

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of SYSTEMS ASSOCIATES,)
INC.)
) Docket No. MSBCA 1257
Under Executive Department)
Solicitation No. EX-102)

November 7, 1985

Competitive Negotiation - Responsiveness - The concept of strict responsiveness, the legal obligation to perform the required services in exact conformity with the specifications, is not usually present in a competitive negotiation procurement since the agency's needs are not usually described by detailed specifications.

Competitive Negotiation - Acceptability of Proposals - The procurement officer has reasonable discretion to determine the proposals that are acceptable, or capable of being made acceptable, within the RFP's scope of work.

Competitive Negotiation - Acceptability of Proposals - The procurement officer reasonably determined that a contractor's technical proposal was acceptable for further consideration where the RFP required offerors to address the cabling and wiring required for installation of an automated data processing system, and the contractor's proposal included a price for cable material, recommended other contractors to install the cable, and offered to supervise cable installation.

Competitive Negotiation - Evaluation - Timeliness - An issue concerning the fairness of the technical evaluation with respect to the cabling requirement raised for the first time in the notice of appeal was a new ground for protest. This issue was waived since it was not first presented to the procurement officer for decision.

Competitive Negotiation - Acceptability of Proposals - The procurement officer reasonably determined that a proposal was acceptable for evaluation purposes where the proposal offered the necessary training for the existing staff to operate the equipment and to use the accounting software package.

Competitive Negotiation - Evaluation of Proposals - The procurement officer in selecting the most advantageous proposal reasonably relied on the scoring of the Evaluation Committee that reflected the experience and judgment of its members. The successful offeror's system, requiring minimal training for operators to reach effective and efficient operating status, reasonably received a high score for the training and implementation criteria compared to Appellant's score on this criteria.

Waiver of Minor Informality - Failure of the successful offeror to submit with its proposal a properly completed anti-bribery affidavit and properly completed non-collusion certificate was a minor informality which was cured by submission of these properly completed documents prior to award.

Competitive Negotiation - Technical Evaluation - Evaluation Criteria - Appellant's proposal was reasonably evaluated where the Evaluation Committee did not observe a demonstration of the actual equipment and software Appellant proposed, but observed Appellant's older systems at several sites and contacted references identified by Appellant in its proposal. The evaluation criteria related to performance history and customer satisfaction in a general and subjective sense and was not designed to gauge the technical capabilities of the current system being offered.

Competitive Negotiation - Evaluation Procedure - Timeliness - Since Appellant's objection to the methodology employed by the procurement officer to evaluate proposals was not timely submitted to him for consideration as required by Maryland procurement regulations, Appellant waived its right to have its appeal considered on this ground. However, the Board noted that where the weighted scores of two proposals were essentially equivalent, the procurement officer reasonably selected IBM based on its higher technical score since the RFP specified that technical evaluation carried more weight than price.

Competitive Negotiation - Price Change - Timeliness - Appellant's contention that the procurement officer improperly considered the successful offeror's reduction in price prior to execution of the contract is not properly before the Board for consideration. This issue was neither raised with the procurement officer nor decided by him. However, Appellant was not prejudiced by the procurement officer's acceptance of the price change since notification of the change in price was received by the procurement officer after he had completed his evaluation and selected the successful offeror having the most advantageous proposal based on its higher, unchanged price.

APPEARANCE FOR APPELLANT:

Nathaniel C. Fick, Jr., Esq.
Towson, MD
Baltimore, MD

APPEARANCES FOR RESPONDENT:

Louis J. Kozlakowski
Paul S. Sugar
Assistant Attorneys General
Baltimore, MD

OPINION BY MR. KETCHEN

This was a procurement by competitive negotiation for automated information processing equipment and related software that resulted in award of a contract to IBM Corporation (IBM). Appellant maintains that IBM's higher priced proposal did not meet the technical requirements of the specifications and thus was nonresponsive. Appellant also contends that the

proposals considered were improperly evaluated as to technical factors and price. Concomitantly, Appellant contends that its proposal, if properly evaluated, would have been the most advantageous to the State.

The Executive Department contends that the appeal is without merit as IBM's proposal met the RFP's requirements and was the most advantageous proposal based on consideration of price and the technical evaluation factors set forth in the RFP.

Findings of Fact

1. On November 23, 1984, the Executive Department issued an RFP for automated information processing equipment and related software for a pilot automation project for the four offices of the Governor's senior staff.

2. Following a preproposal conference held on December 18, 1984, the Executive Department issued an amendment to the RFP dated December 31, 1984. This amendment modified the technical and financial requirements of the RFP. The date for receipt of proposals was extended to January 25, 1985.

