying a protest to notify a contractor of its appeal rights substantially in accordance with the notice provisions set out in COMAR 21.10.02.08 C is a defective decision that does not start the running of the appeal period. Maryland New Directive, Inc., MSBCA (June 9, 1988). See: McLean, supra, MSBCA 1288. Accordingly, Appellant's appeal filed on March 17, 1988 is timely filed regarding the subsequently issued March 30, 1988 final agency

⁶We also note that the procurement officer's decision of March 2, 1988 was not a final appealable procurement officer's decision pursuant to General Procurement Law §11-137(a)(2). Final agency action did not take place until the agency head reviewed and approved the procurement officer's action as indicated in the letter of March 30, 1988. (Agency Report, Exh. 8).

decision.

II. Substantive Aspects of Protest of Award

The Board considered the substantive issues Appellant raises regarding the procedures followed in this competitive negotiation procurement and MPA's decision to make an award to ITOFCA. We deny the appeal on the merits.

Appellant maintains that the MPA improperly evaluated ITOFCA's proposal because ITOFCA failed to meet the RFP's established minimum proposal requirements qualifications of bidders, and RFP submission requirements. Appellant also raises in the record before the MPA procurement officer a number of issues concerning the evaluation and award process which we paraphrase as follows:

1. The successful awardee, ITOFCA, does not have a meaningful business presence in the POB. That is, ITOFCA does not presently have the customers, business contacts, etc. with those entities involved in shipping cargo through the POB.
2. ITOFCA will not operate exclusively in the POB.
3. MPA improperly selected for award an out-of-state entity. This will affect Appellant's competitive position in the POB and thus threaten the continued employment of Appellant's employees.

4. Appellant is highly qualified to perform the services called for by the contract.

5. The evaluation was not conducted in accordance with the request for proposals or Maryland procurement law. The selection committee that evaluated the proposals considered ITOFCA's computer system. This was outside the scope of the factors the RFP indicated MPA would consider in evaluating proposals.

6. Appellant has played a major role and pioneered door to door cargo transportation services for over seventeen years in the POB area and offers a wealth of experience, contacts, and proven services in the areas which are the subject of this contract.

7. The MPA debriefing of Appellant indicated that MPA did not accord fair and equal treatment to all offerors regarding discussion, negotiations and clarification of proposals.

8. MPA did not reveal the evaluation rating system to Appellant prior to Appellant's oral presentation.

9. MPA's rating system did not properly evaluate the proposals on a comparative basis so as to take into account Appellant's presence and performance in the POB at the time of the solicitation.

10. MPA's selection committee did not grant Appellant "equal opportunity to address areas submitted by ITOFCA which were considered to be of significance by the evaluators and were not requested as part of the specifications for the RFP."

The delineated issues Appellant raises fall into several categories which may be grouped and addressed for purposes of this decision. Our decision addresses all Appellant's issues as they were somewhat narrowed or reframed at the hearing.

We place in the first category of issues those that maintain essentially that Appellant is the better qualified offeror when compared to ITOFCA to provide the services sought by the MPA solicitation; Issues 1, 4, 6, 9. In this regard, Appellant's marketing vice-President testified extensively as to Appellant's present capabilities to provide the contract services in the POB and to its present services and contacts in the POB area. (Hearing, May 4, 1988, Tr. 15-77). He testified that Appellant's share of the shipping volume presently flowing through POB was approximately 57% of the current volume of traffic. He testified regarding business contacts in the POB, including its contacts with local carriers, local custom house brokers, foreign freight forwarders, steamship lines, local haulers, and high quality local short haul truckers, which are in short supply in the area. Appellant's main thrust thus is that it is the best qualified offeror to perform MPA's solicitation requirements.

