BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of TRANSIT CASUALTY COMPANY	)	
	)	Docket No. MSBCA 1260
Under State Treasurer's Office Contract: State of Maryland, Department of Transportation, Mass Transit Administration Metropolitan Transit System Claims Administration Service	)	

December 18, 1985

Board of Contract Appeals - Motion to Dismiss - The Board may determine in summary fashion requests for relief to include a motion to dismiss where there is no dispute as to material facts or the issue to be determined involves only a question of law.

Bid Protest - Timeliness - Protests based upon alleged improprieties which are apparent before the closing date for receipt of proposals are untimely unless filed before the closing date for receipt of proposals. COMAR 21.10.02.03A. Where the RFP set forth that the Treasurer would award the contract (for claims administration services), a protest challenging his authority to do so filed after the date for receipt of proposals was untimely.

Award of Contracts - Authority to Contract - The Board of Public Works has legally delegated to the Treasurer the authority to approve and award contracts for claims administration services. Therefore, even if Appellant had filed a timely challenge to the proposed award of the contract by the Treasurer, its appeal would have been denied.

Bid Protest - Timeliness - Appellant's failure to challenge the determination by the Treasurer to seek claims administration services by competitive negotiation rather than competitive bid prior to the closing date for receipt of proposals was untimely pursuant to COMAR 21.10.02.03A.

Bid Protest - Timeliness - Alleged Violation of Maryland Public Ethics Law - The Board has no jurisdiction to determine whether there has been a violation of the Maryland Public Ethics Law. Such determination is committed to the Public Ethics Commission under Article 40A. However, assuming arguendo, some nexus between allegations of ethical impropriety and this Board's jurisdiction over bid protests, such allegations must be timely filed pursuant to the provisions of COMAR 21.10.02.03 or consideration of such allegations by this Board is barred.

Negotiated Contracts - Evaluator Bias - Bias will not be attributed to procurement officials based on inference or supposition. The record failed to support Appellant's allegations that one or more of the evaluators were biased against it and/or biased in favor of its competitor.

Negotiated Contracts - Numerical Rating - Scoring of Proposals - Minor errors in adjustments made by the chairperson of the evaluation committee to the price of Appellant's proposal and that of its competitor in a good faith attempt to make pricing of the proposals comparable, did not require sustaining the appeal where the differential in scoring of the proposals resulting from a correction of such errors would not overcome the Appellant's low score in the technical area.

Negotiated Contracts - Evaluation of Proposals - Procurement officials enjoy a reasonable degree of discretion in evaluating proposals. However, proposals may only be evaluated on the basis of the written and oral material that is presented to the evaluator. Here, despite the fact that Appellant had been the encumbent provider of the services being procured for 30 years, the record did not support Appellant's contention that the low ratings assigned to its proposal as contrasted with the high ratings assigned to its competitors proposal were arbitrary or contrary to all objective fact such as to call into question the bona fides of the exercise of the evaluators' discretion.

Negotiated Contracts - Discussions - If a state agency conducts discussions or negotiations with one offeror, it must do so with all offerors who have submitted proposals which are acceptable or susceptible of being made acceptable. Here the record did not support Appellant's contention that it was not afforded the opportunity in oral discussions to amend its proposal to include a service (risk management) that it had not previously offered to provide but had been offered by its competitors.

APPEARANCES FOR APPELLANT:

Morton A. Sacks, Esq.
Thomas L. Crowe, Esq.
Ray R. Fidler, Esq.
Edward J. Bedford, Esq.
Cable, McDaniel, Bowie & Bond
Baltimore, MD

APPEARANCES FOR RESPONDENT:

William A. Kahn
Margaret Lee Quinn
Gail Cohn
Assistant Attorneys General
Baltimore, MD

APPEARANCES FOR INTERESTED PARTY:

Henry R. Lord, Esq.
John E. Griffith, Jr., Esq.
Piper & Marbury
Baltimore, MD

Thomas G. Young, III, Esq.
Steven E. Leder, Esq.
Lord, Whip, Coughlan & Green, P.A.
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This appeal arises from the State Treasurer's decision as procurement officer denying Appellant's protest and supplemental protest on numerous grounds of the proposed award of the captioned contract to Marsh & McLennan Incorporated (M&M). Appellant took a timely appeal from the procurement officer's decision.[1] The appeal contained four counts. Count I alleged error in the procurement officer's determination that award of the contract by the State Treasurer without approval by the Board of Public Works was proper. Count II alleged error in the determination of the Treasurer to seek the requested services through competitive negotiation rather than by competitive sealed bid. Count III alleged violations of due process. Count IV alleged that proposed award of the contract to M&M was in violation of the Maryland Public Ethics Law.

The Board granted M&M's Motion for Summary Disposition as to Counts I, II, IV and a portion of Count III. In the surviving allegations of Count III, Appellant contends, inter alia, that its rights to due process were violated because the evaluation committee was biased against Appellant and in favor of M&M and the proposals of M&M and Appellant were improperly evaluated both as to price and technical factors.

Findings of Fact - Part I

The numbered findings of fact in Part I (1-32) set forth for convenience of reference the Board's findings concerning events and activity that have led to this appeal to the extent possible in chronological order. The findings of fact in Part II (33 - 45) do not lend themselves to such ordering.

1. On April 12, 1985, the State Treasurer issued a Request for Proposals (RFP) (Ex. 1, AR), soliciting offers for liability insurance and/or claims administration services for the Mass Transit Administration's (MTA) bus and subway operations. Proposals were due on June 20, 1985. (Ex. 1, AR, ¶1.2). The contemplated contract or contracts were to begin July 1, 1985, upon expiration of the liability insurance policy and claims administration service agreement then in place with Appellant.[2] The RFP permitted an offeror to present a proposal for liability insurance, claims services, or both. (Ex. 1, AR, ¶2.1). The RFP stated a preference for a three-year insurance policy; it also indicated that proposals for a one-year term would be entertained. (Ex. 1, AR, ¶2.3). The latter alternative was included in recognition of the chaotic and deteriorating state of the liability insurance

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[1]The events leading to the protest, the protest and appeal occurred while the State procurement law was still codified in Article 21 of the Annotated Code. Accordingly, statute references are to Article 21 rather than the State Finance and Procurement Article.

[2]In 1984 the Treasurer had awarded Appellant a one year insurance policy with a $25,000 deductible or SIR (self insured retention) per occurrence (bus) and $500,000 SIR per occurrence (subway). Also awarded was a one year claims administration service contract. The term of the claims administration service contract (Ex. 37, AR) was for one year beginning July 1, 1984 and provided for extensions for one or more annual periods should the insurance policy be likewise extended.

market in the Spring of 1985. (Oct. 21 Tr. 18-21). The RFP provided for self insured retentions ranging up to $1,000,000 (bus) and $2,000,000 (subway). (Ex. 1, AR, ¶2.7).

2. The RFP designated the State Treasurer, William S. James, as the procurement officer, (Ex. 1, AR, ¶1.1), and stated that the contract or contracts for insurance and claims services would be awarded by him. (Ex. 1, AR, ¶5.3). The RFP also designated the State Insurance Manager, Jane Harrell, as the "sole point of contact" with respect to the procurement. (Ex. 1, AR, ¶1.1). The RFP contemplated an evaluation committee's review of proposals. (Ex. 1, AR, ¶5.1). Evaluations were to be based upon price (50%), the insurance company's "Best's" rating[3] (10%), the capacity of the offeror's proposed claims service to handle claims (30%) and the completeness and quality of the proposal and oral presentation, including the offeror's explanation of any deviations of its policy form (10%). (Ex. 1, AR, ¶5.4).

The services sought in connection with Claims Administration Service were described in Paragraph 2.5C of the RFP as follows:

> C. Claim Administration Service
>
> 1. The offeror/insurer agrees to assume the responsibility of the Named Insured to investigate, settle, defend, and pay all claims or suits arising under the policy. This includes but is not limited to claims and suits brought against driver employees of the Named Insured on account of injury or damage to passengers or other third parties. The offeror/insurer will bear and absorb all claim expenses related to this service identified herein. The insurer will also pay all allocated claim expenses and for the cost of defense of drivers of the Named Insured charged with traffic violations wherein passengers or third parties have been injured or damaged.
>
> 2. The offeror/insurer will also provide the same claim service described above for those claims coming within the Named Insured's deductible retention. This claim service shall continue until all claims arising under the policy have been settled and paid.
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> 3. The successful offeror's/insurer's claim settlement authority, without prior approval of the MTA, is negotiable. Initially, it is the intent of the MTA to establish a limit. Settlements over this limit will require the approval of the MTA. This limit will be periodically reviewed and adjusted based on experience developed.
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> 4. The MTA, if necessary, will negotiate with the successful offeror/insurer an escrow deposit account to cover funds paid by the offeror/insurer for losses within the Insured's deductible retention.

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[3] A "Best's" rating is an industry wide rating for insurance carriers which indicates their underwriting strength and financial capability. (Oct. 21 Tr. 27).

5. The offeror/insurer must furnish prompt claim service, on call, 24 hours a day. On specific request of the Named Insured, the offeror/insurer must furnish immediate claim service. The offeror/insurer may be required to establish a claim service with the service area of the Named Insured, and this should be taken into consideration when pricing this service. The MTA will negotiate with the successful offeror/bidder concerning this feature and the number of claims adjusters needed on premises.

6. The offeror/insurer must furnish the Named Insured with separate quarterly statistical reports indexing all claim activities on the following basis:

   a. Losses falling within the Insured's deductible retention, and

   b. All others.

   These statistical reports will include losses reported, paid, open, (outstanding) claims, and open reserves. The reports are to be delivered to the insured within thirty (30) days following the reporting quarter period.

   On request of the insured, the offeror/insurer will furnish a "detail" report covering individual claim data.

7. The offeror/insurer will include with its proposal a brief profile of its claim service facilities with emphasis on the adjusting staff numbers and experience within the metropolitan Baltimore area. If independent adjusting organizations are utilized, furnish the identity, capacity and experience of the adjusting firm(s) used.

8. The offeror/insurer must provide the Named Insured with a Safety Program. The offeror's/insurer's proposal will outline briefly features of a proposed Safety Program.

9. NOTE: In consideration of this Claim Administration Service provided for the Named Insured, the offeror is to promulgate and quote a separately identified Claim Administration Service fee.

   Under the current policy contract, the incumbent insurer's monthly billings to the MTA are for the actual claims paid only. The insurer absorbs all claim adjustment costs and traffic court costs related to its representation of drivers charged with traffic violations where passengers or third parties are injured or damaged.

(Ex. 1, AR, ¶2.5C).

The RFP at paragraph 4.4 provided:

> 4.4 Deviations from Specifications
>
> The offeror has the responsibility to identify and explain any and all deviations, modifications or changes in its proposal not in compliance with the specifications contained in this RFP. Failure to comply could result in the Treasurer's rejection of the proposal.

(Ex. 1, AR, ¶4.4).

The RFP at paragraph 5.2 provided:

> 5.2 Discretion as to Deviations and Compliance
>
> The Procurement Officer will determine which offerors have met the basic requirements of this RFP. The Procurement Officer has the sole right to determine whether any deviations from the requirements of this RFP is substantial in nature, and he has the right to reject unacceptable proposals.

(Ex. 1, AR, ¶5.2).

The RFP at paragraph 5.3 provided:

> 5.3 Competitive Negotiations
>
> The Evaluation Committee will conduct negotiations with all offerors whose proposals are deemed acceptable or potentially acceptable by the Procurement Officer. However, no negotiations will be conducted if the Committee determines that such negotiations are unnecessary because of time of delivery or performance does not permit negotiations or the existence of adequate price competition indicates that acceptance of an initial offer without negotiations would result in a fair and reasonable price. Upon completion of these negotiations, the Evaluation Committee will recommend an award to the Treasurer. Upon receiving a recommended award from the Evaluation Committee, the Treasurer shall either accept the recommendation and award the contract to the recommended offeror, or reject the recommendation and remand the matter to the Evaluation Committee.

(Ex. 1, AR, ¶5.3).

The RFP at paragraph 2.3 provided:

> 2.3 Policy Term
>
> The Treasurer prefers a three (3) year term. We will consider a three (3) year term payable in installments with the second and third year renewal terms subject to premium negotiation. Should a three year policy not be available, consideration will be given to a one (1) year policy term.
>
> Coverage and Claim Service must extend to all claims arising out of events which occur during the policy term, including claims occurring within the policy term, but made after the policy termination. Determination of liability and claim service must continue until all claims are paid or settled.

(Ex. 1, AR, ¶2.3).

3. Ms. Harrell, Carol Hall, the Assistant State Insurance Manager who reports directly to Ms. Harrell, both appointed by the Treasurer and Lanetta Finnegan, an MTA employee appointed by the MTA Administrator, subsequently formed the membership of the evaluation committee. (Sept. 24 Tr. 103-104, 126; Nov. 11 Tr. 166; Nov. 12 Tr. 92; Ex. 47, AR). Ms. Harrell was principally responsible for the decision to issue the RFP based on representations of Appellant's broker, the Layton Company, in July 1984 that due to lapse of certain re-insurance treaties Appellant would not be able to continue under the liability insurance policy beyond July 1, 1985.[4] (Sept. 24 Tr. 110-113; Sept. 30 Tr. 184-185; Oct. 21 Tr. 13). Ms. Harrell was also primarily responsible for drafting the RFP (Sept. 24 Tr. 111) using various boiler plate provisions and, in particular, language from invitations for bids (IFB's) issued in May and November of 1982 by the Treasurer's office. (Sept. 24 Tr. 114-117; Sept. 26 Tr. 3, 7, 8-26; App. Exs. 67, 84). Ms. Harrell started the process of gathering information necessary to prepare an RFP on January 31, 1985 (Ex. 43, AR; Oct. 21 Tr. 13-14) expressing concern that MTA provide her with necessary information as soon as possible in a letter dated March 1, 1985 and follow-up telephone call of March 15, 1985. (Exs. 40, 41, AR; Oct. 21 Tr. 15-18).

4. In February of 1985, Ms. Harrell had received from Mr. John Darlington, a Vice President of M&M responsible for operations in its Baltimore and Washington D.C. offices, a copy of a memorandum from M&M's New York home office alluding to financial reverses being experienced by Appellant and directing that a copy of the memorandum be sent to all clients. (Ex. 38, AR). This memorandum was apparently sent to Ms. Harrell by Mr. Darlington in the normal course of business as a result of MTA also being a client of M&M with respect to M&M being the broker on the MTA bus physical damage insurance underwritten by Appellant. This memorandum also apparently was to alert the Treasurer's office to the potential for release of re-insurance carriers presently committed to Appellant under its existing liability policy with MTA thus permitting them to commit to other bidders if

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[4]As noted in footnote 2 above, the term of Appellant's claims administration service contract was co-extensive with its insurance liability policy contract.