3. The RFP, in pertinent part, apprised offerors that:

"The Executive Department has elected to procure against a general statement of its requirements as opposed to a detailed specification of equipment, software and performance criteria. Bidders are encouraged to use the full capabilities and variations of their products and services to offer their best cost effective solution to the overall requirements of the Executive Department."

(RFP, Specifications, Section III, pp. 3, 12). Offerors were also advised, in pertinent part, that:

"Our needs are detailed. We are basically asking for off-the-shelf [hardware and software]. You should propose what you think best suits our needs as stated in our specifications, keeping in mind that you are in a competitive situation."

(RFP, Amendment, Addendum 1, p. 4; Agency Report Exh. 2). With regard to system design, the RFP stated that "[w]e do not have a particular system in mind. We are asking you to turn on your creative juices, consider our requirements and tell us what you think would best suit our needs."

4. Proposals were to be evaluated based on a "bid to" specification of 20 work stations and 9 printers with expansion capability to 30 work stations and 20 printers using the following configuration:

<u>Office</u>	<u>Work Stations</u>	<u>Printers</u>
Administrative Office	7	3
Appointments Office	6	2
Legislative Office	3	2
Press Office	4	2
	<u>20</u>	<u>9</u>

The "bid to" specification was requested by a vendor attending the preproposal conference. This "bid to" specification was used to evaluate the proposals on a uniform basis, although the actual contract award was to be based on the State's determination of its particular needs after all proposals were evaluated and at the time the contract was finally awarded based on the proposal deemed to be the most advantageous to the State. (Tr. 105). No objection to the "bid to" specification method of evaluating proposals was raised prior to the time specified for receipt of proposals.

5. Section III of the RFP, entitled "Specifications," set forth both mandatory requirements (RFP, Section III, Paragraph C) and desirable features (RFP, Section III, Paragraph D).

6. Section III, Para. C.13 (Mandatory Requirements) of the RFP required offerors to address the electrical and cabling requirements needed to support the installation and utilization of the proposed system. Although offerors were required to address cabling, they were not required to offer to install cabling. (Tr. 109). In this regard, the RFP stated that offerors should provide, as a desirable feature, system components that are unobtrusive in the historical setting in which they are to be employed with regard to electrical and cabling requirements. An amendment to the RFP provided sketches of the State Office Building for use by offerors and offerors were taken on a tour of the State House during the preproposal conference to assist them in estimating the amount of cabling required. In this regard, an offeror's implementation plan, requested as a desirable feature, was required to address pre-installation assistance that would be provided, equipment delivery, and installation. (RFP, Section III, Para. D.10).

7. Offerors were to list the costs of cabling associated with the installation of the proposed equipment on Appendices 1 and 3.

8. IBM's proposal addressed the cabling requirements needed to support installation of its system by including a price for the cost of cabling material for all the equipment it proposed. Although IBM did not propose to install the cabling as part of its price, it did recommend firms capable of performing this work, and offered technical and engineering assistance to assure that the cabling installation work would be compatible with the proper operation of its equipment.

9. Section III, Para. C.10 and C.11 of the RFP required offerors to propose systems operable by existing office staff having no technical background and experience and to propose any required training. RFP, Section III, Para. D.2 specified, as a desirable feature sought by the State, hardware and software requiring minimal operator training and technical assistance in order to be efficiently and effectively used by existing office staff. Offerors also were to describe, as a desirable feature, the training and implementation plan proposed, including the location, duration, and description of all training courses required to efficiently and effectively utilize the proposed equipment.

10. The RFP, as amended, further described the scope of training to be provided as follows:

You will price the training in Appendix 1. Appendix 1 is a summary of Appendix 2 through Appendix 3. The rest of the appendix [sic] are for future cost data. Appendix 3 addresses the training costs. We

have stated the number of people in each office. If you propose a terminal for every person, every person would have to be trained. We assumed we would get the cost estimate for training per person. Training costs would then be on a per person basis. Some of this is a matter of negotiation with the selected vendor. The selection process will be based on comparative prices. (Underscoring added).

11. IBM's proposal described the training assistance provided which was a combination of fee and no fee courses and both onsite and offsite training assistance. (Agency Report Exh. 21, pp. 32-33, 57-61, 72-79). Training on the accounting system offered by IBM was included within IBM's price. (Agency Report Exh. 17; Tr. 57-58, 129).

12. Appellant's proposal offered unlimited training on its equipment within its contract price.

13. The RFP required that offerors complete an anti-bribery affidavit and a non-collusion certificate. The required affidavits submitted with IBM's proposal were signed by an authorized representative of IBM, although the blanks relating to IBM's name and address were not filled in.

14. The RFP also required offerors to submit a minimum of three references consisting of current users of the hardware and software proposed. The RFP specified that the State, at its discretion, may contact an offeror's references as part of the evaluation process.