Consistent with his testimony, Appellant's witness testified that

ITOFCA's lack of local presence will not permit ITOFCA to meet the contract's requirement. In this regard Appellant emphasized that ITOFCA would require significant start up time to establish an office in the POB and to begin its performance as well as time to develop the business and customer relationships that Appellant now has in the POB in order for ITOFCA to reach and develop the level of cargo business volume that Appellant presently has. Appellant's Vice President thus stated that ITOFCA in order to establish its presence as a consolidation service in the POB will have to purchase transportation services from local providers at premium rates. (Hearing, May 4, 1988, Tr. 23). Appellant's evidence further points out that ITOFCA does not have offices, supplies, or equipment in the POB area. Based on these assertions, Appellant concludes that ITOFCA is not an acceptable offeror and was improperly evaluated compared to Appellant because ITOFCA cannot meet contract requirements. Appellant specifically argues that ITOFCA should not have received favorable evaluation scores over Appellant based on the requirements of the RFP. (See Findings of Fact Nos. 7 and 9.)

The standard for reviewing a procurement officer's evaluation of proposals submitted in response to an RFP in a competitive negotiation procurement is stated as follows:

When evaluating the relative desirability and adequacy of proposals, a procurement officer is required to exercise business and technical judgment. Under such circumstances, a procurement officer enjoys

a reasonable degree of discretion and, for this reason, his conclusions may not be disturbed by a reviewing board or court unless shown to be arbitrary or arrived at in violation of Maryland's Procurement Law.

Baltimore Motor Coach Co., MSBCA No. 1216, 1 MICPEL ¶94 at 12 (1985).
See Systems Associates, Inc., MSBCA No. 1257, 2 MICPEL ¶116 at 15 (1985);
Beilers Crop Service, MSBCA No. 1066, 1 MICPEL ¶25 at 6 (1982; B. Paul Blaine Associates, Inc., MSBCA No. 1123, 1 MICPEL ¶58 at 14 (1983).

We have adopted the reasoning underlying this standard in a related context in competitively bid procurements as follows:

Under Maryland law, a procurement officer has broad discretion in determining whether a bidder is responsible and such a determination will not be disturbed unless clearly unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulations. Compare Solon Automated Services, Inc. v. University of Maryland, et al.; Miscellaneous Law No. 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982) (and cases there cited). Consistent with this principle, affirmative determinations of bidder responsibility normally will not be

disturbed since such decisions involve business judgment based on a host of subjective factors going to the capability to perform the work. Compare Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD ¶64: Keco Industries v. United States, 428 F.2d 1233, 1240 192 Ct.Cl. 733 (1970).

Custom Management Corp./Ogelen Food Service Corp., MSBCA 1086/1090, 1 MICPEL ¶28 (1982). In this regard, the rationale expressed for the above standard of review of an agency's selection of its contractors is succinctly stated by the Comptroller General of the United States as follows:

"Because reasonable men may well disagree as to a company's capability to perform a particular contract, our Office has adopted the rule that we will not substitute our judgment for that of the contracting officer unless it is shown that the determination of nonresponsibility was made in bad faith or lacked any reasonable basis. 37 Comp. Gen. 430 (1957); 49 Comp. Gen. 553 (1970). In making the determination of a contractor's ability to perform a contract, the contracting officer is vested with a considerable degree of discretion, as we recognized in 43 Comp. Gen. 228, 230 (1963):

"Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the Government's behalf. 39 Comp. Gen. 705, 711.

* * *

The issues raised by Appellant essentially address Appellant's ability and ITOFCA's comparative ability to perform the contract services. Appellant makes a detailed presentation to the effect that it is better able to perform the instant services than ITOFCA but this is not the test nor our judgment to make, although we clearly understand that Appellant disagrees with MPA's selection of ITOFCA. Mere disagreement with an agency's judgment, however, is not a basis for this Board to overturn an agency's selection decision. Four Seas and Seven Winds Travel, Inc., MSBCA 1372 (August 18, 1988). After carefully examining the record, we

conclude that Appellant has not shown that the MPA procurement officer's determination based on the RFP's evaluation criteria and which considered the MPA selection committee's evaluation and recommendation or the MPA agency head's review of the selection decision were the product of bad faith or lack a reasonable basis. We specifically find that Appellant has not met its burden of proof regarding its allegation that ITOFCA cannot establish an office in the POB within ninety days pursuant to RFP, Paragraph 4. C. As well, having an office already established prior to the competition was not a qualifying factor in this RFP. In addition, we find, as MPA points out, that under RFP, Paragraph 4, "Minimum Qualifications," including Paragraph 4, Subparagraphs B and D, the RFP's requirements do not limit the requisite experience of offerors to that experience obtained in the POB. To do so would certainly limit competition. In any event under the RFP, offerors who wished to compete on this procurement were free to qualify as acceptable offerors by using their experience in other ports.