Appellant were disqualified from any re-bid of the liability insurance policy in view of the limited amount of excess insurance available for the MTA risk in the London market. (Oct. 21 Tr. 14-15; Oct. 24 Tr. 144-149).

On April 19, 1985, Ms. Harrell sent the RFP specifications to Mr. Ronald J. Hartman, the MTA Administrator. The letter forwarding the specifications to Mr. Hartman stated in part:

> Please be aware that Transit Casualty's financial condition is in a state of turmoil currently. Both Marsh & McLennan and A&A have corporate directives forbidding their use of Transit Casualty. With this in mind, I have told Layton Company if they use Transit Casualty that we will have to have evidence as to their current and projected financial condition. (Ex. 63, AR).

On April 30, 1985, Ms. Harrell received, unsolicited, a handwritten note stamped confidential from Mr. Darlington. Attached to this note was a telex addressed to all heads of offices from M&M's New York home office respecting Appellant's financial condition and incorporating matter extracted from a recent Securities and Exchange Commission Form 10K pertaining to Appellant. The note stated: "Jane - This came over our telex last Friday night. It looks as if they are out of business. I would suggest that you secure a complete copy of their 10K for review. What does Commissioner Muhl have to say? I would be interested." (Ex. 36, AR).

Mr. Darlington testified that he would have sent this information to the State of Maryland even if Appellant had not been a competitor for the instant procurement. While not denying that a partial motivation for sending the information was that Appellant was a potential competitor he also testified that at the time he sent Ms. Harrell the note he assumed based on his review of the 10K information that Appellant would not be a bidder because they were effectively out of business. (Oct. 24 Tr. 85-90).

As a result of this communication and previous discussions she had had with Mr. Edward J. Muhl, the State Insurance Commissioner, concerning Appellant, Ms. Harrell called Mr. Stanley Mayer, President of the Layton Company, on April 30 and requested that the Treasurer's office be furnished a copy of Appellant's most recent 10K. (Sept. 24 Tr. 127-130, Oct. 25 Tr. 31-32; Exs. 2, 36, AR). This oral request was followed up by letter from Ms. Harrell to Mr. Mayer on May 7, 1985. This letter stated:

> This will confirm our phone conversation of April 30, 1985.
>
> Due to the questionnable [sic] financial condition of Transit Casualty, I must have a complete copy of their most recent 10K.[5]
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> Please have the Company forward this to me within the next two weeks. (Ex. 2, AR).

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[5]The 10K in question is actually that of Appellant's parent, Beneficial Standard Corporation. (Ex. 4, AR).

Ms. Harrell also spoke to Commissioner Muhl on April 30, 1985 to discuss Appellant's financial condition and wrote Commissioner Muhl the following day. This May 1, 1985 letter from Ms. Harrell to Commissioner Muhl stated:

> It was a pleasure talking with you yesterday although your news was not too good concerning Transit's present condition.
>
> I am enclosing for your information a copy of the telex received by Marsh & McLennan on April 26. Taking into consideration Transit's financial difficulties, it is more comforting to know that the Mass Transit Administrations's coverage should be solid at least through expiration of July 1, 1985.
>
> However, at your suggestion, I will place this program elsewhere. Hopefully, we will get some bids for the whole program, but as you are painfully aware, our major problem is capacity when putting together a program of this size.
>
> Keep me advised as to any changes, good or bad, so that I can keep the Mass Transit Administration and the Treasurer aware. Again, thanks for you help. (Ex. 3, AR).

5. A preproposal conference was held at the State Treasurer's Office on May 2, 1985. In attendance were the three members of the evaluation committee, and representatives from the MTA, the Layton Company, M&M, Alexander & Alexander (A&A) and Appellant. (Ex. 62, AR; Nov. 13 Tr. 60; Nov. 14 Tr. 44-47). Among the matters discussed at the preproposal conference was the due date for receipt of proposals. (Nov. 14 Tr. 47). A representative of A&A expressed concern that this date (June 20, 1985) was too close to June 30, 1985, the date of expiration of Appellant's insurance and claims services contracts; however, no other prospective offeror expressed concern or objection. (Sept. 24 Tr. 133; Nov. 14 Tr. 47). It was decided to maintain the June 20th due date, thereby permitting all offerors of insurance coverage maximum opportunity to explore the tight insurance markets. Additionally, Mr. Joseph Karey, Appellant's Baltimore branch manager who was in attendance, was identified as the person for offerors of claims services to contact to obtain statistical loss data on the MTA's prior claims experience.

6. On May 6, 1985, Ms. Harrell wrote Ronald J. Hartman, the MTA Administrator, to advise him of Appellant's financial status and the status of renewal insurance. This letter stated:

> In my April 19, 1985 correspondence I mentioned some concerns about Transit Casualty's financial condition. I am afraid the situation is much worse than I had expected. Please keep this as confidential as possible.
>
> I have seen a copy of a partial 10K which makes them look almost out of business. I have been assured by our Insurance Commissioner, Edward J. Muhl, that barring any unusual catastrophies, all losses through July 1, 1985, should be insured. However, Mr. Muhl <u>strongly</u> suggests that all coverages be placed elsewhere at renewal and that we <u>not</u> accept Transit's renewal proposal.

I have asked that a complete copy of the Company's most recent 10K be sent to me within the next two weeks. At that time, Commissioner Muhl, and Treasurer James will make a ruling. We will of course share this with you.

In my conversation with some of the interested brokers, there is a definite possibility this entire program will be much changed. We may have separate claims management service. In addition, Mass Transit Administration's retention levels may increase dramatically, or we may not find the capacity for $100 Million on the subway.

The insurance industry is facing troubled times, and I want you to be aware of how this may adversly affect the Mass Transit Administration. If you have any questions, please let me know. (Ex. 5, AR)

7. On or about May 13, 1985, Mr. Darlington sent Ms. Harrell a second handwritten note which stated: "Jane - Per today's conversation, I think you will find this analysis "interesting." Please keep this "confidential - your eyes only." (Ex. 39, AR). Attached to this note were summaries of claims paid by Appellant for policy years 1977-1984 that were above $25,000 (the MTA self insured retention (SIR) or deductible under Appellant's liability insurance policy) and the Appellant's total incurred losses (losses paid, expenses paid and reserves) for those policy years. This summary reflected for the period July 1, 1983 - July 1, 1984 $2,205,435.37 for losses paid, $22,572.63 for expenses paid and $1,921,935.20 for reserves for total incurred losses of $4,149,943.20. This information was gleaned from an M&M employees' review of Appellant's statistical loss data at Mr. Karey's office. (Ex. 39, AR; Oct. 24 Tr. 164; Nov. 14 Tr. 25-38).

Mr. Darlington testified that his motivation for sending Ms. Harrell this memorandum was his belief that she would be interested in an analysis of the number and type of claims (settled or reserved for) that penetrated the 25,000 deductible as compared with the total overall losses experienced by MTA since 1977. (Oct. 24 Tr. 91-95). He further testified that : ". . . in our opinion it cleared up some of the questions that we had, and we felt that Miss Harrell might have had as respects the overall past experience of the MTA under the Transit Casualty program" (Oct. 24 Tr. 164) and that his reason for marking the cover note "confidential - your eyes only" was that: "Well, we were in a competitive bid situation with other competitors, as previously stated. And this was a work product of Marsh and McLennan. And the point of saying this (confidential -your eyes only) was that I didn't want the information released to any of our competitors to a general addendum to the bid because that would give them an advantage that they ordinarily wouldn't have had. So we felt that if other participants in the bid were interested in developing this information, they would have found out the same way we did and acted accordingly." (Oct. 24 Tr. 165).

On May 22, 1985, Ms. Harrell wrote Commissioner Muhl to advise that she had yet to receive Appellant's 10K and to request advice concerning the status of Appellant. (Ex. 6, AR).

8. On or about May 23, 1985, Mr. Karey, as a result of a request conveyed by Mr. Mayer, personally delivered a copy of Appellant's 10K which he had requested and received from Appellant's Los Angeles, California headquarters to Ms. Harrell in Annapolis. (Sept. 24 Tr. 145-146; Nov. 14 Tr. 49-50). At this time a conversation occurred between Ms. Harrell and Mr. Karey concerning the instant RFP. Ms. Harrell testified that the discussion centered around her explanation to Mr. Karey, who claimed Appellant would submit the lowest price, of the distinction between an invitation for bids IFB where price is usually determinative of award and a request for proposals RFP where price is not completely determinative of award. In this discussion she used as an example the 1982 IFB for liability and claims administration services for MTA in which a protest filed by Appellant led to the disqualification of M&M as being nonresponsive and the award of a contract for such services to Appellant. She explained, according to her testimony, that M&M would not have been disqualified in an RFP since the "technicality" upon which it was disqualified in 1982 would have been correctable through negotiation in an RFP context, although it could not be corrected in an IFB context. (Sept. 24 Tr. 145-147). Ms. Harrell also testified that during this conversation she mentioned to Mr. Karey that she was concerned about the incurred losses that the MTA was experiencing and that she mentioned a figure of 4 million in that regard. (Sept. 24 Tr. 147). She attributed this concern principally to the more active role the Treasurer's office was taking in the administration of all State insurance programs, including MTA's, to reduce claims expenditures and experience rather than to her review of Appellant's loss summaries attached to monthly bills[6] to support reimbursement charges due Appellant or to her review of the material provided in the "your eyes only" May 13, 1985 memorandum from Mr. Darlington. (Sept. 24 Tr. 147-149).

Mr. Karey testified that Ms. Harrell, in response to his assertion that MTA would pay more money under a new claims administration service provider for handling claims than if Appellant provided such services, stated that Appellant only received the 1982 contract on a technicality and that if M&M had received such contract the State would have saved $4 million. (Nov. 14 Tr. 50-52).[7] He denied that Ms. Harrell's alleged comment was in the context of a discussion concerning differences between an IFB and a RFP. (Nov. 14 Tr. 51). Mr. Karey testified that after this conversation and before submitting Appellant's proposal he reviewed Appellant's records and found that the 83/84 policy year incurred losses were in fact $4,149,943. (Nov. 15 Tr. 132, 133-135; Resp. Ex. 74).

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[6]These bills for amounts paid by Appellant on losses within the $25,000 deductible and expenses were forwarded by Appellant to MTA who in turn forwarded a copy to Ms. Harrell. (Nov. 13 Tr. 225-227). At one time an entire copy of the monthly loss runs were forwarded to the insurance manager as distinct from a summary; however, this practice was discontinued before Ms. Harrell became insurance manager. (Nov. 14 Tr. 11-17; Nov. 15 Tr. 31-38). Mr. Karey did not become aware that the loss runs were not being forwarded to Ms. Harrell until several weeks after Appellant's oral presentation on June 25, 1985. (Nov. 15 Tr. 31).

[7]Mr. Karey understood this remark to mean that MTA would have saved $4 million over the three year policy period up until 1985 rather than as a reference to the $4.1 million incurred losses in the 1983-1984 policy year. (Nov. 15 Tr. 135-141).

9. On May 24, 1985, Ms. Harrell again wrote Commissioner Muhl and enclosed a copy of the 10K received from Mr. Karey. This letter stated:

> Attached at long last is the complete 10K for Beneficial Standard/Transit Casualty. I am somewhat disturbed to see it is no more current than the information I forwarded to you earlier.
>
> In my conversation with Tom Barbera on May 23, he advised that the Missouri Insurance Department had requested Transit to voluntarily submit to receivership and that Transit had refused.
>
> One of my primary concerns at this time is the availability of coverage for the MTA. As you know, this is a very specialized market and the capacity is limited. There are currently eight excess carriers writing coverage over Transit's $10 million primary. These carriers are committed to Transit for the renewal quote and cannot quote for any other broker. In addition, it is my understanding that some of these carriers are unwilling to quote over Transit due to the latters precarious position.
>
> If at your instruction we do not accept Transit's renewal bid, I need to present these facts to the Treasurer so this decision can be made now rather than waiting for the proposal due date. Rejecting Transit Casualty now would enable me to issue letters of authorization and free the other excess markets and thereby, provide the MTA with the coverage it needs.
>
> Please review the attached material and advise me as soon as possible when you would be able to meet with the Treasurer. (Ex. 8, AR).

By letter dated May 31, 1985 (Ex. 9, AR) the Deputy Insurance Commissioner Mr. Thomas Barbera responded to Ms. Harrell's May 24 letter to Commissioner Muhl stating in part ". . . you are advised that Transit will not submit a renewal bid on the MTA coverage" and enclosing a copy of a directive from the Insurance Commissioner to Appellant accepting its decision not to write any new or renewal business of any kind. Mr. Barbera's letter further advised that "Transit Casualty is not to write any new or renewal business of any kind in Maryland unless and until you request and receive prior authorization from the Insurance Commissioner of Maryland." As a result of this advice, the Treasurer instructed the Layton Company on June 4, 1985 that Appellant was disqualified from the RFP "as well as all other insurance bids for the State of Maryland" (Ex. 10, AR) and, in RFP Amendment No. 2, notified all prospective offerors of this disqualification and expressed the hope that excess insurance carriers then committed to Appellant would consider committing to other insurers who might be interested in offering MTA a policy. (Ex. 12, AR). Ms. Harrell testified that on June 5, 1985, Mr. Mayer called her to advise that Appellant would not be participating in the RFP and that it was obvious from the conversation that Mr. Mayer had not yet received either the June 4 letter or Amendment No. 2 respecting Appellant's disqualification. (Oct. 21 Tr. 55-56; Ex. 46, AR). On June 10, 1985 Ms. Harrell wrote Mr. Mayer a letter which stated:

> This is to confirm our present contract with Transit Casualty Insurance Company for Claims Administration for the MTA. It is my understanding that Transit Casualty will stay on board until such time as all claims are settled, paid or closed.
>
> I also understand that it may not be necessary for Transit adjusters to be "in house" at MTA's headquarters in order to do this, and trust that we will be able to negotiate terms acceptable to Transit Casualty as well as the MTA and this office. (Ex. 48, AR; Oct. 21 Tr. 56-57).