15. Proposals were required to be submitted in two volumes with Volume I to contain the technical proposal and Volume II to contain the financial proposal.

16. The financial proposal was to provide complete cost information for all hardware, software, and services proposed, including training and implementation assistance costs and monthly maintenance costs. Cabling costs associated with the installation of hardware were to be addressed and identified in the financial proposal.

17. Best and final offers were to be provided with the financial proposal. The total costs for an offeror's system were to be submitted on Summary Cost Form, Appendix 1. Component costs of the total costs were to be submitted on the RFP cost breakdown forms, Appendices 2 and 3. Costs for future functions, based on the potential expansion of the system into other State offices, were to be provided on RFP forms, Appendices 4 to 11.

18. Financial proposals were to provide pricing per device and per feature for direct purchase, for installment purchase on a 24 month basis, and for installment purchase on a 36 month basis. Other purchase or lease options could be proposed. Any special or one-time charges were to be identified and provisions were to be made for all products and services proposed, including transportation and other handling charges.

19. Section V of the RFP expressly apprised offerors that:

"The cost evaluation will be conducted on a three year life cycle basis and may include future functions. The State may utilize its own resources to satisfy any pre-installation, site preparation requirements

and reserves the right for evaluation and contract purposes, to substitute these costs for site preparation costs proposed by the vendor."

20. The contract was to be awarded to the responsible offeror whose proposal complied with the RFP's mandatory requirements and was determined to be the most advantageous to the State, considering both the financial and technical evaluation factors set forth in the RFP. The RFP required that moderately greater weight be assigned to the technical evaluation than to price.

21. An evaluation and selection committee (Evaluation Committee) consisting of five persons, including the procurement officer, was to evaluate the proposals received for compliance with the RFP's mandatory requirements.

22. After determining the proposals that were acceptable as being in compliance with the RFP's mandatory requirements, the Evaluation Committee was to conduct an evaluation of the technical merits of these proposals, and score them on a 100 point basis in accordance with the following specified evaluation criteria and subcriteria:

<u>Criteria</u>	<u>Weighting Factors</u>
<u>Technical Features</u>	25
Vendor understanding of RFP objective.	
Ability of components to support functional requirements.	
Equipment utility and ease of use.	
Modularity and ease of expansion and upgrade.	
Communications network configuration, expansion capability, functionality and ease of use.	
Site requirements and preparation.	
Compatibility with installed mainframes.	
Functions, applications and data security.	
Features that exceed mandatory minimum requirements.	
<u>Software (General and Applications)</u>	25
Software functionality.	
Software support.	
Ease of operation and "help" features.	
General software features.	
Application [of] software features.	
Software documentation.	
Future software and features.	
Additional software features.	
<u>Training and Implementation Assistance</u>	15
Training and implementation plan.	
Initial and follow-up training.	
Operation manuals.	
Additional technical support requirements.	

Maintenance and Vendor Support

15

- Commitment to assure the orderly and successful installation, implementation, utilization of all system(s), components and functions.
- Software documentation.
- Future software and features.
- Additional software features.
- Hardware/software maintenance plan.
- Availability of facilities and personnel.
- Scope of service provided.
- Response to service calls.
- Additional maintenance support features.

System(s) Reliability

10

- History of performance.
- Experience of other users.

Delivery and Installation

5

- Implementation plan.
- Ability to meet desirable delivery schedule.
- Installation requirements and support.

Guaranties and Warranties

3

Administrative

2

- Clarity and organization of proposal

Total

100

23. Nine proposals were received by January 25, 1985, the date set for receipt of proposals. The proposals submitted by NBI, Inc., International Business Machines Corporation (IBM), and Appellant were determined to be acceptable as meeting the RFP's requirements. The remainder were rejected as technically unacceptable.

24. The combined aggregate scores of the Evaluation Committee's technical evaluation based on the various criteria set forth above were as follows:

	<u>IBM</u>	<u>NBI</u>	<u>Appellant</u>
A. Technical Features	109	105	107
B. Software	111	108	102
C. Training & Implementation	61	56	62
D. Maintenance & Support	71	57	58
E. System Reliability	38	46	25

F. Delivery & Installation	23	24	24
G. Guarantees & Warranties	14	14	13
H. Administrative	9	7	8
	<u>436</u>	<u>417</u>	<u>399</u>

25. The Delivery and Installation criterion was weighted at 5 out of 100 points. For this criterion, Appellant received a total score of 24 points (average 4.8 points per evaluator). IBM received 22 points (average: 4.4 points per evaluator).

26. The Training and Implementation Assistance criterion was weighted at 15 points. For this criterion Appellant received the highest score of 62 (average: 12.4 points per evaluator). IBM received a total score of 61 (average: 12.2 per evaluator).