In addition, Appellant's large local market share of the present volume of transportation of cargo through the POB is commendable and certainly nothing prevents it from continuing to maintain that level of business. And we find the selection committee took this qualification emphasized by Appellant into account (Appellant has not shown otherwise) in evaluating Appellant's proposal under evaluation factor three which considered offerors qualifications and experience. Under evaluation factor three, the evaluators on the selection committee each rated Appellant relatively high on this factor, although not as high as ITOFCA in all cases. Appellant has not otherwise shown that the evaluators'

judgment in rating the offerors' qualifications and experience was unreasonable or contrary to law or regulation. While Appellant emphasizes that its local market share of the POB cargo business is above fifty percent, we also find that local market share in the POB per se was not an evaluation factor. Again, in a competitive negotiation, the agency and its evaluators may only utilize those evaluation factors or criteria set out in the RFP in making the selection decision. Four Seas and Seven Winds Travel, Inc., MSBCA 1372, *supra*, at 13. Accordingly, as to Issues 1, 4, 6, and 9, we find that Appellant fails to sustain its burden of proof to show that Maryland Procurement Law was not followed; that it was not permitted to compete on an equal basis in accordance with the terms of the RFP.

We turn next to consider Issues 5, 7, 10. Appellant generally alleges that it was not afforded fair and equal treatment, i.e., that it was not allowed to compete on an equal basis on the instant procurement. There is almost a complete lack of specificity regarding a basis for Appellant's allegations. However, in order to address them, we assume that Appellant's complaint is based at least in part on the fact that during the discussions and negotiation phases of the solicitation ITOFCA made a presentation regarding the computer system it would use in performing the contract services. Appellant thus maintains that MPA's consideration of ITOFCA's computer system was improper because it was beyond the scope of the evaluation factors the RFP indicated MPA would consider in evaluating the proposals. Generally, the procurement agency must conduct the evaluation of offers based on the evaluation factors set forth in the solicitation. See: Four Seas and Seven Winds Travel, Inc.,

MSBCA 1372, supra at 13; Compuware Corp., GSBCA No. 8869-P-R, 87-3 BCA ¶20,021 (1987).

The MPA procurement officer's uncontradicted response in the record is that ITOFCA's unsolicited demonstration of its computer system that it intended to use if it were selected for contract award was not accorded any weight in the evaluation. There is no credible evidence in the record elsewhere that the selection committee or the MPA procurement officer considered ITOFCA's demonstration improperly in evaluating the submitted proposals based on the RFP evaluation factors.

We note that the selection committee members acknowledged that they were aware generally that the offerors responding to the solicitation all use essentially similar types of computer systems. To reiterate, however, the unrebutted evidence is that the selection committee affirmed that ITOFCA's demonstration did not influence their evaluation and decision to select ITOFCA as the highest rated offeror based on the solicitation's evaluation criteria.

Appellant next contends by Issue 3 that ITOFCA was improperly selected because it is an out-of-state entity. There is no requirement under Maryland procurement law given the facts established in this appeal that Maryland contractors are to be favored over non-Maryland contractors.⁷ Appellant thus fails on this issue.

⁷We note, however, that under circumstances not shown to be applicable here, Md. Ann. Code, State Finance and Procurement Article, §11-145 provides, in pertinent part, as follows:

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We next consider Issue 2. Appellant maintained that ITOFCA will not operate exclusively in the POB. Appellant's protest, in effect, argues that ITOFCA is not eligible for award because it does not, or cannot, meet the RFP provision which states as follows:

"3. Contractor Responsibility

A. The business entity established pursuant to the negotiated contract shall use the Port of Baltimore or other Maryland ports as the exclusive entry and exit point(s) for maritime cargo; and . . ."