10. Sometime after May 31, 1985, Edward J. Birrane, Esq., a former State Insurance Commissioner, contacted the Insurance Commissioner and/or the Deputy Insurance Commissioner to advise that Appellant intended to submit a proposal for claims administration services and questioned the authority to prevent Appellant from submitting a proposal for such services. (Oct. 21 Tr. 55-56; Oct. 25 Tr. 47-63).

On June 7, 1985, as a result of a telephone call from the Deputy Insurance Commissioner relating Mr. Birrane's concerns, Ms. Harrell requested written clarification of Appellant's ability to offer a claims administration service proposal given the Insurance Commissioner's prior directive. (Oct. 21 Tr. 55-56; Ex. 13, AR). This letter also reflected concern that Appellant's financial condition might affect its ability to perform a claims administration contract. By letter dated June 12, 1985 (Ex. 14, AR), the Deputy Commissioner responded advising that the Insurance Commissioner was without jurisdiction to regulate claims services, and, therefore, his directive was not to be interpreted to extend to the business of providing claims administration services. His letter apologized for the misunderstanding and explained that he and the Commissioner were unaware that there were two types of contracts at issue. Upon receipt of this letter from the Deputy Insurance Commissioner on June 17, 1985, Ms. Harrell called Mr. Mayer and advised him that Appellant would be able to participate in the claims administration portion of the RFP. (Oct. 21 Tr. 57). Ms. Harrell testified that the Treasurer told her not to give any consideration to Appellant's financial condition in evaluating its proposal and that she conveyed this instruction to Ms. Hall. (Sept. 24 Tr. 130-131; Nov. 11 Tr. 172-173). She did not remember if she conveyed this instruction to Ms. Finnegan since "she was not as aware of the financial condition of Transit Casualty as Ms. Hall and I were." (Sept. 24 Tr. 131).

11. On Thursday, June 20, 1985, insurance proposals were received from A&A and M&M and claims administration proposals were received from Appellant (two options) (Ex. 15, AR), M&M (four options) (Confidential Ex. 16, AR), and A&A (Confidential Ex. 17, AR), and Crawford and Company.

12. The proposal submitted by Appellant for claims administration services was prepared as to price and services offered by its Los Angeles office and contained two options.[8] Option number one proposed an annual claims service fee of $1,017,720.00 to investigate, settle, defend and pay from

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[8] Mr. Karey prepared the descriptive narrative of Appellant's claims administration capabilities with assistance from Mr. Edward Althoff, Appellant's former Baltimore branch manager.

funds provided by MTA all claims occurring on and after 12:01 a.m., July 1, 1985, arising out of the use, operation and maintenance of bus and rail facilities and operations of MTA to include any allocated claims expenses[9] and legal expenses with respect to suits arising out of such claims. The claims service was to continue until all claims occurring during the term of the agreement had been settled or paid. Option number two proposed an annual claims service fee of $747,492.00 to investigate, settle, and pay from funds provided by MTA all claims occurring on and after 12:01 a.m., July 1, 1985, arising out of the use, operation and maintenance of bus and rail facilities and operations of MTA. This claims service fee did not include any allocated claims expenses or legal expenses. The claims service was to continue until all claims occurring during the term of the agreement had been settled or paid. (Ex. 15, AR). Both options provided that the claims service provided would include furnishing MTA with quarterly statistical reports indicating losses reported, paid and outstanding, including amounts paid and outstanding reserves thereon and that "detail statistics" would be provided upon request. Both options also conditioned the claims service fee upon the present lease costs for maintaining Appellant's existing claims service facility on MTA property and noted that any change of location at the request of MTA would result in an adjustment of the claims service fee to reflect the difference between present lease costs and those required by relocation. (Ex. 15, AR). Both options also provided for mutually acceptable adjustments of the annual claims service fee effective at each July 1st and provided for the right of termination by either party upon giving the other party at least 90 days written notice prior to any July 1.

13. The proposal (Confidential Ex. 16, AR) submitted by M&M for claims administration services contained four options. These options costed on a first year basis and reflective of post proposal submission date negotiations (Ex. 33, AR) were in summary fashion as follows:[10]

(Option (1))	
Edward S. Schaffer, Inc. (claims administration)	$876,954 (includes $118,000 for risk management)
William J. Wiseman, III (legal services)	$145,000 - $50.00 hourly rate and per suit maximum of $1800 per claim for a total maximum of $145,000 for all District and Circuit Court suits - excepting defense of drivers in District Court and $60.00 per hour for Court of Appeals cases with all allocated expenses and court costs to be paid by MTA (subsequently revised in negotiations to $180,000 cap including defense of drivers in District Court and all legal work

[9]Allocated claims expenses involve expenses relating to investigation or adjustment of a claim such as the cost of police reports, medical records, expert testimony and the like.

[10]A&A proposed to provide claims administration services for $745,000 (including $90,000 for risk management), property appraisals for $56,250 and legal services for $390,000. (Confidential Ex. 17, Ex. 34a, AR; Sept. 30 Tr. 147-148).

	required, but exclusive of allocated expenses and court costs).
Property appraisals (Edward S. Schaffer, Inc.)	$67,500 for first 1500 claims in excess of $500. All claims in excess of 1500 charged at $45 per case.
	$1,124,454
Option (2)	
BBB Co.* (claims administration)	$1,027,280 (including property appraisals)
ABC Law Firm* (legal services)	$385,000 (originally $280,000 but increased to $385,000 through negotiation to include defense of drivers in District Court and allocated expenses.
Risk Management	200,000
	$1,612,280
Option (3)	
BBB Co.* (claims administration)	$1,238,445 (including property appraisals)
ABC Law Firm* (legal services)	$385,000 (originally $280,000 but increased to $385,000 through negotiation to include defense of drivers in District Court and allocated expenses)
Risk Management	200,000
	$1,823,445
Option (4)	
AAA Co.* (claims administration)	$1,108,767 (including property appraisals)
XYZ Law Firm* (legal services)	$ 425,000
Risk Management	135,000
	$1,668,767

14. The M&M Option (1) written proposal as submitted on June 20, 1985 specifically provided the following as to the Edward S. Schaffer, Inc. claims administration and property damage services fee:

* Offerors of these services continue to request confidential treatment of their proposals pursuant to an order respecting confidentiality of certain matters entered by the Board in these proceedings.

Edward S. Schaffer, Inc.

The fee quoted herein includes all statistical reports outlined in the RFP which will be provided by Marsh & McLennan, Inc., RIMSTAR, and the Risk Management Fee.

First year contract fee: $876,954

Property Damage Service Fee: $67,500 for the first 1,500 claims for property damage in excess of $500. All claims in excess of 1,500 will be charged at $45 per case.

The second and third contract year fees will be negotiated based upon the increase in claim frequency and the C.P.I., but in no case will the fee increase be in excess of 10% per contract year.

Runoff claims after contract termination and all incurred but not reported claims; i.e., claims for occurrences during the contract term but reported after the contract termination will be administered for the following additional fee quotations:

1st year following contract termination at 60% of the expiring contract year fee.

2nd year following contact termination at 40% of the expiring contract year fee.

3rd year following contract termination at 20% of the expiring contract year fee.

4th year all remaining claims will be handled to conclusion at no additional cost. (Confidential Ex. 16, p. 49).

15. The legal service portion of the M&M option (1) written proposal as submitted on June 20, 1985 utilizing the services of William J. Wiseman, III, Esq., provided that:

Services: Legal services for the defense of suits brought by passengers or third parties against the insured will be provided at a cost of $50 per hour. All allocated expenses and court costs are to be paid by the MTA.

The defense of each suit filed in District Court would be billed on an hourly basis but would not exceed a maximum of $1,800 per claim.

The defense of each suit filed in the Circuit Court would be billed on an hourly basis but would not exceed a maximum of $1,800 per claim.

All Court of Appeal cases, if any appeal is desired by the insured or insurer, would be handled on the basis of $60 per hour. This would be in addition to the fee quoted herein.

Fee Quotation: The total defense of all litigation filed in the District Court and/or Circuit Court would not exceed a maximum of $145,000 annually.

Term: This proposal shall include defense for all law suits reported for a 1-year term and thereafter be subjected to adjustment after re-evaluation at the conclusion of the first year.

Exception to RFP:

1. This fee quotation does not include defense of drivers in Traffic Court; however, this is subject to negotiation.

2. This fee quotation does not include allocated expense, expert fees, or court cost. (Confidential Ex. 16, pp. 45-46).

16. The M&M proposal (all options) did not provide for a right of termination at the election of M&M. As noted in Finding of Fact No. 12, supra, Appellant's proposal, both options, provided for a right of termination at the election of either party. A right of termination at the election of an offeror of claims administration services is inconsistent with those provisions of the RFP that require that claims adjustment and legal services continue until all claims (or suits) that arise under the policy (insurance) have been settled or paid whether the claims are within or without the deductible.[11] (Ex. 1, AR, ¶¶2.3 and 2.5C).

17. These proposals were reviewed independently by the members of the evaluation committee, which, following such review, determined that oral presentations (Ex. 1, AR, ¶¶5.3, 5.4D) would not be necessary with respect to three of the four alternative claims services proposals offered by M&M (Sept. 30 Tr. 15; Nov. 12 Tr. 57-59); however, the committee invited oral presentations from Appellant, A&A and from M&M, the latter with respect to the least cost option in its proposal employing the services of Edward S. Schaffer, Inc. (Schaffer) and William J. Wiseman, III, Esq., (Wiseman). After discussion with Ms. Hall and Ms. Finnegan concerning any additional information they wanted from the offerors or questions they wished to ask the offerors, Ms. Harrell called each of these offerors to schedule their oral

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[11]In addition, we note that under Maryland procurement law the right of the State to terminate a State contract for convenience is a mandatory requirement to be provided in all State procurement contracts. Md. Ann. Code, State Finance and Procurement Article, §§13-602, 15-101. COMAR 21.07.03.02. The State's right to terminate a contract for convenience is the quid pro quo for the State's waiver of sovereign immunity regarding suits based on written State contracts. See: Md. Ann. Code, State Government Article, §12-202. There is no similar right in those wishing to contract with the State.

presentations, to advise them of items to be discussed and to request that they provide certain additional information deemed necessary by the committee. (Oct. 21 Tr. 61-62; Nov. 11 Tr. 177-179; Nov. 12 Tr. 98).

18. Ms. Harrell testified that her notes reflect that she called Mr. Karey at approximately 10:30 a.m. on June 24, 1985 to schedule Appellant's presentation for June 25, 1985 and to request certain additional information. (Sept. 30 Tr. 16; Oct. 21 Tr. 62; Exs. 18, 34C, AR). She further testified that her notes reflect that Mr. Karey was not available at the time of her initial call and that he returned her call at 11:30 a.m. on June 24th. (Sept. 30 Tr. 16; Oct. 21 Tr. 62; Exs. 18, 34C, AR). Ms. Harrell's testimony and her transcription of the shorthand notes that she took concerning what was discussed during the conversation reflect that she asked Mr. Karey to provide at the presentation written resumes of Appellant's legal staff, sample statistical monthly or quarterly loss reports,[12] details on service standards, claims philosophy and Appellant's proposed safety program, and a forecast of funding necessary for a $2 million self-insurance retention ("SIR").[13] (Exs. 18, 34C, AR; Sept. 30 Tr. 16-22; Oct. 21 Tr. 62-67). Ms. Harrell also asked Mr. Karey during this conversation if Appellant's attorneys were staff attorneys or independent counsel. (Oct. 21 Tr. 66-67). Ms. Harrell testified, inter alia, that she requested this information because she found Appellant's proposal to be generally vague and lacking in detail (Sept. 26 Tr. 39-69; Oct. 21 Tr. 62-68), a view clearly shared by Ms. Hall (Nov. 11 Tr. 177-216) and to a degree shared by Ms. Finnegan.[14] (Nov. 12 Tr. 175-178, 182-184). Summarizing the reasons that further information was sought from Appellant Ms. Harrell testified as follows:

> Q. Can you tell us, Miss Harrell, at this point in time, after you had read all the proposals whether or not you gave any thought to rejecting Transit Casualty's proposal?
>
> A. Yes, I did.
>
> Q. Can you tell us what thoughts you had about that?
>
> A. I thought that their proposal was unacceptable and I also believed that if it had been received from anybody other than the incumbent on the account I would have recommended that the Treasurer reject it immediately.

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[12]Ms. Harrell could not recall if she used the words "loss runs" but testified that in the insurance industry "when somebody refers to statistical quarterly reports, that's exactly what — its's common knowledge that that's what they are referring to." (Sept. 30 Tr. 20).

[13]It was apparent at that time that the only acceptable proposal with respect to insurance coverage was a proposal from A&A contemplating a SIR of $2 million per occurrence at an annual premium of $400,000. M&M had proposed a $500,000 SIR for bus and subway operations for an excessively high annual premium of $9.5 million. This is in marked contrast to the $25,000 SIR (bus) and $500,000 SIR (subway) under Appellant's existing insurance policy.

[14]Ms. Finnegan, who gave Appellant the highest score of the three evaluators in the claims service category, testified that had Appellant not been the incumbent provider of claims administration services for a number of years she would have scored Appellant lower than she did in this category. (Nov. 12 Tr. 178).

Q. Why did you not make that recommendation?

A. Because Transit Casualty had been on the MTA's account for twenty-five plus years and that they were the incumbent on the account and for those reasons we did what we could to try to make their proposal potentially acceptable.

Q. Just generally what was it about the Transit Casualty proposal that led you to think that had it been someone else it should have been rejected?

A. It contained no documentation. It was very vague, completely generalized and filled with selfserving puffery type statements that they offered no documentation to back up what they were, all the accolades they were giving themselves. And there was nothing concrete, no actual physical proof to show me how it was that they were doing what they were doing or how it was that they were doing what they were doing or doing what they could do what they stated they could do. (Oct. 21 Tr. 67-68).[15]

Specifically concerning her request for monthly and quarterly reports, Ms. Harrell testified:

Q. The next item on the list is copies of quarterly and monthly reports parentheses, statistical, end parentheses. Why did you ask Mr. Karey about that?

A. I wanted to see copies of Transit Casualty's statistical reports so I could judge how in fact Transit Casualty kept the statistical claims information and to be able to compare that information with what was being offered by the other offerors as to its flexibility, whatever information it detailed and whether or not it could be changed and put in different formats. Information that was being provided by both, well, Marsh McLennan, Alexander and Alexander, General Adjustment Bureau and Crawford and Company was very explicit in this area as to the flexibility available through their programs and because we really needed to take a close look at the losses MTA was having and be able to effectively analyze those losses and manage them we would definitely need very detailed statistical reports. I had nothing to compare Transit Casualty's with since they didn't provide any.