27. In the overall evaluation of the proposals, the technical evaluation was weighted at 60 points and price at 40 points to comport with the RFP requirement that moderately greater weight be given to technical evaluation over price.

28. The total technical scores received by the proposals were weighted (normalized) for comparison purposes using the 60 point weight assigned to the technical evaluation as follows:

	<u>IBM</u>	<u>NBI</u>	<u>Appellant</u>
Weighted Technical Score (Offeror's Score/Highest Score x 100 x .60)	60	57	54

29. The procurement officer initially evaluated the proposals on a three year installment payment basis using the following prices:

	<u>IBM¹</u>	<u>NBI</u>	<u>Appellant</u>
Hardware (Time Pay x 36 Mos.)	\$152,807	\$147,177	\$168,563
Software & Misc. (Outright Purchase)	29,095	32,215	10,800
Maintenance for 36 Mos.	83,520	41,652	46,510
Totals	<u>\$265,422</u>	<u>\$221,044</u>	<u>\$225,873</u>

For purposes of the evaluation, IBM's software and miscellaneous price was increased by approximately \$9,000 to \$29,095 by the procurement officer based on an error IBM made in summarizing its bid. (Tr. 95).

¹IBM's proposal did not include a cost for installing cable, although it did include the material cost for the cable required. Both NBI's and Appellant's proposals included a cost for the cable and a cost for cable installation.

30. Price scores for the three acceptable proposals were weighted (normalized) on the 40 point basis assigned for price and combined with the weighted technical scores in the following manner:

	<u>IBM</u>	<u>NBI</u>	<u>Appellant</u>
Weighted Price Score (Lowest Price/Offror Price x 100 x .40) Plus Weighted Technical Score	33	40	38
Total Weighted Score	<u>60</u> 93	<u>57</u> 97	<u>54</u> 92

31. The procurement officer conducted a second evaluation and ranking of proposals, also on a three year installment cost basis, after a mistake in the procurement officer's determination of NBI's price was discovered and adjusted from \$221,044 to \$198,773. (Tr. 82). The procurement officer's second evaluation gave the following results:

	<u>IBM²</u>	<u>NBI</u>	<u>Appellant</u>
Hardware (Time Pay x 36 Mos.)	\$152,807	\$123,794	\$168,563
Software (Outright Purchase)	29,095	33,327	10,800
Maintenance for 36 Mos.	<u>83,520</u>	<u>41,652</u>	<u>46,510</u>
Total	\$265,422	\$198,773	\$225,873
Weighted Price Score (Lowest Price/Offr Price x 100 x .40) Plus Weighted Technical Score	30	40	35
Total Weighted Scores	<u>60</u> 90	<u>57</u> 97	<u>54</u> 89

32. On May 28, 1985, the procurement officer informed NBI that it was to be recommended for award as the successful offeror.

33. By letter dated June 3, 1985, Appellant filed a timely protest objecting to award to either NBI or IBM. Appellant maintained that NBI did not meet the RFP requirements for on line storage capacity. Appellant maintained that IBM did not meet the RFP's requirements regarding (a) cable installation costs, (b) required affidavits, and (c) training costs. Appellant further contended that the Evaluation Committee did not observe a demonstration of its proposed equipment, properly evaluate Appellant's greater capability, or appropriately downgrade IBM's proposal with regard to its training plan.

²IBM's price did not include a cost for cable installation.

34. In a final decision issued on July 18, 1985, the procurement officer sustained Appellant's protest in part by rejecting NBI's proposal as technically unacceptable.³ However, the procurement officer denied Appellant's protest with respect to IBM's proposal.

35. By letter dated July 18, 1985, the procurement officer notified IBM that it was to be recommended for contract award as the successful offeror. In selecting IBM, the procurement officer used as a guideline his second technical and price evaluation which gave IBM the second highest overall weighted score next to NBI. In making his selection, the procurement officer also relied heavily on the fact that IBM had received a higher technical score than Appellant. (Tr. 103, 123).

36. Appellant submitted a timely appeal of the procurement officer's final decision to this Board on July 26, 1985.

37. Following the appeal, the procurement officer received a letter from IBM dated August 1, 1985 confirming an earlier conversation with an IBM representative. In it IBM stated that after receiving notice of Appellant's appeal it had reviewed its proposal and discovered a mistake in the cost it quoted for maintenance in its proposal. The mistake incorrectly increased its three year maintenance costs by \$39,805.00. The correct three year maintenance cost, according to IBM, was \$43,714.44, not the \$83,520 figure that had been used by the procurement officer in both his first and second evaluations of the proposals.