This provision is somewhat unclear as to what is meant by business entity to be established vis-a-vis an acceptable bidder. While not complained of by any offeror prior to receipt of proposals and therefore not an issue,⁸ MPA through the RFP obviously intended further

(b) In General. - (1) When awarding a contract by competitive bidding, if the state in which a nonresident firm is located gives an advantage to its resident businesses, a procurement agency may give an identical advantage to the lowest responsive and responsible bid from a Maryland firm over that of the nonresident firm.

(2) An advantage may include:

- (i) a percentage preference;
- (ii) an employee residency requirement; or
- (iii) any other provision that favors a nonresident firm over a Maryland firm.

⁸See Neoplan USA Corporation, MSBCA No. 1186 & 1202, 1 MSBCA Paragraph 84 (1984) (failure to protest an alleged defect in the solicitation's evaluation formula prior to receipt of proposals is fatal to the right to challenge the

discussions after selection of the successful contractor to establish the contractor's operating entity to operate the consolidation service under the terms of the instant service contract.

The issue Appellant raises here arguably raises an issue contract performance, i.e., whether the contractor will perform in accordance with the contract's requirements, not one of contractor selection for award. Corbetta Construction Co., 55 Comp. Gen. 201, 75-2 CPD ¶144 (1975), motion for reconsid., 76-1 CPD ¶240 (1976) (whether a contractor's performance will conform to the contract's requirements is immaterial; the issue is whether the requirements of competitive negotiation were complied with in the procurement). The provision that Appellant points to requires the successful awardee to use the POB or other Maryland ports as the exclusive entry and exit point(s) for maritime cargo for which it provides consolidation services at the rates established under the contract. Appellant alleges that ITOFCA is a maritime freight consolidator at other ports and thus it is impossible for ITOFCA as an entity to use the POB exclusively.

Even assuming, arguendo, that the issue Appellant raises is a contract formation issue for our consideration now, as distinguished from an issue of contract performance, which believe it is not, Appellant fails on this issue under a plain reading of the RFP requirement. The term "exclusive" in the RFP provision quoted above modifies use of Maryland entry and exit points. The request for proposals thus reasonable states

formula).

that the successful contractor will provide the contract services through establishment of an operating organization under the terms of the contract that will use the contract rates bid only for cargo shipped through Maryland ports. This is the way the MPA procurement officer interpreted this provision and we believe his interpretation is reasonable. In the Agency Report, Exh. 5 (page 5), he states that "[b]y definition, ITOFCA's services through Baltimore will be exclusive to Baltimore since the rates will not be available elsewhere." It simply does not say that the successful contractor can have no business activities in other United States ports. We think the plain terms of the solicitation required offerors to quote rates for use by the successful contractor's operating organization to be established in Maryland to provide the consolidation services through Maryland ports at the quoted rates. Apparently, the rates secured by the instant procurement will be somewhat lower than those rates quoted by freight consolidators currently offering consolidation services through Maryland ports and this was the goal of the procurement of this contract for services. In this regard, this contract will not prevent others from providing the same services. The advantage of the instant contract to the successful contractor is the MPA endorsement and the availability of the MPA marketing system and contacts throughout the world.

The final issue that we address is Issue 8, which concerns the effect of MPA's failure to reveal to Appellant the "evaluation rating system" used until the time of Appellant's oral presentation to the selection committee. Maryland's General Procurement Law §11-111 provides, in pertinent part, as follows:

(b) Request for proposals. If the competitive sealed proposals method is authorized by subsection (a), proposals shall be solicited by a request for proposals which shall, at a minimum, include:

- (1) a statement of the scope of the contract;
and
- (2) a list of the factors and the relative importance of each factor, including price, that will be used in evaluating proposals.

Similarly, in this regard, COMAR 21.05.03.03A provides that numerical rating systems may be used in evaluating proposals but are not required.