Q. At that time can you tell us whether you had any reason to believe that Transit Casualty did not have quarterly statistical reports?

A. No, I had no reason to believe that they didn't. It was -

Q. Did you have any reason at that time to believe that Transit Casualty did have quarterly statistical reports?

A. Yes. I had reason to believe they did. These were the reports that it was my understanding that the offerors went in and looked at when they went into Transit Casualty's office and the fact that these

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[15]Ms. Hall gave similar testimony. (Nov. 11 Tr. 180-181, 186).

had been requested and required in the previous bid specs[16] and are required in all insurance bid specs from the state so it was certainly my understanding that Transit Casualty would have them. (Oct. 21 Tr. 64-66).

Mr. Karey testified that he did not return Ms. Harrell's telephone call until approximately 3:00 p.m. on the afternoon of June 24, 1985. His testimony and the notes that he took during the telephone conversation reflect that Ms. Harrell (1) requested nothing in writing, (2) that she asked for the number of hours expended by in-house and outside counsel on legal work for the previous policy year, (3) that she asked for discussion on what Appellant would do if it had to give an orientation, (4) that she advised that three other attractive bids had been received, (5) asked who the adjusters reported to, (6) requested that Mr. Karey bring down copies of Appellant's monthly and quarterly reports, (7) requested details on Appellant's safety program, (8) requested Mr. Karey to provide an estimate of what the MTA should set aside for the self insurance retention, (9) requested substantive information on loss control and audit control (whole control system), (10) requested information on Appellant's service standards and working philosophy and (11) requested resume information regarding the attorneys. (Resp. Ex. 71; Nov. 14 Tr. 55-64).

Specifically, explaining his version of what Ms. Harrell requested by way of copies of Appellant's monthly and quarterly reports, Mr. Karey testified as follows:

Q. The next item in your notes is copy of monthly report, and copy of quarterly report. What was the discussion concerning that?

A. She said she wanted us to bring down copies of the monthly and quarterly reports, and I said to her, well, you know they were attached to the RFP, but they weren's all there. You want me to bring down the rest of them, and she said yes.

Q. Well, what did you have reference to when you said they were attached to the RFP?

A. Monthly activity reports.

Q. Did she mention. .

A. And . . . go ahead, I'm sorry.

Q. Go ahead, finish your answer.

A. Well, it didn't occur to me she meant loss deductible runs because she didn't say loss deductible runs and there would have been no quarterly loss deductible runs because the loss deductible runs were

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[16]The 1982 IFB specifications (¶3.7c) provided in part that the "Insurer must furnish the Named Insured with separate quarterly statistical reports indexing all claim activities on the following basis: (1) Losses, falling within the Insured's deductible retention, and (2) all others. These reports will include losses reported, paid, open (outstanding) claims, and open reserves." (App. Ex. 67 ¶3.7c).

provided monthly. And second, I was under the impression at that time she already had the loss deductible runs in her possession because of that letter that I received every month. (Nov. 14 Tr. 58-59)

Q. All right. Now, the next item on Miss Harrell's memo is copies of quarterly and monthly reports, and with the word "statistical" in parens. I believe you indicated that matter was, in fact, discussed, was it not?

A. But not the word "statistical". She never asked me for any statistical information. See, the way I have it is copy of monthly and quarterly reports. (Nov. 14 Tr. 62).

19. Ms. Harrell also called Mr. Robert H. Friz of M&M on June 24, 1985 to request that the evaluation committee be provided at M&M's oral presentation on June 25, 1985, with information on allocated claims expense, maximum attorneys' fees and forecasting for the SIR retention. At this time she also made a note to herself to request a break-out of M&M's risk management fee. (Exs. 19, 34b, AR; Sept. 30 Tr. 23-30). Ms. Harrell also advised A&A of its June 26, 1985 presentation but requested no additional information of that offeror at that time. (Sept. 30 Tr. 143).

20. Appellant was represented at its oral presentation to the evaluation committee on the morning of June 25, 1985 by Mr. Karey and by Edward Althoff who had retired as Appellant's Baltimore branch manager on January 6, 1984.[17] (Nov. 13 Tr. 61, 77). The presentation lasted approximately an hour and a half. (Nov. 12 Tr. 5; Nov. 14 Tr. 127). All three of the evaluation committee members were present and testified that they took notes during the meeting.[18] (Nov. 12 Tr. 5, 135). These notes are reproduced as Exs. 20, 34c, 35b, 55, AR. At that time, Appellant was advised of a change in evaluation factors. The evaluation committee had determined to allocate the 10% factor for evaluation of Best's rating (Ex. 1, AR, ¶5.4) to claims service, thereby raising the evaluation points attributable to the claims service factor from 30% to 40%. This action was taken because a Best's rating is only available for insurance companies providing insurance and not an insurance company providing claims handling services. It is uncontroverted that Appellant offered no objection to this change. (Nov. 14 Tr. 109-110). It is also uncontroverted that the subject of termination by either party was discussed at the oral presentation (Nov. 14 Tr. 115; Exs. 20, 34c, 35b, 55 AR) and that oversight of the claims administration function by a third party was discussed. (Nov. 14 Tr. 129; Exs. 20, 34c, 35b, 55 AR). The backgrounds of Appellant's in-house legal staff and Mr. O'Doherty, an outside counsel to whom certain "heavy" cases were assigned, was discussed, although no resumes were provided. (Nov. 14 Tr. 96, 113-115; Exs. 20, 34c, 35b, 55, AR). Also discussed, principally through Mr. Karey's reference to a claim file involving a case that he had been involved in, were Appellant's service standards, claims

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[17] Although Mr. Althoff had retired, he continued to visit the Baltimore branch office approximately once a week as a paid consultant. (Nov. 13 Tr. 9, 77-78). He was listed in Appellant's proposal as "[o]ur most experienced staff member [who] has over 50 years in public transportation claims handling." (Ex. 15, AR).

[18] Ms. Harrell testified that she took shorthand notes during the presentation and transcribed them shortly after the presentation. (Sept. 30 Tr.43-44).

handling philosophy and procedures. (Nov. 14 Tr. 74-80, 97, 110; Exs. 20, 34c, 55, AR). Appellant and the evaluation committee also discussed Appellant's view on a funding forecast for a 2 million dollar SIR. Appellant's approach was to add 10% to what had been previously paid out over the past several years by Appellant. (Nov. 14 Tr. 117-118; Exs. 20, 34c, AR). There were discussions concerning the monthly activity reports attached to the RFP prepared manually by Appellant on MTA premises. (Nov. 14 Tr. 115-116; Nov. 15 Tr. 152-153). Mr. Karey testified that he did not provide the evaluation committee with monthly or quarterly loss run reports because he was under the impression that the evaluation committee had the monthly loss runs that were prepared in Appellant's Los Angeles office. (Nov. 14 Tr. 116). He was under the mistaken belief that MTA had been routinely sending them to Ms. Harrell in support of Appellant's monthly billings and did not realize that Ms. Harrell had not been receiving these reports. (See Footnote 6 Finding of Fact No. 8 supra). There was also discussion concerning the safety program and Mr. Karey and Mr. Althoff in this discussion referred several times to working with an MTA employee named Vertis Parks on safety matters. (Nov. 13 Tr. 66-68; Nov. 14 Tr. 111-113; Exs. 20, 34c, 35b, 55, AR). There was also discussion about confidentiality of proposals. Mr. Karey advised that Appellant's proposal was not confidential. When asked if Appellant could see the other proposals, Ms. Harrell replied that the other proposals were considered proprietary by the offerors and that only pricing could be released. (Nov. 14 Tr. 108-109; Exs. 20, 34c, AR).[19] Ms. Harrell also asked Mr. Karey if Appellant's financial condition would impact on its ability to perform claims administration services. (Nov. 14 Tr. 130; Ex. 35b, AR). There also was some discussion and concern expressed by Ms. Harrell about Appellant's incurred losses under its existing contract (Nov. 12 Tr. 19; Nov. 13 Tr. 65; Exs. 20, 34c, AR) and the draft authority of Appellant's adjusters. (Nov. 12 Tr. 139-141; Exs. 20, 34c, 35b, 55, AR).

However, the testimony of Appellant's Messrs. Althoff and Karey, who did not take notes, is in virtually complete conflict with the testimony and notes of the evaluation committee members concerning other matters discussed at the oral presentation. Mr. Karey and Mr. Althoff testified that there was no discussion of risk management or a risk manager as such (Nov. 13 Tr. 65; Nov. 14 Tr. 129). The testimony and notes of Ms. Harrell, Ms. Hall and Ms. Finnegan reflect that risk management as a concept was discussed at the oral presentation and that the term risk manager was used. However, Messers. Karey and Althoff did not appear to understand the concept and did not want a third party risk manager overseeing Appellant's claims administration activity. (Sept. 30 Tr. 51-52; Nov. 11 Tr. 225-232; Nov. 12 Tr. 17, 138-139; Exs. 20, 34c, 35b, 55, AR). Mr. Karey did testify, however, that the subject of oversight of its claims administration activity by M&M and A&A was discussed and that he thought that would be a good idea but would need to have it approved by the Los Angeles office. (Nov. 14 Tr. 121-122). Mr. Althoff testified that he believed that Ms. Harrell was referring to oversight by one person, rather than by a firm as was Mr. Karey's understanding, and that while he would not object to such oversight he believed the work would

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[19] Ms. Harrell apparently assumed that the other offerors considered their proposals confidential at this time. At the oral presentation of M&M its representatives indicated that its proposal was considered confidential, confirmation of which Ms. Harrell received in writing by letter dated June 28, 1985. By letter dated June 26, 1985, A&A advised Ms. Harrell that it considered its proposal confidential.

be so massive that no one man could do it. (Nov. 13 Tr. 65-66). Mr. Althoff also testified that while risk management was not called for in either its existing contract for claims administration services or in the RFP, Appellant was providing informal risk management services free from its Baltimore office under its existing contract. He acknowledged, however, that these informal services were not the risk management services available from Appellant's Risk Management Division in Los Angeles for a fee. (Nov. 13 Tr. 73-75). In an affidavit executed by Mr. Gerald S. DeGennero, Appellant's Chief Executive Officer, it was averred that the RFP did not call for risk management and that if it had, Appellant would have included such services (as provided by its Los Angeles Risk Management Division) in its proposal. (Nov. 15 Tr. 206-211).

Mr. Karey testified that there was no discussion of allocated claims expense or allocated expenses at the oral presentation. (Nov. 14 Tr. 123-124). Mr. Althoff testified that he thought "the overall word was discussed" (Nov. 13 Tr. 64) and that "we may have gone into it, I don't know." (Nov. 13 Tr. 65). The notes and testimony of Ms. Harrell and Ms. Hall reflect that allocated claims expense was discussed at the oral presentation and that Appellant's representatives were unwilling or unable to break such expenses out of Appellant's Option 1. (Sept. 30 Tr. 80-81; Nov. 12 Tr. 16, 51-52; Exs. 20, 34c, 35b, AR).

The testimony and notes of Ms. Harrell, Ms. Hall and Ms. Finnegan reflect, inter alia, that Appellant was advised of the need or possible need to obtain space outside of the MTA's premises as a result of a decision by MTA that it would not provide space for claims adjusting services activity and that Appellant promised to provide an estimate of increased cost as anticipated by its proposal.[20] (Sept. 24 Tr. 149-153; Sept. 30 Tr. 61-64, 80; Nov. 12 Tr. 53-54; Exs. 20, 34c, 35b, AR). Mr. Karey testified that Appellant was never advised at this meeting or at any other time of the need to obtain space outside of the MTA premises. (Nov. 14 Tr. 72-74). He did acknowledge, however, that he was requested to provide Ms. Harrell with the estimated cost of such a relocation in a telephone conversation with Ms. Harrell on the afternoon of June 25, 1985 (Nov. 14 Tr. 127, 131-132), that discussion concerning Appellant's vacating MTA premises had occurred a number of times over the past several years (Nov. 14 Tr. 73-74), and that Ms. Harrell had alluded to this possibility in a letter she sent Mr. Karey earlier that month. (Nov. 14 Tr. 73; Ex. 48, AR).[21]

After the oral presentation, during an informal exchange of pleasantries, Ms. Harrell remarked to Mr. Althoff that she had been in the insurance business for 20 years and had worked for insurance agencies including M&M. (Nov. 13 Tr. 95-98). Mr. Karey interpreted Ms. Harrell's

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[20]Appellant's proposal (Options 1 and 2) provided in relevant part: "This Claims Service Fee is predicated upon present lease costs for maintaining the Claims Service Facility at 1515 Washington Boulevard, Baltimore, Maryland. Any change of location at the request of MTA would result in the Claims Service Fee being adjusted to reflect the difference between present lease costs and those required by relocation."

[21]It appears that Mr. Karey was referring to a letter from Ms. Harrell to Mr. Mayer dated June 10, 1985. This letter mentioned the possibility of relocation and reflected copies to Mr. Karey and Mr. Hartman. (Ex. 48, AR).

remarks to mean that she had worked for M&M for 20 years. (Nov. 15 Tr. 141-148). In fact Ms. Harrell had only worked for M&M for three years during the period 1977 to 1980. (See finding of fact 33, infra).

21. M&M was represented at its oral presentation to the evaluation committee on the afternoon of June 25, 1985 by several persons, including Mr. Friz, Mr. Darlington and Mr. Craig Routson of M&M; Mr. Edward S. Schaffer, Jr., President of Edward S. Schaffer, Inc.; and William T. Wiseman, III, Esquire.[22] They, too, were advised of the change in evaluation factors to allocate the 10% for Best's rating to claims service and offered no objection. M&M provided written documentation of anticipated SIR funding and other requested materials. (Ex. 21, AR; Sept. 30 Tr. 97-98; Oct. 25 Tr. 170-172; Ex. 59, AR). Unlike Appellant, the Schaffer firm which was to perform the claims administration services under the M&M proposal was located off MTA premises, but within the MTA's service area as required by the RFP. (Ex. 1, AR, ¶2.5C.5). Additional cost for off-premises space was, therefore, not an issue. Also, unlike Appellant which had not proposed risk management services (Finding of Fact No. 20, supra), M&M offered to provide these services as an integral part of its claims administration proposal. In order to permit meaningful comparison among the offerors of the costs of services to be provided, M&M was asked to break-out the portion of its claims services fee allocable to risk management, which it did. (Sept. 30 Tr. 96-97; Nov. 12 Tr. 31-34).