38. After receipt of IBM's August 1, 1985 letter, the procurement officer conducted a third evaluation using the corrected IBM maintenance cost, but with NBI's proposal still included as part of the scoring process. The results were as follows:

	<u>IBM⁴</u>	<u>NBI</u>	<u>Appellant</u>
Hardware (Time Pay x 36 Mos.)	\$152,807	\$123,794	\$168,563
Software (Outright Purchase)	29,095	33,327	10,800
Maintenance for 36 Mos.	<u>43,714</u>	<u>41,652</u>	<u>46,510</u>
Total	<u>\$225,616</u>	<u>\$198,773</u>	<u>\$225,873</u>
Weighted Price Score (Lowest Price/Offer Price x 100 x .40)	35	40	35
Plus Weighted Technical Score	<u>60</u>	<u>57</u>	<u>54</u>
Total	95	97	89

³Although NBI submitted a timely appeal of the procurement officer's final decision on July 25, 1985, it subsequently withdrew its appeal. The Board dismissed NBI's appeal (Docket No. MSBCA 1256) with prejudice on September 19, 1985.

⁴IBM's price does not include cable installation costs.

39. The following results of the procurement officer's third evaluation were presented to the Board of Public Works on August 14, 1985 with a recommendation for award to IBM pursuant to COMAR 21.10.02.10.⁵

	<u>Evaluated Cost</u>	<u>Technical⁶ Score</u>	<u>Total Weighted Score</u>
IBM	\$225,616	433	95
Appellant	225,873	394	89

40. The Board of Public Works approved the execution of a three year lease purchase contract to IBM to run from August 31, 1985 to August 31, 1988. Approval of award to IBM was based on the three year cost of the system and equipment selected for award by the procurement officer, and one year's maintenance cost as follows:

Hardware Costs (36 months installment purchase)	\$121,808.88
Start-up Costs	27,625.43
First Year Maintenance Costs	<u>2,932.90</u>
	<u>\$152,367.21</u>

Decision

I. Cabling

Appellant maintains that IBM does not meet the requirements for cabling and thus its proposal is nonresponsive. Appellant argues this because IBM proposed to supply cable but did not propose to install the cable. The State, on the other hand, maintains that IBM's proposal was acceptable and met the RFP requirement that cabling installation be addressed since its proposal included the cost of cabling material, recommended contractors capable of installing cabling, and offered consulting services to supervise the installation.

In a competitive negotiation procurement, it is usually true that "responsiveness," the legal obligation to perform the required services in exact conformity with the specifications, is an inapposite standard for determining whether proposals may be considered, since the agency's needs usually are not

⁵COMAR 21.10.02.10 provides that if a timely protest or appeal has been filed the contract can only be issued if the Board of Public Works finds that execution of the contract without delay is necessary to protect substantial State interests.

⁶There was a modification in the technical scores of IBM and Appellant between the second and third evaluations conducted by the procurement officer. This modification corrected several tabulation errors on the evaluators individual scoring sheets but did not change the weighted technical scores of the proposals which remained IBM (60), NBI (57) and Appellant (54) and thus did not affect the total weighted scores.

adequately described by detailed specifications. Compare Engineered Systems, Inc., Comp. Gen. Dec. B-184098, March 2, 1976, 76-1 CPD ¶144; 51 Comp. Gen. 247 (1971); Baltimore Motor Coach Co., MSBCA 1216 (January 8, 1985) p. 23. See generally: COMAR 21.05.01.02.⁷ Accordingly, the group of offerors may include those firms who submit acceptable or potentially acceptable proposals within the general framework of the work described by the RFP. COMAR 21.05.03.03B.⁸ Identification of those proposals that are acceptable, or capable of being made acceptable, is a matter within the reasonable discretion of the procurement officer. Compare Adden Furniture, Inc., MSBCA 1219 (January 2, 1985). See also: M/A-COM, Inc., MSBCA 1258 (September 23, 1985).

Here, offerors were required to address cabling by advising the State how cable installation should proceed given the historic nature of the State House. The RFP, however, indicated that the State could choose to perform such work with its own forces or by separate contract. IBM elected to include the cost of the cabling, technical assistance to oversee and coordinate cabling installation and installation of its equipment, but did not offer to install the cabling as part of its price. Since the RFP, in very general terms, required offerors to address cabling, and IBM did so, we find the procurement officer did not act unreasonably in finding IBM's proposal acceptable.

Appellant's protest did not directly object to the reasonableness of the assessment of IBM's treatment of cabling, although the procurement officer's final decision noted that the offerors' proposals with respect to cabling were evaluated under the delivery and installation criterion. The allegation that the technical evaluation unfairly assessed IBM's treatment of cabling first was raised in the notice of appeal. Since this issue raised a new ground for protest and was not timely submitted to the procurement officer for his consideration pursuant to Article 21 of the Code of Maryland Regulations,⁹ Appellant waived its right to have its appeal considered on this ground. Compare National Elevator Co., MSBCA 1252 (October 15, 1985); Mitek Systems, Inc., Comp. Gen. Dec. B-208786.3, May 10, 1983, 83-1 CPD ¶494.