"It is essential that offerors be informed in an RFP of all evaluation factors and the relative importance to be attached to each such factor so that they may submit accurate and realistic proposals and compete on an equal basis. However, this requirement traditionally has been limited to a disclosure of the principal evaluation factors which form the judgmental bases for award." B. Paul Blain Associates, MSBCA 1123, 1 MICPEL ¶58 (1983) at 9. "With regard to the relative importance of each evaluation criteria, it is not essential to disclose the precise numerical weights to be applied by an agency to each general criteria. compare 50 Comp. Gen. 565 (1971). However, ' . . . offerors should be informed of the broad scheme of scoring to be employed and given

reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other.' BDM Services Company, Comp. Gen. Dec. B-180245, 74-1 CPD ¶237 (1974) at p. 7." Id. at 9. See: MIS Support Group, Inc., MSBCA 1055, 1 MICPEL ¶17 (1982) (the RFP is not required to specify a numerical scoring system for the purpose of indicating the relative importance of evaluation factors); COMAR 21.05.03.02A (an RFP shall include an indication of the relative importance of each evaluation factor, including price).

RFP, Paragraph 7, entitled "Evaluation Criteria" stated as follows:

"The evaluation criteria set forth below are intended to be the standards by which each proposal shall be found acceptable to the MPA and shall be measured and rated. The said evaluation criteria are listed in their order of priority, in terms of the MPA's project goals." (Underscoring added).

The RFP listed five evaluation factors. (Finding of Fact No. 9). These five evaluation criteria were listed, according to the RFP, in their order or priority, i.e., in descending order of importance, thus indicating the relative importance of each evaluation factor. Appellant complains that it was not informed of the scoring system until the negotiation phase. The specific numerical scoring system used by a procurement agency to evaluate proposals in a competitive negotiation

procurement need not be set forth, however, as long as the RFP informs offerors of the evaluation factors and their relative importance. B. Paul Blain Associates, supra. Although the detailed numerical scoring system used did not have to be revealed, Appellant did not otherwise offer any evidence showing that it was prejudiced in the scoring under the scoring system used. Nor did Appellant demonstrate, as we discussed above, that selection of ITOFCA as the contractor to provide the contract services as the most advantageous offeror, based on consideration of price and RFP evaluation factors, was unreasonable or contrary to law or regulation. Accordingly, we conclude that the evaluation criteria provided in the RFP adequately permitted offerors to draft meaningful proposals and compete on an equal basis. B. Paul Blain Associates, supra. In this regard, to reiterate, we have reviewed the individual evaluations of each selection committee member. ITOFCA was rated higher than Appellant on an overall basis based on the ratings of each selection committee member, although in some instances individual members rated Appellant higher than ITOFCA on some evaluation factors. No untoward action is indicated. (Agency Report Exh. 3).

Dissenting Opinion by Chairman Harrison

I agree that Appellant's protest lacks merit. However, for the following reasons I dissent from the Board's determination that it has jurisdiction to consider the appeal.

MPA has moved to dismiss the appeal on grounds that this Board lacks jurisdiction over this request for proposals to establish a business arrangement between MPA and the private sector to encourage a reduction in the cost of the movement of goods through the Port of Baltimore. The grounds initially asserted for this motion are predicated upon the provisions of Subsection (a)(2)(iv) of Section 11-103, Division II, State Finance and Procurement Article. Subsection (a) of Section 11-103 respecting applicability of the procurement law provides in its entirety as follows:

(a) In general. - This Division II applies to:

(1) every expenditure by a State agency under any contract except to the extent that:

(i) the State agency or procurement is expressly exempted under this subtitle; or

(ii) the State agency was expressly exempted, as of June 30, 1986, from some or all provision of this article in accordance with a statutory provision that is not in this article;

(2) every procurement by a State agency, even if any resulting contract will involve no State expenditure

and will produce revenue for the State, for services that are to be provided:

(i) at a State facility, including a State school, hospital, institution, or recreational facility, for the benefit of State officials, State employees, or students;

(ii) at a State hospital or institution, for the benefit of clients or patients;

(iii) at a State recreational facility, for the benefit of the public; or

(iv) at a State transportation or State higher education facility, for the benefit of the public, to the extent required by the Board; and

(3) procurement by a State agency on behalf of another governmental agency or any other entity.