22. At its oral presentation on the morning of June 26, 1985, A&A was represented by Mr. Peter Kagel, Mr. John Stricker and Mr. Dennis Moscato. (Ex. 23, AR). They were advised of the change in evaluation factors to allocate the 10% for Best's rating to claims service and offered no objection. (Ex. 22, AR). As with Appellant, A&A advised that it would have to provide figures for the additional cost of leased space off of MTA premises. (Sept. 30 Tr. 141-142). In addition, A&A advised that it also would have to provide figures for property damage appraisals, as well as for allocated claims expenses. (Ex. 22, AR). Later that day, A&A advised Ms. Harrell that the additional annual cost for leased space would be $85,000, and that the cost of property damage appraisals (approximately 1,500) would amount to $56,250. (Ex. 22, AR). A&A estimated annual allocated expenses as less than $20,000. (Ex. 22, AR; Sept. 30 Tr. 145-146).

23. In the early afternoon of June 25, 1985 Mr. Karey had telephoned the President of Appellant's Risk Management Division in Los Angeles and obtained approval of issues raised at the oral presentation concerning claims administration oversight, termination rights and relocation from MTA premises. (Nov. 14 Tr. 131-133). Mr. Karey then called Ms. Harrell in the early afternoon of June 26, 1985, and advised her that Appellant's cost to lease space off premises would run between $3,000 and $3,500 more per month. (Nov. 14 Tr. 133-135; Exs. 24, 34c, AR). Ms. Harrell testified that her suggestion to take the average of the two figures ($3,000 and $3,500 = $3,250)

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[22]The Committee had determined to request a presentation from representatives involved with M&M's lowest cost alternative of the four alternative proposal options presented by that company. This alternative employed the claims adjusting services of Edward S. Schaffer, Inc., and the legal services of Mr. Wiseman. (See Finding of Fact No. 13, supra).

multiply it by twelve, and add an additional $39,000 to Appellant's original cost proposal was agreed to. (Exs. 24, 34c, AR; Sept. 30 Tr. 171-172). During this conversation, Mr. Karey also told Ms. Harrell that Appellant would agree to claims administration oversight provided by either M&M or A&A. (Ex. 24, 34c, AR; Sept. 30 Tr. 172-173; Nov. 14 Tr. 132, 135). There was also discussion during this telephone conversation regarding how many days notice each party would be required to give the other in the event either party wished to terminate the contract. In its proposal Appellant, as to both options, proposed that the contract be "subject to termination by either party, by giving the other party at least ninety (90) days written notice by certified mail prior to any July 1." Appellant was not willing for the State to only be required to give 30 days notice to terminate while the contractor was required to give 90 days notice. Mr. Karey indicated that Appellant would compromise and agree to a contract condition that each party to the contract be required to give 45 days notice. (Exs. 24, 34c, AR; Nov. 14 Tr. 132-135). As noted in Finding of Fact No. 16, supra, the Board finds that Appellant's inclusion of a right to terminate in its proposal is inconsistent with those provisions of the RFP that require that claims administration and legal services continue until all claims (or suits) that arise under the policy (insurance) have been settled or paid whether the claims are within or without the deductible.

24. Following completion of the oral presentations and the receipt of the additional cost information provided by Appellant and by A&A, Ms. Harrell adjusted the pricing of the M&M (Schaffer/Wiseman) proposal, the A&A proposal and Appellant's proposal. From the M&M proposal of $1,124,454 Ms. Harrell deducted an amount of $117,500 for risk management services. She deducted $90,000 from the A&A proposal for these services. Ms. Harrell made these leveling adjustments because Appellant had not proposed risk management, although M&M & A&A had, in order to evaluate the pricing of the proposals of M&M, A&A and Appellant on a comparable basis. (Exs. 33, 34a, 34b, 34c, AR; Sept. 30 Tr. 96-97, 148). The RFP did not use the term risk management as such but clearly the offering of such services and the inclusion thereof in a proposal was not precluded by the RFP. Even Appellant's Messrs. Althoff and Karey agreed with the testimony of Ms. Harrell and Ms. Hall and Messrs. Darlington, Friz and Schaffer that risk management services are generally thought to be a part of claims administration services. (Ex. 1, AR; Sept. 26 Tr. 121; Oct. 21 Tr. 210-227; Oct. 25 Tr. 181-188; Nov. 11 Tr. 225-226; Nov. 13 Tr. 47-52, 207-210; Nov. 15 Tr. 45).

25. M&M and A&A did not include allocated claims expenses in their proposals. (Confidential Exs. 16, 17, AR). Paragraph 2.5C1 of the RFP provided that allocated claims expenses were to be paid by the offeror. (Ex. 1, AR). Mr. Darlington and Mr. Schaffer testified that if the claims service provider paid allocated expenses a conflict of interest would arise because the claims service provider might not do everything it should to reduce the client's potential exposure on any given claim in order to keep costs within the amount it had estimated in its bid or proposal for allocated expenses. (Oct. 24 Tr. 186; Nov. 11 Tr. 69-71). Based on M&M's and A&A's estimate of annual allocated claims expense which Appellant had included in Option #1 of its proposal (in an unspecified amount) Ms. Harrell reduced Appellant's proposal by $20,228. Ms. Harrell testified that this was done as in the case of the risk management fee adjustment for purposes of making the cost portion of the proposals comparable. (Sept. 30 Tr. 54, 80-82).

26. As a result of advice received from MTA shortly before Appellant's oral presentation on June 25, 1985 that space would not be provided on MTA premises for the claims administration service, Ms. Harrell also adjusted the Appellant's proposal for price comparability by adding to it the $39,000 estimated by Mr. Karey as the additional cost involved in Appellant's leasing premises off of MTA property.[23]

27. The net result of the adjustments to Appellant's and M&M's (Schaffer/Wiseman) price proposals were as follows:

APPELLANT

OFFERS	
Appellant's Option #1 (total claims service fee (including property appraisal), legal expense and allocated expense)	$1,017,720
Appellant's Option #2 (claims service fee only)	- 747,492
Total legal expense and allocated claims expense	$ 270,228
REVISION	
Claims service fee	$ 747,492
Lease expense	+ 39,000
	$ 786,492

[23]At the time the RFP was issued Appellant was occupying space on MTA premises pursuant to a lease agreement dated March 12, 1965 between it and MTA's predecessor, the Baltimore Transit Company (App. Ex. 1002) and was paying a monthly rental of $530.00 pursuant to a letter agreement dated June 30, 1967. (App. Ex. 1003). The RFP, however, did state that an offeror "may be required to establish a claim service within the service area of the Named Insured, and this should be taken into consideration when pricing this service. The MTA will negotiate with the successful offeror/bidder concerning this feature and the number of claims adjusters needed on premises." (Ex. 1, AR at ¶2.5C5). The Appellant's proposal (both options) specifically stated that any change of location at the request of MTA would result in the claims service fee being adjusted to reflect the difference between present lease costs and those required by relocation. (Ex. 15, AR). Despite the caveat in Appellant's proposal regarding upward adjustment of its fee if required to relocate, and despite the specific language of the RFP set forth above, Mr. Karey was of the belief that Appellant's pricing would not have to include costs for relocation since he interpreted the RFP to mean that the provider of claims services would move onto MTA premises and Appellant was already on the MTA premises. Therefore, Mr. Karey speculated that Ms. Harrell was asking about relocation costs to determine how much MTA would have to pay Appellant to move. (Nov. 14 Tr. 134).

Legal expense less allocated claims expense (estimated at $20,228)	+ 250,000
Revised Total	$1,036,492

M&M (Schaffer and Wiseman)

OFFER	
Total claims service fee (exclusive of risk management fee)	$ 758,954
Property appraisals	67,500
Legal expense	180,000
Risk Management fee	117,500
	$1,123,954
REVISION	
Offer as above	$1,123,954
Risk management fee	- 117,500
Revised Total	$1,006,454

28. The members of the evaluation committee independently scored the price (as adjusted for M&M and Appellant), claims service and presentation evaluation factors set forth in the RFP for the proposals submitted by M&M (4 options), A&A and Appellant. Ms. Hall and Ms. Finnegan orally conveyed their scores on these factors to Ms. Harrell. (Sept. 30 Tr. 87-88, 175-178, 208-210; Nov. 12 Tr. 161; Ex. 49, AR). Ms. Harrell compiled a composite of the scores of the three evaluators late on the morning of June 27, 1985. (Ex. 33, AR; Sept. 30 Tr. 174-178). The composite scoring for Appellant and M&M (Schaffer/Wiseman) was as follows:

	Appellant		M&M	
Harrell[24]				
Price (50 pts.)	50	47.5	46	50
Claims Service(40 pts.)	5	20	40	38
Presentation (10 pts.)	1	8	10	10
	56	75.5 = 65.75	96	98 = 97
Finnegan				
Price (50 pts.)	48.5		50	
Claims Service (40 pts.)	25		35	
Presentation (10 pts.)	7		9	
	80.5		94	

[24]Ms. Harrell rated each proposal twice, before and after the oral presentation, and averaged the results.

Hall		
Price (50 pts.)	48	50
Claims Service (40 pts.)	20	35
Presentation (10 pts.)	2	10
	70	95

Ms. Harrell then added the scores in each column and divided by 3, i.e., Appellant - 65.75 + 80.5 + 70/3 = 72.08; M&M - 97 + 94 + 95/3 = 95.33.

29. The results of this process were set forth in a memorandum dated June 27, 1985, which was forwarded to the State Treasurer by Ms. Harrell for his review and concurrence with the recommendation to award a contract to M&M (Schaffer/Wiseman). (Ex. 25, AR). The memorandum summarized price and technical factors as follows:

1. Marsh & McLennan, Inc./Edward S. Schaffer, Inc.
   $1,006,454. (95.33%)

2. Marsh & McLennan, Inc./BBB Co., Option A
   $1,412,280. (80.88%)

3. Marsh & McLennan, Inc./BBB Co., Option B
   $1,623,445 (75.58%)

4. Alexander & Alexander, Inc./Alexis, Inc.
   $1,101,250. (75%)

5. Transit Casualty Company
   $1,036,492. (72.08%)

6. Marsh & McLennan, Inc./AAA Co.
   $1,533,767. (71.52%)

This recommendation was reviewed with Treasurer James by Ms. Harrell and Ms. Hall following the Treasurer's receipt thereof. (Sept. 30 Tr. 181-184). The Treasurer adopted the Committee's recommendation to award the proposed contract for claims administration services to M&M (Schaffer/Wiseman). (Sept.30 Tr. 184).

30. Following this determination, on June 27, 1985, Ms. Harrell advised Appellant, A&A and M&M of the Treasurer's decision by telephone. (Sept. 30 Tr. 184; Nov. 14 Tr. 135-137).

31. On July 1, 1985, in accordance with Mr. Karey's telephone requests of June 27 and 28, 1985, Ms. Harrell provided Mr. Karey with a summary of prices and evaluation scores accorded the proposals of Appellant, M&M and A&A. (Ex. 27, AR; Nov. 14 Tr. 135-139).

32. On July 5, 1985, Appellant filed its protest with the State Treasurer's Office of the intended award to M&M. This initial protest specified some twelve grounds of objection to the proposed award. (Ex. 28, AR). A supplemental protest was filed with the State Treasurer on July 16, 1985 specifying additional grounds. (Ex. 29, AR). On July 31, 1985, the State Treasurer issued his final decision denying the Appellant's protests. (Ex. 30, AR). On August 7, 1985, Appellant filed this appeal.

Findings of Fact - Part II

33. Ms Harrell has been in the insurance business for approximately 20 years. (Sept. 24 Tr. 144; Resp. Ex. 95). She was employed by M&M in its Washington D.C. office from 1977 through May 1980, first as a personal lines representative and than as a commercial lines representative. (Sept. 24 Tr. 104). Ms. Harrell's employment with the State of Maryland began in February of 1983 as Assistant Insurance Manager in the Treasurer's office and in May of 1984 Ms. Harrell was promoted to her present position as Insurance Manager. (Sept. 24 Tr. 103). Since joining the State in February 1983, she has met and spoken with representatives of M&M and other brokers regularly and frequently in the normal course of business. (Sept. 24 Tr. 103-106). One of the persons at M&M with whom she dealt on a regular business basis and with whom she was on a first name basis was Mr. Darlington (Sept. 24 Tr. 105-106). Other than her contacts with M&M representatives arising out of the scope of her employment with the State, her only association with M&M had been her three years of employment in the Washington, D.C. office which ended almost five years before the instant procurement began. (Oct. 21 Tr. 3-12). She has no financial or ownership interest in M&M.

Ms. Harrell has a high regard for the professional capabilities of M&M and certain of its personnel. Prior to the instant RFP, Ms. Harrell had little contact with Appellant's personnel or representatives and had very little professional experience with Appellant.

34. Ms. Harrell and Ms. Hall have served on a number of evaluation committees involving competitively negotiated procurements for insurance and insurance related services on behalf of the Treasurer's Office since July of 1983 when the Treasurer commenced soliciting offers for State insurance coverage through negotiated procurements. Ms. Harrell served on all 12 such committees and was designated point of contact or chairperson in all but one. Ms. Hall served on 6 such committees. (Sept. 24 Tr. 106-108; Oct. 21 Tr. 10-13; Resp. Ex. 93; Nov. 11 Tr. 166-167). M&M responded to 8 of the 12 RFP's issued since July 83 and submitted the successful proposal in three of these procurements. Ms. Harrell and Ms. Hall participated together on the evaluation committees in the three procurements in which M&M was the successful offeror. Also receiving contracts as a result of these 12 RFP's were Poor, Bowen, Bartlett & Kennedy (4); Riggs, Counselman, Michaels & Downes, Inc. (3); and A&A (3). (Resp. Ex. 93).

35. Ms. Hall testified that prior to her employment with the State which commenced in June 1984 she had previously worked with Mr. Darlington from time to time from 1966 to 1972 with an abreviation from late 1969 to early 1972 and from 1972 to 1976. (Nov. 11 Tr. 164-165). During this period of time Mr. Darlington was employed by the brokerage firm of Poor, Bowen, Bartlett & Kennedy. (Oct. 21 Tr. 195). She also came to know Mr. Friz prior to joining the State. (Nov. 11, Tr. 164-165). Like Ms. Harrell she had had very little professional experience with Appellant or contact with its personnel prior to the instant RFP. (Nov. 11 Tr. 167).