Assuming, arguendo, that the cabling evaluation issue was properly raised, we have reviewed the technical evaluation which shows that IBM was scored lower than Appellant on the delivery and installation criterion (with a 5 point value) under which cabling was considered. The record otherwise does not show that the proposals were unfairly evaluated. Under these circumstances, we would not find that the procurement officer's exercise of discretion to award the contract to IBM on the basis of its overall higher technical evaluation than Appellant's was unreasonable. Compare Information Control Systems, MSBCA 1198 (August 29, 1984).

⁷COMAR 21.05.01.02 provides that contracts in excess of \$7500 shall be awarded by competitive sealed bidding unless it is determined that specifications cannot be prepared that permit an award on the basis of the lowest bid price or the lowest evaluated bid price.

⁸COMAR 21.05.03.03B provides that the procurement officer may determine that for purposes of conducting negotiations proposals are acceptable or reasonably susceptible of being made acceptable.

⁹COMAR 21.10.02.02 and COMAR 21.10.02.09A require a protester to raise its concerns initially with the procurement officer representing the agency. See also: Md. Ann. Code, State Finance and Procurement Article, §17-201.

II. Training and Implementation Plan

Appellant maintains that IBM's proposal is nonresponsive since it does not reflect true training costs. Appellant further contends that IBM's offer did not include training for the accounting software package so that the State will have to enter a separate contract to obtain this training.

However, the record reflects that IBM's proposal included within its price the training necessary for the existing staff to operate its equipment and the training necessary for the accounting software package. The procurement officer thus reasonably determined that IBM's proposal was acceptable for purposes of evaluation. Compare Adden Furniture, Inc., supra; Baltimore Motor Coach Co., supra; Engineered Systems, Inc., supra, 76-1 CPD ¶144.

Appellant next complains that its proposal, which offered unlimited training at its contract price, is superior to IBM's proposal which provided only a limited amount of training. Appellant thus argues that its proposal should have received a higher score, and maintains that the fact that it did not receive a higher score compared to IBM is evidence of an arbitrary evaluation procedure.

Here, the evaluators' scoring reflected their experience and judgment about the quality of training offered by each proposal and the procurement officer was entitled to rely on this when he made his decision. In this regard, the technical evaluation, in addition to the amount of training and its cost, covered subjective factors requiring an analysis of how the training plans would be implemented, initial and follow-up training, operator manuals, and any additional support requirements offered. We note also that one of the desirable features sought by the State was a system providing hardware and software requiring minimal operator training in order to be efficiently and effectively used by existing office staff. Thus, a system requiring minimal training to reach effective and efficient operating status, reasonably was more highly scored than a system requiring more intensive training. In summary, we cannot find that the score received by IBM for the amount of training it offered, compared to the score received by Appellant for the training it offered, was unreasonable.

III. Affidavits

Appellant contends that IBM's proposal should have been rejected as nonresponsive for failure to properly complete the anti-bribery affidavit and the non-collusion certificate included in the RFP. Each affidavit required by the RFP contained detailed affirmative representations to which the signer would agree by his execution of the affidavit. Additional information was required to be provided if the affirmative representations required by these affidavits could not be made. The affidavits also required the signer to specify his title, the firm represented, and the firm's address.

The affidavits included in the RFP, to be executed by an offeror, are an express requirement of Maryland law¹⁰ and are intended to assist the State in determining eligibility (responsibility) to receive a contract award. Failure to submit properly signed and completed affidavits raises an issue of

¹⁰See, e.g., "Maryland's Anti-Bribery Law." Md. Ann. Code, State Finance and Procurement Article, §3-405(h)(1).

responsibility. However, information bearing on responsibility does not alter an individual offeror's commitment to perform the work and, for this reason, failure to submit such information with the offer is considered to be a minor informality which may be cured or waived, as appropriate. Maryland Supercrete Co., MSBCA 1079 (October 14, 1982) p. 7. Compare Carpet Land, MSBCA 1093 (January 19, 1983).

Here, the affidavits submitted with IBM's proposal were signed, although information relating to the title of the person signing the affidavits was not indicated, and IBM's address was not provided in the appropriate places. IBM subsequently submitted fully completed and signed affidavits on August 2, 1985. While the failure to provide the requested information in the manner and form sought may represent careless business practice, this oversight was a minor irregularity and does not require rejection of IBM's proposal as unacceptable as a matter of law. Maryland Supercrete, supra, p. 8.