MPA asserts that the services sought are (1) to be performed, at least in part, on a State transportation facility (i.e. on port facilities) for the benefit of the public at large (i.e. the citizens of Maryland) and (2) are to be performed pursuant to a contractual arrangement where there will be no State expenditure and the arrangement will produce revenue for the State.¹ MPA thus argues that the services sought constitute a procurement under Subsection (a)(2)(iv) above. Subsection (a)(2)(iv) provides that Division II applies to procurement for

¹At oral argument on the initial motion, MPA's counsel indicated that MPA was considering whether certain of the revenue paid to MPA might be rebated to the users of the Port of Baltimore. In any event, counsel for the parties agree that no State expenditure is contemplated.

services at State transportation facilities, for the benefit of the public, "to the extent required by the Board" [of Public Works]. However, since the Board of Public Works had not promulgated any regulations indicating to what extent procurement for services on State transportation facilities are to be included, MPA initially argues that all such services are excluded from the coverage of the general procurement law and thus this Board lacks jurisdiction. While I must disagree with MPA on the grounds initially asserted for lack of jurisdiction, I believe that the general procurement law does not apply to this procurement on more general grounds and thus the Board lacks jurisdiction.

MPA argues, and I agree, that in order for a procurement to be within the coverage of the general procurement law, it must fall within one of three categories as set forth in Subsection (a) of Section 11-103, above.² Thus, the procurement must either (1) involve an expenditure (for a non exempt procurement or agency); (2) involve a procurement, even if the resultant contract will involve no State expenditure and may produce revenue for the State, for certain services at certain described facilities; or (3) be a procurement by a State agency on behalf of "another governmental agency or any other entity."

²I have considered the argument that the direction in Section 11-102, Division II, State Finance and Procurement Article to liberally construe and apply the procurement law in order to foster the promotion of public confidence in State procurement is best served by a construction that all procurement activity is covered unless specifically excluded by the provisions of Subsection (b) of Section 11-103. I reject this construction as (1) being too expansive in terms of the Board's previous decisions that it has only such jurisdiction as is specifically conferred upon it by the legislature and (2) as having the practical effect of rendering portions of Subsection (a) of Section 11-103 as surplusage. See Engineering Technologies Associates, Inc., MSBCA 1362, 2 MSBCA ____ (1988), recon. dec. 2 MSBCA ____ (1988), and cases cited therein at p. 8.

Since we are advised by counsel, and I would so find from the record, that the instant procurement involves no State expenditure, jurisdiction may not be founded upon an expenditure of State funds under (1) above.

Concerning the specific grounds initially asserted by MPA respecting certain revenue neutral or revenue producing service contracts at transportation facilities under (2) above, I conclude that the instant procurement was not the kind contemplated by the General Assembly when it enacted this provision in the 1986 legislative session with an effective date of July 1, 1987 (Senate Bill 162; Chapter 840, Laws of 1986) and thus the legal effect of the absence of Board of Public Works regulations need not be considered. This legislation (Chapter 840, Laws of 1986) for the first time makes specific reference to the applicability of the general procurement law to a procurement that involves no State expenditure, although this Board had previously indicated its belief that such procurements were covered. See Solon Automated Services, Inc., MSBCA 1117; 1 MSBCA ¶7 (1984); Baltimore Motor Coach Company, MSBCA 1216, 1 MSBCA ¶94 (1985). In the Bill Analysis prepared by the Maryland Department of Legislative Reference for use during consideration of Senate Bill 162 by the Senate's Economic and Environmental Affairs Committee it is noted in the overview that:

Division II specifies which agencies and types of procurement are covered by the law. In this regard, current law makes no specific provision for concession contracts

under which a contractor provides services to the State and receives no money from the State or, in many cases, pays money to the State under the contract. However, current law has been interpreted to apply to these revenue-generating contracts.

In the comments on specific changes, the Analysis provides:

Page 11, Section 11-103(a) Applicability.

Procurement law applies to every expenditure by a State agency under any contract except to the extent if the State agency or procurement is expressly exempted under this subtitle; or the State agency is expressly exempted as of June 30, 1986, from some or all provisions of this article in accordance with a statutory provision that is not in this article.

Expressly includes revenue generating or revenue neutral "concession" contracts and procurement by a State agency on behalf of another governmental agency or any other entity.