36. Risk management was defined by Mr. Schaffer and Messrs. Althoff and Karey as follows:

Mr. Schaffer:

A. Risk, risk management is a composite of first identifying the risk. Secondly making a determination whether you are either going to control or avoid the risk and last, if need be, to transfer the risk.

Q. Um Hum. And what are the ways one might transfer the risk?

A. The most popular ways are either by insuring or by virtue of an indemnity agreement or contract.

Q. So risk management in one sense is much broader than insurance, is that correct?

A. Oh, yes.

Q. Okay. Now, in a claims administration or insurance setting, how do you use risk management? Where does it fit in?

A. Claims, it fits in all through it. You cannot have a claims administration program without having risk management. It's probably the key element to claims administration. Claims administration virtually is a generic term uh which encompasses the various areas, the claims adjusting, the loss control, loss prevention and risk management.

It starts in the beginning and it is your base line and guide line all the way through and if you're going to get a result it's going, or if you're going to get a favorable result it's going to be through risk management.

Q. Okay. Where did you learn about claims administration and risk management?

A. Fifteen years in the industry. Risk management has been a key element. The majority of our clients are high risk, high exposure type of risks and uh its's, it had always been a key element and it works with the adjustment. It works hand and glove so you have got to know.

Q. And you use it as a tool for reducing loss ratios?

A. That's almost the goal that you have, yes. It will establish what your loss ratio is at the beginning and then it will give you the criteria to determine whether or not you're doing better. (Nov. 11 Tr. pp.46-47).

Mr. Althoff:

Q. Would you tell us what your understanding is of the term Risk Management?

A. Well, I would resume [sic] that some companies would use it slightly different than others but overall the — I think that the original concept of Risk Management was that the insurance companies would approach a potential customer or insured and give them — offer them a package and the package would vary but fundamentally, the package would be, "We will review your entire insurance needs, not only this one policy that you're looking for but we'll review the whole package and we will then find either our company or various companies to insure you. We will then supply you with the claim handling work and we will supply you with some statistical analysis as to where your problems are and perhaps we might even give you from a safety standpoint a method of combating those problems." And, generally speaking, that's my concept of what Risk Management is.

Q. Let me ask you this, you're familiar with the term, "Claim, Claim Services or Claims Administration Services?"

A. Yes.

* * *

Q. What does that involve?

A. That basically involves the handling of a claim from its inception to its conclusion and by that I mean you will get the claim, you will sign the claim, handle the claim, reserve the claim and dispose of the claim.

Q. Is Risk Management typically thought to be part of Claims Administration Services?

* * *

The witness: I would say generally, yes.

Mr. Crowe: I'm sorry, is Risk Management part of Claims Administration Services?

* * *

Mr. Harrison: Let me ask the question. Now, you have given the Board a definition of Risk Management as you understand that concept.

The witness: Yes.

Mr. Harrison: You then gave the Board a definition of your understanding of what is involved in claims handling. You were then asked if claims handling involved — you were then asked if Risk Management is a part of claims handling or to state it another way. Does claims handling involve any Risk Management and your answer to that question was, yes. I'm going to ask you that question again. What is the relationship if any between Risk Management and claims handling?

The Witness: The only way I can answer that very definitely is to say that claims handling persay [sic] is not Risk Management. Generally speaking, whatever you have the claims management, you work in conjunction with or you produce safety engineering and as a result of safety engineering, you come up with the tail end or a little portion of Risk Management. And as a result of that, that is where the association of Risk Management and claim handling is and that's all. (Nov. 13 Tr. 47-50).

Mr. Karey:

Q. What do you understand Risk Management to be?

A. Well, there are a lot of definitions I think to Risk Management and I think the number ought to come out in this matter — this proceeding. My understanding of Risk Management is that you would take —encompasses a whole body of things, it encompasses where a company, insurance agent or insurance company or whatever would come in and look at the risk, meaning a company and try to determine its potential exposure to some type of liability where it would be subjected to cost involved and exposures of some nature.

Then you would have identifying those risks and trying to either eliminate those risks or providing some means to compensate those risks. And then of course you'd get into the loss prevention which is another name for safety, you'd get into analysis of record keeping that's generated to try to see how you can do these things. (Nov. 13 Tr. 210).

37. Based on its review of the record as a whole, the Board concludes that Appellant did not offer risk management in its proposal as submitted on June 20, 1985. We find that Appellant's Los Angeles office, which prepared the options concerning services to be provided and the fees for those service, determined not to offer such services. The Board further finds that as a result of discussions at Appellant's oral presentation concerning the concept of risk management and risk management oversight by a third party entity, Appellant was afforded the opportunity to amend its proposal to include risk management services for a fee rather than submit to oversight by a third party and that it chose not to do so. We also find that the so called free, informal risk management services that Appellant was allegedly providing under its existing claims administration services contract (see Finding of Fact No. 20, supra) were not risk management services as that term is commonly understood in the insurance industry.

38. The RFP provided for certain rights of termination. Paragraph 3.11 of the RFP entitled Termination provided as follows:

3.11 Termination

A. Termination by Default
If the insurer fails to fulfill its obligations under the policy properly and on time, or otherwise violates any provision of the policy, the Treasurer may terminate the policy by written notice to the insurer. The notice shall specify the act or omission relied on as cause for

termination. All finished or unfinished work products provided by the insurer shall at the Treasurer's option, become the property of the Treasurer. The insurer shall retain that part of the prepaid premium allocable to satisfactory performance performed prior to receipt of notice of termination, less the amount of damages caused by the insurer's breach. If the damages are more than the premiums paid to the insurer, the insurer will remain liable after termination, and the Treasurer can affirmatively collect damages.

B. Termination by Treasurer
In addition to any other provision of this policy, the Treasurer may terminate this policy, in whole or in part, at any time for any reason by notice to the insurer. The insurer may retain that part of the prepaid premium earned before the effective date of the termination.

C. Termination by Insurer
The insurer's notice of intent to cancel or notice of intent to nonrenew must be made by mailing to the insured at the address shown in the policy a written notice stating when not less than 90 days thereafter such cancellation or nonrenewal shall be effective. The effective date and hour of cancellation stated in the notice shall become the end of the policy period.

Notice of intent to cancel for nonpayment of policy premium must also be made by mailing to the insured at the address shown in the policy a written notice stating when not less than 10 days thereafter such cancellation shall be effective. All notice must be by certified mail to the Insured.

(Ex. 1, AR, ¶3.11).

The Board finds that subparagraph C of paragraph 3.11 only applies to a right of termination by an offeror of an insurance policy and not to claims administration services. In this regard, the Board also finds that a unilateral right to terminate claims administration services by an offeror of such services is inconsistent with the provisions of paragraphs 2.3 and 2.5C of the RFP which require the handling of a claim to conclusion even where the events giving rise to such claim occur during the contract term but the claim is not reported until after the contract term. (See Finding of Fact No. 16, supra).

39. The M&M fee quotation for its services in connection with the claims administration services to be provided by Edward S. Schaffer, Inc., provided in relevant part:

Run-off claims after contract termination and all incurred but not reported claims; i.e., claims for occurrences during the contract term but reported after contract termination, will be administered for the following additional fee quotations.

1st year following contract termination at 60% of the expiring contract year fee.

2nd year following contract termination at 40% of the expiring contract year fee.

3rd year following contract termination at 20% of the expiring contract year fee.

4th year all remaining claims will be handled to conclusion at no additional cost.

Messrs. Friz and Schaffer testified that the clause was inserted into the proposal in reaction to Mr. Schaffer's concern that he would lose money if the contract were terminated by the State before the end of a three year contract term. (Oct. 25 Tr. 123; Nov. 11 Tr. 136-142). Ms. Harrell, Mr. Schaffer and Mr. Darlington testified that it was not anticipated that there would be any right of termination except the State's right. (Oct. 21 Tr. 178-79; Oct. 24 Tr. 50-51, 60, 104-108, 198-225; Nov. 11 Tr. 139-142).

The M&M proposal did not include any termination provision either for itself or for the State. Mr. Friz testified that there was no discussion at the M&M oral presentation about any provision permitting M&M the right to terminate and that the discussion was about termination by the State for nonappropriation of funds. (Oct. 25 Tr. 101-102). Mr. Schaffer gave similar testimony. (Nov. 11 Tr. 143-144). This testimony is consistent with a reasonable interpretation of the references in Ms. Harrell's and Ms. Hall's notes (Exs. 34b and 35b, AR) regarding termination[25] and Ms. Hall's testimony, inter alia, that the only discussion with M&M regarding termination she actually recalled concerned termination for lack of appropriation. (Nov. 11 Tr. 223-224; Nov. 12 Tr. 34-39). Mr. Friz's testimony is also consistent with Ms. Harrell's testimony that it was agreed that the State would be required to give 30 days notice of termination for lack of funds and an informal "handshake" agreement to attempt to provide 90 days notice of termination based on funding limitations. (Oct. 21 Tr. 186-187). Accordingly, the Board finds that the record as a whole does not support Appellant's contention that the State agreed that M&M would have a right of termination or that M&M proposed that it be given such right.

40. By letter dated July 1, 1985 and commencing with the phrase "This is 'for your eyes only'" Ms. Harrell wrote Mr. Darlington to advise M&M as to its ranking with respect to other offerors and enclosed a copy of the evaluation summary of June 27, 1985 (Ex. 25, AR) that had been forwarded to Treasurer James. (App. Ex. 60; Sept. 30 Tr. 214-215).

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[25] Ms. Harrell's note in this regard states: "Termination provision - O.K. for 90 days on their part with 'hand shake' agreement on our part to notify them as soon as we know, but in no case less than 30 days." Ms. Hall's note in this regard states: "90 day Cancellation or Termination - 90 days by offeror - 30 days on part of State with advance notice." Ms. Hall testified regarding her note that it meant that M&M had asked for 90 days notice from the State if the State was going to terminate for nonappropriation but that the State would only agree to 30 days advance notice. (Nov. 11 Tr. 223-224).

41. The scoring sheets prepared by Ms. Harrell and used by the evaluation committee to evaluate the proposals use the terms "risk management" and "loss control" which appear in the M&M and A&A proposal but not in the RFP or in Appellant's proposal. (Exs. 1, 33, 34 and 35 AR; Confidential Exs. 16 and 17, AR).

42. M&M (Schaffer) proposed a charge of $67,500 to perform 1500 property damage appraisals for claims in which the damage claimed was in excess of $500 with a charge of $45 per claim for claims in excess of 1500. Mr. Schaffer testified that he believed that the number of annual appraisals would not exceed 1500 and that the fee of $67,500 would be paid regardless of the number of appraisals that had to be performed. (Nov. 11 Tr. 21-22). Ms. Harrell testified that based on her review of the property loss experience reported by Appellant, which did not indicate the number of loss claims in excess of $500, it could nevertheless be reasonably determined that the number of claims over $500 would not exceed 1500 annually. (Oct. 21 Tr. 98).

43. M&M (Wiseman) proposed to handle all suits filed or served (reported) in the first year at an hourly rate of $50.00 and a per case cap for a total cap of $145,000 excepting defense of MTA drivers in District Court and appellate work which was to be performed at an additional hourly rate of $60. Mr. Wiseman testified that, as a result of negotiations, his proposal was revised to include defense of all suits filed or served in the first year and defense of drivers and appellate work, all at the specified hourly rates and per case caps, subject to a total overall cap of $180,000. (Oct. 25 Tr. 246-249; 258-259). He further testified that second and third year fees would be subject to negotiations based on experience in the previous year (years). (Oct. 25 Tr. 248-249). Ms. Harrell testified that her understanding of the Wiseman proposal was that the $180,000 was a first year cap and that second and third year fees, while subject to negotiation, would not include $180,000 in addition to the fee for suits filed in the second and third year as negotiated. (Sept. 26 Tr. 143-146, 148-151; Sept. 30 Tr. 11-12). We find this testimony to be credible.

44. The RFP required that the offeror provide MTA with a safety program and that the offeror's proposal briefly outline features of a proposed safety program. (Ex. 1, AR, ¶2.5C7). M&M proposed a detailed safety program available through Constitution State Service Company for an additional fee[26] beyond that for the services of Schaffer and Wiseman. (Confidential Ex. 16, AR; Sept. 26 Tr. 146-147). Appellant's proposal noted the following with respect to its proposed safety program:

> 9 - Transit Casualty will continue to furnish the Mass Transit Administration with the safety program that has been coordinated with Mass Transit Administration safety personnel.
>
> a - Transit Casualty offers an experienced safety engineer, who has spent over 20 years working in the development, administration and coordination of safety programs and related activities. Transit Casualty's staff engineer has

[26]The fees for the services of Constitution State were expressed in hourly and flat fee rates for various discreet activities with provision of printed safety materials free of charge upon the entering into of a contract for services.

extensive experience in dealing with safety issues incident to the operation of a common carrier fleet. He is familiar with the local public transportation activities and their special problems.

b - Coordinate Mass Transit Administration's safety experts with Transit Casualty's safety expert to interface their specialization for the ultimate loss prevention system.

c - Coordinate the loss prevention data of Transit Casualty with the Mass Transit Administration's data.

d - Perform necessary audits of the loss prevention data to assist Mass Transit Administration's management with its in house safety program.

e - Report by outside adjusters any equipment defects affecting safety.

(Ex. 15, AR). While Appellant included the cost of this program in its proposal such cost is not broken out. Based on the apparently very sketchy description at Appellant's oral presentation of what the program would actually entail in terms of specific features it would have been very difficult if not impossible for the evaluation committee to have determined the cost of Appellant's safety program and indeed what it consisted of. (Sept. 30 Tr. 46-48; Nov. 11 Tr. 217-219). The record also reflects that much of what Appellant describes in its proposal as set forth above respecting its safety program would have been provided by M&M routinely in connection with the claims administration services and risk management services to be provided by Edward S. Schaffer, Inc. and M&M. (Confidential Ex. 16, AR; Nov. 11 Tr. 38-66). Accordingly, we find that the M&M safety program offered through Constitution State Service Company was an alternative or option that the State could consider, or at the least was a deviation permitted by paragraphs 4.4 and 5.2 of the RFP and which the State could still consider.

45. The record reflects, inter alia, that (1) Mr. Karey and Mr. Althoff determined not to provide written resumes for attorneys despite Mr. Karey's initial inclination to do so, based on Mr. Althoff's previous experience in responding to IFB's that you did not provide anything that was not specifically called for in the specifications; (2) Mr. Karey and Mr. Althoff determined not to make a presentation as such at Appellant's oral presentation but simply respond to any questions asked of them by the evaluation committee; (3) Mr. Karey and Mr. Althoff perceived no real distinction between an IFB and a RFP and believed price was the controlling factor in an RFP; and (4) Mr. Karey and Mr. Althoff believed that because Appellant had been the incumbent provider of claims administration services for 30 years its proposal would be judged the best if it offered the lowest price. (Transcripts Nov. 13-15).