IV. Technical Evaluation

Appellant maintains that the technical evaluation was improper because the Evaluation Committee did not observe a demonstration of the actual system proposed by Appellant. Appellant also maintains that the systems observed during site visits were five year old systems, two generations removed from Appellant's current product.

Here, the RFP permitted, but did not require, demonstrations of the proposed equipment and software. The evidence in the record does not indicate that the evaluators' scores reflected anything other than their background and experience, or such results as would be expected from an inherently subjective scoring process. Appellant otherwise has not demonstrated that the evaluators' scores, on which the procurement officer relied in making his technical judgment, were improperly based. In this regard, members of the Evaluation Committee visited two sites identified in Appellant's proposal and observed demonstrations of Appellant's systems in use. During one of these site visits, Appellant failed to respond promptly to a service call. References given by Appellant in its proposal were also contacted by the procurement officer.

In addition, the technical evaluation criteria specified a range of subjective factors directed to the system being offered. The system reliability criterion consisting of subcriteria labeled (a) history of performance and (b) experience of other users is the most directly related to Appellant's complaint. However, this criterion and its subcriteria would apply to Appellant's older equipment which was observed by the Evaluation Committee since the criteria apparently sought to obtain some sense of Appellant's past history and reputation with its clients, no matter what the age of the equipment involved. Thus it was not material that the references contacted had older equipment in use, as the criteria, it seems to us, was not being used to judge the technical abilities of a particular system, but instead was being used to gauge more subjective aspects such as the performance history and customer satisfaction with any system supplied by the offeror. Under these circumstances, the record does not demonstrate that Appellant's proposal was unfairly evaluated or that the procurement officer acted unreasonably in selecting the IBM system based on its higher technical score. Compare Information Control Systems Corp., MSBCA 1198 (August 29, 1984) p. 8; Baltimore Motor Coach Co., MSBCA 1216 (January 8, 1985).

V. The Competitive Negotiation Selection Process

Appellant first apprised the Board by letter dated September 16, 1985, that the evaluation methodology employed by the procurement officer in selecting IBM as the successful offeror, with a higher evaluated score and at a higher price than Appellant's price, was improper and unreasonable. We will first address whether this issue is properly before the Board for consideration.

COMAR 21.10.02.02 and COMAR 21.10.02.09 provide that protesters initially are required to seek timely resolution of their complaints by protest to the procurement officer representing the agency. Since the issue of improper proposal evaluation was not timely submitted to the procurement officer for his consideration, Appellant waived its right to have its appeal considered on these grounds. Compare National Elevator Co., MSBCA 1252 (October 15, 1985); Eagle International, Inc., MSBCA 1121 (March 2, 1983); Mitek, supra.

Assuming, arguendo, that the issue regarding the procurement officer's evaluation methodology is properly before the Board, we would still deny the appeal. We have said:

"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. Beilers Crop Service, MSBCA 1066, September 16, 1982, p. 6; B. Paul Blaine Associates, Inc., supra, [MSBCA 1123, August 16, 1983] p. 14"

Baltimore Motor Coach Co., MSBCA 1216 (January 1, 1985) p. 12.

Evaluation schemes in competitive negotiation procurements are used to judge the relative merits of each proposal in order to select the most advantageous one. They should give offerors as good an idea as is reasonably possible of the basis for the selection considering the subjectivity and uncertainty involved. Once offerors are informed of the criteria against which their proposals will be evaluated, the procuring agency is required to adhere to those criteria, or inform all offerors of the changes made in the evaluation scheme. Compare 56 Comp. Gen., 835, 838 (1977); Telecommunications Management Corp., Comp. Gen. Dec. B-190298, January 31, 1978, 78-1 CPD ¶180; BDM Corporation, Comp. Gen. Dec. B-211129, August 23, 1983, 83-2 CPD ¶234. However, unless a solicitation sets forth a precise numerical formula, with price included as a factor, and provides that award will be made to the offeror whose proposal receives the highest number of points, award need not be made on that basis. Telecommunications Management Corporation, supra. In this regard, point scores, based on the use of an informal formula that compares technical evaluation and price, are merely guides for intelligent decision making by the selecting official. Compare Group Hospital Service, Inc. (Blue Cross of Texas), Comp. Gen. Dec. B-190401, February 6, 1979, 79-1 CPD ¶245; BDM Corp., supra, 83-2 CPD ¶234, pp. 6-7. Where such a formula is not mandated by the RFP itself, the procurement officer clearly retains discretion to select the higher quality proposal as being the most advantageous to the State, even at a higher price,

if the selection is reasonable and consistent with the established evaluation criteria. Compare Grey Advertising, Inc., Comp. Gen. Dec. B-184825, May 14, 1976, 76-1 CPD ¶325.