It therefore appears to me that the provisions of Subsection (a)(2) were enacted by the General Assembly to specifically include certain "concession" contracts concerning whose coverage there may previously have been some doubt. However, it also appears to me from the manner in which the provision is structured and the ordinary and natural

import of the words used therein that the services intended to be covered are those which confer some direct, tangible and immediate benefit on the public or specific class of persons described at the specific premises in question. Thus concession type contracts to provide a service of immediate benefit to the class of persons described at the particular facility involved such as services for the consumption of food or beverage, lodging and service station facilities, laundry services, ground transportation services, informational services and the like seem to me to have been intended. The instant procurement, however, apparently involves a hoped for indirect and future benefit to the public at large.

At the hearing on MPA's initial motion to dismiss, counsel for MPA in describing the services to be performed³ stated that the purpose of the procurement was to develop in connection with a private freight consolidation company a service: "that would create better economies for users of the Port of Baltimore so that we could encourage more goods to be shipped through the Port . . . it does not want to spend money to do it but would let its name help sales, services, [and provide] expertise to bond together with the entity providing the service to bring this about." In further describing the services that would be performed by the private sector consolidation company he stated: "[t]hey are basically a clearing house of information, an entity of salesman . . . one group goes out and says all right we've got all these goods we're going to railroad, or some other shipper would say we've got this big bundle of goods, now

³In general the observations of MPA counsel during argument on MPA's initial motion as set forth herein were supported or at least not refuted at the hearing on the merits of the appeal.

you should give us better prices to ship them with [us rather than] someone else."

The services thus described will not be confined to State transportation facilities but will also be performed at other locations both in and out of Maryland and overseas. The services will not involve something that may be physically used or consumed by the public. What is sought is a business partnership with a provider of freight consolidation services to increase waterborne commerce by lowering the cost, through whatever means necessary, of the movement of goods through the Port of Baltimore. I do not believe that such a procurement, albeit having as its purpose a future benefit to the citizens of Maryland in terms of an improved economic climate in the Port of Baltimore, was intended to be covered by the 1986 law as set forth in Subsection (a)(2)(iv). Therefore, this Board would not have jurisdiction over such a procurement by virtue of such provisions. Thus, I conclude that neither (a)(1) above concerning an expenditure nor (a)(2) above concerning a revenue generating procurement confer jurisdiction on this Board.

'Counsel for MPA described the motivation for undertaking the procurement as generated by the conclusion of a consultant survey that "the freight consolidators in Baltimore have . . . not [been] giving the best prices that they could . . . in the Port of Baltimore . . . [A]nd that when you get freight consolidators or anybody else who doesn't give the best prices that tends to drive cargo away from the Port. The concept we're looking at is to increase competition within the Port, lower cost, bring more cargo in." Counsel for MPA indicated that the only control that MPA would exercise under the contract to be entered into with the successful proposer would be to "have a say" in the setting of its rates. Counsel also indicated MPA's delight with the "refreshing" competition to lower the rates charged by freight consolidators in Baltimore expected to be generated by a proposer who dropped out of the running in this procurement and indicated an intent to compete with whichever freight consolidator was ultimately awarded the contract.

Left for consideration are the provisions of (a)(3) above involving procurements by a State agency on behalf of another governmental agency or any other entity. Clearly this procurement is not being conducted by MPA on behalf of another governmental agency. The procurement is being conducted by MPA on its own behalf. While the ultimate beneficiary may (and should) be the citizens of Maryland, this is true of any activity, including procurement, undertaken by a State agency. Thus, I do not believe that the procurement should be viewed as one undertaken on behalf of the citizens of Maryland as an "entity", since such a construction would literally encompass any activity and make meaningless the specific provisions of (a)(1) and (a)(2) regarding specific types of procurements. I think a more logical construction is that the General Assembly intended subsection (a)(3) to only apply to activity where something more specific than the general public is the actual intended beneficiary of the procurement.

Since I conclude that the activity or service sought to be procured in this instance does not fall within the provisions of either (a)(1) , (a)(2) or (a)(3) above, I would find that the general procurement law does not apply to this procurement and dismiss the appeal.