PRELIMINARY MATTER

As a preliminary matter following argument of counsel and upon consideration of the matter set forth in the Motion of M&M for Summary Disposition and Appellant's written opposition thereto, the Board orally granted summary disposition as to Counts I, IV and a portion of Count III as set forth in Appellant's notice of appeal.[27]

Count I

Count I of Appellant's notice of appeal alleged error in the procurement officer's determination that award of the contract by the State Treasurer without subsequent approval by the Board of Public Works was proper.[28] Appellant contends that the award of the contract was required to be reviewed and approved by the Board of Public Works pursuant to COMAR 21.02.01.05A(1) which provides:

> Except as otherwise provided in COMAR 21.05.06 Emergency and Expedited Procurements, the Board shall review and approve the award of those procurement contracts not delegated under this chapter, before execution.

The Board granted the motion to dismiss Count I on the grounds that the protest concerning authority of the Treasurer to award the proposed contract without approval by the Board of Public Works was not timely filed and that, in any event, the Treasurer properly had authority to award the contract without review and approval by the Board of Public Works.

A. Timeliness

COMAR 21.10.02.03 provides:

> A. Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.
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> B. In cases other than those covered in §A, bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

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[27]The Motion of M&M for Summary Disposition also addressed Count II as set forth in Appellant's notice of appeal. Count II challenged the determination of the Treasurer to engage in competitive negotiation rather than competitive bids. Appellant in its written opposition to M&M's motion acknowledged that Count II was time barred and consented to summary disposition as to that count.

[28]The subject contract has not been awarded. Pending disposition of this appeal, the Treasurer has entered into an interim contract with M&M for the provision of the necessary claims administration services.

The Board has held that the timeliness requirements of COMAR 21.10.02.03 are substantive in nature and to be strictly construed. See: RGS Enterprises, Inc., MSBCA 1106 (April 8, 1983) at p. 5; Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at p. 5; International Business Machines, MSBCA 1071 (August 18, 1982) at p. 5. See also: Kennedy Temporaries v. Comptroller, 57 Md. App. 22, 39-43 (1984). Failure to raise a timely protest will result in the individual interests of a bidder or offeror being outweighed by the public interest involved in assuring that state procurements proceed without delay. Rolm Mid-Atlantic, MSBCA 1094 (January 21, 1983) at p. 6.

The grounds for Appellant's protest that the Treasurer had no authority to award an insurance claims administration services contract where the cost exceeded $100,000 were apparent before the closing date for receipt of proposals, June 20, 1985. Appellant received the RFP in mid-April of 1985. The RFP, Part IV, paragraph 5.3, provided in pertinent part:

> Upon completion of these negotiations, the Evaluation Committee will recommend an award to the Treasurer. Upon receiving a recommendation from the Evaluation Committee, the Treasurer shall either accept the recommendation and award the contract to the recommended offeror, or reject the recommendation and remand the matter to the Evaluation Committee.

We believe that the language of paragraph 5.3 apprises offerors that the award of the subject contract would be made solely by the Treasurer without review and approval of such action by the Board of Public Works. Given this notice, objection to an award by the Treasurer without Board of Public Works approval should have been made prior to the closing date for proposals. By waiting until after the proposal submission date to raise this alleged impropriety apparent before that time, the offeror's right to protest on this ground is waived. See: American Air Filter Co., MSBCA 1199 (November 19, 1984); DASI Industries, Inc., MSBCA 1112 (May 5, 1983); Delmarva Drilling Company, MSBCA 1096 (January 26, 1983).

As it was, the challenge to the Treasurer's authority to award was not raised until July 16, 1985, eleven days after Appellant's initial protest was filed with the procurement officer. On that date, it was clearly untimely, coming some three months after the ground for the protest was or should have been known.

B. Authority to Award

Assuming, arguendo, as contended by Appellant, that the language of paragraph 5.3 concerning award is not such as to alert an offeror that the Board of Public Works would not be involved in the award and approval process, we find that the Board of Public Works has lawfully delegated to the Treasurer the authority to award the subject contract without review and approval by the Board. The authority of the Treasurer to award the instant contract is contained in COMAR 21.02.01.04E which provides in relevant part:

> The Board hereby delegates authority to the Treasurer for the approval and award of the following procurement contracts within the Treasurer's jurisdiction:
>
> (1) Banking, investment, and other financial services contracts authorized by Article 95 of the Annotated Code of Maryland;
> (2) Insurance policies obtained pursuant to Article 95 of the Annotated Code of Maryland.

(Underscoring added) and COMAR 21.02.01.05C which provides in relevant part:

> The provisions of this regulation requiring submission of Action Agendas and PAARS to the Board [of Public Works] do not apply to procurements by the Treasurer pursuant to Regulation .04E [21.02.01.04E]. However, quarterly, the Treasurer shall submit to the Board, on the Board Secretary's Action Agenda, a description of procurements made pursuant to Regulation .04E during the preceding quarter.

Appellant argues that the instant contract is neither for banking, investment or other financial services nor for an insurance policy but involves the investigation and processing of tort liability claims. We conclude that the instant contract is not for banking or investment services; nor is it an insurance policy. We do believe, however, that this contract fairly relates to "other financial services contracts authorized by Article 95. . . ." where, as here, the services in question are directly related to containment of exposure under the terms of a liability insurance contract. Appellant notes that the Deputy Insurance Commissioner in his June 12, 1985 letter (Ex. 14, AR) to Ms. Harrell respecting Appellant's eligibility to compete in the instant procurement, stated in part:

> The statement made by Commissioner Muhl is to be interpreted to apply to insurance business only, inasmuch as the statutory authority afforded the Commissioner by the Insurance Code extends only to the business of insurance. Therefore, the May 31, 1985 letter is not intended to restrict Transit Casualty from engaging in the business of providing claims administration services.

Appellant argues that the Insurance Commissioner's determination that claims administration services do not involve the business of insurance is dispositive of the issue of whether award of claims administration services contracts have been delegated to the Treasurer pursuant to COMAR 21.02.01.04E. However, recognizing that this letter was issued in the context of the eligibility of Appellant to participate in this procurement and that the Insurance Commissioner only has jurisdiction over insurance matters as specifically set forth in Article 48A of the Annotated Code of Maryland, we do not think this letter is dispositive of the matter. We are persuaded by our reading of the provisions of Article 95 relating to the Treasurer's duty respecting insurance matters (now contained in the State Finance and Procurement Article, Division I at §§9-101 - 9-107) that the particular services contemplated by the instant contract are fairly within the Treasurer's jurisdiction over insurance matters. See: Md. Ann. Code, State Finance and Procurement Article §9-103(a). We further note that the State Insurance Commissioner does not as suggested by Appellant have authority to determine the scope of coverage of a procurement regulation of the Board of Public Works under Article 21 or the statutory authority of the Treasurer regarding

insurance matters under Article 95. Further, we conclude that the June 12, 1985 letter may not be read as an attempt by the Insurance Commissioner to define either the Treasurer's authority or that of the Board of Public Works respecting award and approval of this contract.

Of further significance to the Board in its summary disposition of Count I was the fact that in 1984 the Treasurer awarded an insurance contract to Appellant and also awarded a separate claims administration service agreement to Appellant similar to the proposed contract at issue without review and approval by the Board of Public Works. From January 1984 through March 1984 a number of insurance and insurance related contracts were reported to the Board of Public Works by the Treasurer (Ex. 32, AR) as being within his authority to award without approval by the Board of Public Works pursuant to the delegation set forth above.[29] The Board of Public Works approved such reports (Ex. 32, AR) evidencing concurrence in the Treasurer's understanding of what had been delegated to him pursuant to COMAR 21.02.01.04E. This Board gives great if not controlling weight to the interpretation placed upon a procurement regulation by the promulgating executive branch agency if such interpretation is not unreasonable. Clearly the Treasurer's and Board of Public Works' interpretation of the scope of COMAR 21.02.01.04E as encompassing contracts such as the one at issue is not unreasonable. See: Md. Comm'n on Human Rel. v. Beth. Steel, 295 Md. 586, 592-594 (1983). Accordingly, Appellant's appeal under Count I was denied.

Count IV

Count IV of Appellant's notice of appeal alleged that the subject contract was awarded in violation of the Maryland Public Ethics Law, Article 40A §§1-102, et seq., of the Annotated Code of Maryland.

Specifically, Appellant alleges under Count IV that (1) "Ms. Harrell's long employment history with M&M made it improper for her to be a member of, let alone chair, the Evaluation Committee," and (2) that "[h]er membership on such Committee, coupled with her evident favoritism toward M&M and bias against Transit, created an appearance of improper influence in violation of Md. Code Ann., Art. 40A, §1-102 and rendered the resulting Committee action void, or at least voidable."

The Board first notes that existence of alleged violations of the provisions of the Maryland Public Ethics Law by State employees are to be determined by the Public Ethics Commission and not this Board. Clearly this Board whose jurisdiction solely derives from Article 21 of the Annotated Code of Maryland has no jurisdiction over matters committed to the Public Ethics

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[29]Exhibit 32 to the Agency Report does not reflect that award of Appellant's two MTA contracts for insurance and claims handling in 1984 were reported to the Board of Public Works. However, during oral argument on the Motion for Summary Disposition it was indicated that these two contract awards were in fact reported to the Board of Public Works pursuant to COMAR 21.02.01.05. (Sept. 24 Tr. 22-23, 36). Even if these contracts were not reported to the Board of Public Works, as required, the decision of this Board on the matter is not affected.

Commission under Article 40A. However, assuming arguendo some nexus between Count IV and this Board's jurisdiction over bid protests, the Board specifically dismissed Count IV on grounds that it was not timely filed. Ms. Harrell's revelation of her previous employment with M&M and alleged statement concerning why M&M should have been the provider of services in 1982 were made to Appellant on June 25, 1985. Appellant was aware that it would not be awarded the contract and that M&M would on June 27, 1985. Therefore, by June 27, 1985 Appellant should have been aware of any potential violation[30] of the Maryland Public Ethics Law stemming from Ms. Harrell's previous employment with M&M and should have specifically raised alleged violation of the Public Ethics Law in its July 5, 1985 protest. Protest referencing the Maryland Public Ethics Law, as such, was not made until late July and was, therefore, untimely. However, in dismissing Count IV, the Board made it clear that it was only dismissing on timeliness and jurisdictional grounds, consideration of the alleged violation of the Public Ethics Law. The Board indicated that alleged bias and favoritism in the context of Maryland's procurement law were still viable issues fairly contained in allegations appearing in Count III of the notice of appeal.

Count III

The Board also partially granted M&M's Motion for Summary Disposition on timeliness grounds as to the allegation or subcount of Count III of the notice of appeal asserting that the date set for receipt of proposals, June 20, 1985, was inappropriately late in the process, thereby leaving insufficient time for meaningful competitive negotiations prior to the projected award date of July 1, 1985. The date set for receipt of proposals, June 20, 1985, was contained in the RFP issued on April 12, 1985. See: paragraph 1.2, RFP. (Ex. 1, AR, ¶1.2). The appropriateness of the June 20, 1985 proposal due date was the subject of discussion at the pre-proposal conference held on May 2, 1985 and the procurement officer determined to maintain the June 20, 1985 proposal due date. Mr. Karey was present at the pre-proposal conference.[31] Therefore, at the latest, Appellant was aware on May 2, 1985 that the proposal due date would be June 20, 1985. However, complaint was not made until July 5, 1985 at the earliest[32] and then only if one liberally interprets the

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[30]Appellant has not suggested what specific provisions of the Maryland Public Ethics Law Ms. Harrell's previous employment as related to her participation in this procurement may have violated. No authority has been cited by counsel that precludes a government employee from acting in any fashion respecting a matter involving a previous private sector employer. The only specific reference in Count IV of Appellant's notice of appeal is to §1-102 of Article 40A. Section 1-102 is a generalized statement of legislative findings and statement of policy concerning improper influence and propriety of the conduct of public officials and officers.

[31]The record reflects that Mr. Karey did not make any objection to the June 20, 1985 proposal due date at the pre-proposal conference, and in any event discussions apparently centered around the appropriateness of this date for obtaining quotes for insurance purposes. (Nov. 13 Tr. 87-88).

[32]Counsel for Appellant in oral argument in opposition to the Motion For Summary Disposition contended that the issue of the appropriateness of the proposal due date was contained in paragraph 7 of Appellant's July 5, 1985 protest. (Sept. 24 Tr. 42-44). Paragraph 7 stated: "The procurement officer arbitrarily and capriciously reached a determination without due regard for the criteria established in the Request for Proposal." The supplemental

grounds set forth in the July 5, 1985 protest since the timing of the date set for receipt of proposals is not specifically alluded to. In any event, the protest on grounds that the June 20, 1985 date for receipt of proposals was inappropriate was clearly untimely pursuant to COMAR 21.10.02.03 since it was raised after the closing date for receipt of proposals and accordingly, was summarily dismissed.

Decision

Left for consideration by the Board is the procurement officer's denial of Appellant's protest involving allegations of impropriety as contained in Count III of the notice of appeal. These issues as delineated by counsel for Appellant in a letter to counsel for Respondent dated September 9, 1985[33] are as follows:

> (1) The bid price in the winning M&M/Schaffer/Wiseman Proposal was not $1,006,454, but rather was for a substantially greater amount. Indeed, such bid price violated the RFP specifications (and therefore was not responsive to such specifications) and, considering all of its components, it was for an amount in excess of $2,000,000 and thus constituted, by several hundreds of thousands of dollars, the highest price contained in any of the Proposals. The "adjustments" which were made to the bid price in this Proposal, which had the effect of making it appear that such price was lower than it actually was, were totally unauthorized, unfounded and baseless. The mischaracterization of the winning Proposal as containing the lowest bid price was both false and fraudulent and the victims of such mischaracterization were the citizens of Maryland as well as Transit Casualty.
>
> (2) In contrast, the Transit bid price was in compliance with the RFP specifications and contained the lowest price bid in any of the Proposals. The "adjustments" which were made to Transit's bid price, which had the effect of making it appear that such price was higher than it actually was, were totally unauthorized, unfounded and baseless.
>
> (3) The respective ratings assigned by the Evaluation Committee relating to the "capacity of the offerors' [Transit, on the one hand, and M&M/Schaffer/Wiseman, on the other hand] proposed claims service to handle claims" were contrary to all objective facts and were therefore arbitrary, capricious and illegal.
>
> (4) The Evaluation Committee was biased in favor of M&M and against Transit and its decision to recommend award of the contract pursuant to the RFP to M&M and its subcontractors had been predeter-

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protest of July 16, 1985 makes no reference to the timing of the proposal due date; nor does the notice of appeal. Clear reference to this alleged defect is first made in the letter of September 9, 1985 from counsel for Appellant to counsel for Respondent.