Following rejection of NBI's proposal, the procurement officer selected IBM on the basis of its second place ranking using his informal normalizing formula with NBI included and the fact that IBM had the highest technical evaluation score. While Appellant's weighted total score of 89 and IBM's weighted total score of 90 are essentially equivalent, the procurement officer acted reasonably in selecting IBM on the basis of the original formula ranking, with NBI included, since this weighing method was merely an informal guideline for his use in evaluating the proposals. In this regard, the selection of IBM with a higher price over Appellant, even though their weighted scores are essentially equivalent, was reasonable and consistent with the evaluation criteria since IBM had the highest technical score which carried more weight than price. Compare Group Hospital Service, Inc. (Blue Cross of Texas), supra; Stephen J. Hall & Associates; Thomas N. Anderson, Jr.; Cunningham, Short, Berryman and Associates, Inc., Comp. Gen. Dec. B-180440, B-132740, July 10, 1974, 74-2 CPD ¶17; Mitek, supra.

Assuming, arguendo, that the procurement officer had re-evaluated Appellant's and IBM's proposals, without NBI included in the informal weighing formula as Appellant suggests would have been fairer, the weighted total scores would have shown Appellant outscoring IBM 94 to 93.7.¹¹ An award to IBM still would have been appropriate and consistent with the RFP evaluation criteria given IBM's higher technical score. As we have said, the RFP specified that technical considerations were moderately more significant in this procurement than price, and the informal normalization formula was merely a guideline used by the procurement officer in exercising his subjective judgment to determine which proposal was the most advantageous to the State.

VI. IBM's Change in Price

Appellant next argues that it was improper for the procurement officer to accept IBM's August 1, 1985 change to its proposal that resulted in a \$39,805 decrease in its price, down to \$225,616, and to recommend that the Board of Public Works approve execution of a contract based on IBM's proposal which reflected this price reduction. This issue is not properly before us for consideration since it was neither raised with the procurement

11	<u>IBM</u>	<u>Appellant</u>
Price	\$267,762*	\$225,873
Weighted Price Score (Lowest Price/Offer price x 100 x .40)	33.7	40
Weighted Technical Score	<u>60.0</u>	<u>54</u>
Total	93.7	94

* The price used for IBM in this evaluation includes a cable installation cost estimate.

officer, nor decided by him.¹² Compare National Elevator Co., MSBCA 1252 (October 15, 1985); Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984); Mitek, supra. However, for guidance of the parties we nonetheless provide the following comments assuming, arguendo, that the issue is properly raised.

When IBM reduced its price on August 1, 1985, the procurement officer already had selected IBM as the successful offeror. One might wonder whether the State would have had to absorb IBM's mistake alleged to be evident on the face of the proposal if IBM had not come forward with an offer to change its price. However, at that point in the procurement process, the procurement officer already had decided to select IBM as the successful offeror using its price of \$265,422 because acceptance of IBM's proposal based on technical superiority, albeit at the higher price, was, in his judgment, the most advantageous proposal to the State. (Tr. 103, 123). Thus, Maryland procurement law permits acceptance of this change.¹³ In other circumstances, assuming selection of IBM had not yet been made, acceptance

¹²Appellant on appeal also questioned the correctness of IBM's start-up charges and equipment costs presented to the Board of Public Works with a recommendation for approval of contract execution pursuant to COMAR 21.10.02.10. In addition, Appellant questioned the approval of contract execution that was based on a quantity of equipment less than the quantity of equipment specified in the "bid to" specification used to evaluate proposals. However, Appellant did not prove that there were errors in the material submitted to the Board of Public Works. In addition, Appellant willingly participated in the procurement without raising the propriety of the "bid to" specification methodology for evaluating proposals followed by selection of the final configuration of equipment from the successful offeror. While we do not rule on the propriety of this procurement method, we find that Appellant waived its right to complain on this ground since objection was not raised prior to receipt of proposals. Compare Chesapeake and Potomac Telephone Co. of Maryland, MSBCA 1194 (July 30, 1984).

¹³COMAR 21.05.02.03 F references COMAR 21.05.02.10 which provides, in pertinent part, as follows:

"B. . . . A late modification of a successful bid which makes its terms more favorable to the State shall be considered at any time it is received [before award] and may be accepted.

of IBM's offer to lower its price could have been found to be contrary to Maryland procurement law unless other offerors were afforded an equivalent opportunity to submit a price change. See: COMAR 21.05.03.03C(3) & C(4).¹⁴

For the foregoing reasons, therefore, the appeal is denied.

¹⁴COMAR 21.05.03.03C(3) provides, in pertinent part, that offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations and clarification of proposals. COMAR 21.05.03.03C(4) provides that the head of the procuring agency or his designee may make a written determination that it is in the State's best interest to conduct additional discussions or change the procurement agency's requirements and require another submission of best and final offers.