[33]The September 9, 1985 letter from counsel for Appellant to counsel for Respondent was pursuant to agreement at a prehearing conference on September 3, 1985 that written explication and refinement of the issues set forth in the notice of appeal and the amended notice of appeal would be provided.

mined. Such predetermination of an award which had been held out as being subject to a fair and unbiased public bidding process was contrary to law and violated Transit's rights to due process.

Critical to all these assertions of impropriety in the context of a bid protest is the question of whether one or more of the members of the evaluation committee were biased in favor of M&M and/or against Appellant. Also of concern is the question of whether the respective proposals of M&M and Appellant were properly evaluated pursuant to the terms of the RFP both as to price and technical factors.

Bias

Appellant alleges that the evaluation committee, and in particular Ms. Harrell, was biased in favor of M&M and against Appellant and that it was predetermined that award would be made to M&M.

Predetermination of award stemming from bias for or against an offeror is prohibited by Maryland law and regulations. Maryland Annotated Code, Article 21, §§1-201(b)(2), 1-201(b)7 and 2-201; COMAR 21.05.03.03C(3). Baltimore Motor Coach Company, MSBCA 1216 (January 8, 1985) at pp. 9-10. B. Paul Blaine Associates, Inc., MSBCA 1123 (August 16, 1983) at pp. 13-14. However, bias will not be attributed to procurement officials or those engaged in a procurement process based on inference or supposition. B. Paul Blaine Associates, Inc., supra, at p. 13; Earth Environmental Consultants, Inc., Comp. Gen. Dec. B-204866, 82-1 CPD ¶43 (1982); Information Control Systems, MSBCA 1198 (August 29, 1984) at p. 9.

However difficult it may be to prove the motivation of State procurement officials, an Appellant seeking to establish that its competitive position was affected nevertheless carries this burden. Baltimore Motor Coach Company, supra, at p. 10. Appellant has demonstrated the following:

1. Ms. Harrell worked for M&M for three years from 1977-1980. (Finding of Fact No. 33).

2. Ms. Hall was acquainted with Mr. Friz prior to becoming a state employee and worked with Mr. Darlington from time to time in the 1960's and 70's when Mr. Darlington worked for another broker. (Finding of Fact No. 35).

3. Ms. Harrell was on a first name basis with Mr. Darlington. (Finding of Fact No. 33).

4. Mr. Darlington sent information to Ms. Harrell concerning Appellant's financial status in February and April 1985 (Finding of Fact No. 4) and in May of 1985 sent Ms. Harrell information concerning Appellant's claim experience as the claims administration service provider for MTA during several preceeding policy years. (Finding of Fact No. 7).

5. On July 1, 1985, Ms. Harrell sent Mr. Darlington a copy of her memorandum of June 27, 1985 to the Treasurer which summarized the results of the evaluation committee's review of proposals. (Finding of Fact No. 40).

6. Ms. Hall reports directly to Ms. Harrell, and both scored Appellant lower than did Ms. Finnegan in the claims service and presentation categories. (Findings of Fact Nos. 3, 28).

7. Ms. Harrell in a conversation with Mr. Karey in Annapolis and later at Appellant's oral presentation expressed concern about the level of incurred losses under Appellant's MTA contract. (Findings of Fact Nos. 8, 20).

8. Ms. Harrell was responsible for scoring the pricing of the proposals and made adjustments to the price of the M&M proposal and adjustments to the price of Appellant's proposal. (Findings of Fact Nos. 24-28).

9. Ms. Harrell and Ms. Hall had participated together in several evaluation committees which Ms. Harrell chaired and in which M&M was recommended for and received award of a contract. (Finding of Fact No. 34).

10. Ms. Harrell communicated with the Treasurer, Appellant's broker (Layton Company) and the State Insurance Commissioner and his Deputy concerning Appellant's financial condition and its ability to submit a proposal. (Findings of Fact Nos. 4, 7, 9, 10).

11. Despite the Treasurer's instructions to give no consideration to Appellant's financial condition, Ms. Harrell asked Appellant's Mr. Karey at the oral presentation if Appellant's financial condition would affect its ability to perform the required services. (Findings of Fact Nos. 10, 20).

12. Ms. Harrell had a high regard for the professional capabilities of M&M and certain of its personnel that pre-dates receipt of the M&M proposal on June 20, 1985. (Finding of Fact No. 33).

13. The scoring sheets used by the evaluators to rate the proposals as prepared by Ms. Harrell (Exs. 33, 34 and 35, AR) contained reference to the terms "risk management" and "loss control" that appeared in the M&M and A&A proposals but not in the RFP or in Appellant's proposal. (Finding of Fact No. 41).

Taken singly or in combination, the above factors do not suffice to sustain Appellant's burden of demonstrating that the evaluation committee or any member thereof was biased in favor of M&M and against Appellant to a degree that it was predetermined that award would be made to M&M or at least would not be made to Appellant. Stated another way, Appellant has not shown that the evaluation committee's impartial judgment required to be brought to bear in weighing the respective offers was improperly influenced or exercised.

It might be inferred that Ms. Harrell attempted to influence a decision concerning whether Appellant's financial condition would exclude it from submitting a proposal for claims administration services as well as liability insurance. However, it is just as easily inferred that all her activities pertaining to whether Appellant could submit a proposal were carried out

legitimately in furtherance of her duties as the State's Insurance Manager to obtain the best possible insurance coverage for the MTA in light of the deteriorating insurance market. Similarly, while it might be inferred that Ms. Harrell's business acquaintance with Mr. Darlington as reflected in correspondence concerning the financial condition of Appellant, her prior employment with M&M, and her professional relationship with other M&M employees might predispose her to favoring a proposal submitted by M&M over one submitted by Appellant, the record does no more than raise such inference or supposition. Appellant has failed to overcome Ms. Harrell's testimony denying that her prior employment and existing official day-to-day contact with M&M and certain of its employees, to include Mr. Darlington, prevented her from objectively viewing the respective merits of the proposals submitted by M&M and Appellant. (Sept. 30 Tr. 4-216; Oct. 21 Tr. 3-194). Nor do we find any legal impediment to a procurement official chairing an evaluation committee in competitive negotiations by virtue of prior employment or by official day to day contact with employees of and professional respect for an offeror participating in such procurement. See: Architectural Preservation Consultants; Resource Analysts, Inc., Comp. Gen. Dec. B-200872, B-200872.4, B-200955.2 81-2 CPD ¶446 (December 8, 1981); Earth Environmental Consultants, Inc., supra; Telefax, Inc., Comp. Gen. Dec. B-216596, 85-1 CPD ¶620 (May 31, 1985). Fox & Company, Comp. Gen. Dec. B-197272, 80-2 CPD ¶340 (November 6, 1980); A.R.F. Products, Inc., 56 Comp. Gen. 201, 208, Comp. Gen. Dec. B-186248, 76-2 CPD ¶541 (1976). What we said in B. Paul Blaine Associates, Inc., supra, applied here as well:

> . . . Appellant has established only that the evaluators knew certain of the offerors as a result of professional relationships. Certainly if these relationships and prior experiences had been good ones, a high rating as to professional reputation could be expected. This is not to say, however, that it necessarily guaranteed a low rating for firms such as Appellant which had no prior dealings with the evaluators. A well written proposal, containing references and prior work history in the State, could have resulted in Appellant likewise receiving a high rating. In the absence of any evidence showing a subjective motivation on the part of the evaluators to downgrade Appellant, we cannot find bias here. (pp. 13-14).

Similarly, it might be inferred that (1) the employment relationship between Ms. Harrell and Ms. Hall, (2) the identity of their scores in evaluating Appellant in the claims service category, and (3) the award of several contracts to M&M in previous negotiated procurements where Ms. Harrell chaired the evaluation committee that included Ms. Hall suggest a predisposition of two of the three evaluation committee members to favor M&M in the instant RFP. However, the evidence of record does not suffice to elevate such construction of these facts beyond mere inference, speculation or conjecture. In this regard, we find that it is in the nature of the business of the State in obtaining insurance coverage and claims administration services that the State personnel responsible for this endeavor will be called on a number of times to participate in the procurement process, and the same insurance companies will likely submit offers on State procurements for this coverage for evaluation. That the same State personnel and the same insurance companies are involved in the procurement process over a number of years does not in and of itself support allegations that a decision is influenced by personal bias.

Finally, Appellant contends that adjustments that Ms. Harrell made with respect to the pricing of the M&M proposal and the pricing of Appellant's proposal were calculated to make Appellant's price appear higher than it actually was and to make M&M's price appear lower than it actually was. These actions are said to evidence bias. However, we find that the adjustments were made in good faith in order to compare the various proposals. Even if Ms. Harrell may have erred in making certain of the adjustments in the context of a competitively negotiated procurement such error was based upon misconception rather than bias and did not, as discussed infra, improperly prejudice Appellant in the evaluation process.

Evaluation of Proposals

A. Price Adjustments

Appellant contends that various adjustments made to both its proposal price and that of M&M were improper and had the effect of making the M&M price appear lower than it actually was and the Appellant's price appear higher than it actually was. We will confine our determination of this contention to discussion of the effect of the adjustments on first year contract fees since the evaluation of proposals as to price were based on the fees proposed for the first contract year.

Appellant specifically complains that Ms. Harrell erred in adjusting its price by adding an amount of $39,000 to its price for additional lease expenses attributable to Appellant being required to vacate the leased MTA premises on Washington Boulevard and secure space at some other location within the MTA service area.

It also complains that Ms. Harrell erred in deducting an amount of $117,500 from the M&M price for risk management services.

It also contends that since the RFP called for offerors to include allocated claim expenses in their proposal, Ms. Harrell should not have deducted any amount for allocated claim expenses from Appellant's price. Rather, Ms. Harrell should have added an appropriate figure to M&M's price for the cost of allocated claim expenses not included in its proposal. The appropriate figure Appellant says should have been added was $40,000 - $60,000 as reflective of realistic annual allocated expenses. Conversely, Appellant argues that assuming arguendo it was appropriate for Ms. Harrell to have made an adjustment to its price, she should have deducted $40,000 - $60,000 from its price to achieve true price comparability.

Appellant also suggests that it was prejudiced by Ms. Harrell's alleged failure to consider its provision of a safety program within its stated fee while M&M's proposal identified an additional fee for a safety program.

Lease Adjustment

Appellant contends that Ms. Harrell erred in adjusting its price by adding an amount ($39,000) for the cost of moving out of the premises leased from MTA at its Washington Boulevard facility pursuant to a lease dated March 12, 1965 (App. Ex. 1002) as amended by letter dated June 30, 1967

(App. Ex. 1003). According to Appellant, its lease is for a one year term because it provides for rent calculated on an annual basis payable in monthly installments. It, therefore, argues that if the original lease is unenforceable the Appellant is entitled to hold over for one year and, therefore, the earliest it would have to vacate MTA premises would be mid-March 1986. Therefore, Appellant argues that any adjustment should have been calculated on the basis of off premises rent differential for 3 1/2 months and not 12 months. Appellant further contends that MTA never determined that it did not want the claims administration service housed on MTA property and that, therefore, any adjustment to Appellant's price was improper.

The Board finds, however, that MTA determined subsequent to issuance of the RFP that the claims adjustment activity would not continue on MTA premises and that Appellant was advised of that fact during its oral presentation. (See Findings of Fact Nos. 20, 26). The Board further notes that Appellant apparently anticipated this possibility because it qualified the pricing of both options in its proposal with the caveat that its fee would be adjusted to reflect the difference between its present lease costs and those required by relocation at the request of MTA.

The Board further finds that the figure of $39,000 Ms. Harrell used to reflect this additional cost for MTA directed relocation of Appellant was appropriate since it was derived from Mr. Karey's own cost estimate that the evaluation committee had asked him to provide. (Finding of Fact No. 23).

Assuming, arguendo, that Appellant's argument that it could not have been required to vacate MTA premises until mid-March of 1986 has merit, the few thousand dollars difference in price resulting from this adjustment, as with allocated claim expenses discussed below, would not materially change the scoring of its proposal relative to M&M's.

Risk Management Fee

The Appellant contends that the risk management fee adjustment to M&M's price was inappropriate because the RFP did not call for risk management services and Appellant was not afforded an opportunity to revise its proposal to provide risk management services as required in competitive negotiation procedures. Appellant's two contentions in this regard appear somewhat in conflict. The second contention regarding the scope of competitive negotiations suggests that it was not inappropriate for the Treasurer's office to consider an offer of risk management services from any offeror. In any event, while the words risk management do not appear in the RFP the broadly defined scope of services set forth in the RFP did not preclude the offering of such services. See generally: BDM Corp., Comp. Gen. Dec. 211129, 83-2 CPD ¶234 (August 23, 1983). This is further demonstrated by the testimony of Messrs. Karey, Althoff and Schaffer that risk management is part of claims administration services (see Finding of Fact No. 36) and the testimony of Ms. Harrell and Ms. Hall that knowledgeable offerors would have realized the value of such services to the claims administration services called for by the RFP particularly in view of the high anticipated SIR set forth in the RFP (see Findings of Fact Nos. 1, 24, 36,). Accordingly, we find that the evaluation committee and the procurement officer properly considered the offers of M&M and A&A to provide such services.

Having considered the offers of M&M and A&A to provide such services Appellant argues it was encumbent upon the State to at least engage in discussions concerning risk management with it and to afford it the opportunity to provide such services consistent with this Board's pronouncement in Baltimore Motor Coach Company, supra:

> COMAR 21.05.03.03C.(3) provides, in pertinent part, that "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals." Inherent in this regulation is the requirement that if a State agency conducts discussions or negotiations with one acceptable offeror, it must do so with all acceptable offerors. Compare 50 Comp. Gen. 202 (1970).
>
> Whether discussions or negotiations have been held in a given procurement is a matter to be determined based upon the particular actions of the parties and not merely the characterizations placed thereon by the procurement officer. "The test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal." MAR, Incorporated, B-194631, August 13, 1979, 79-2 CPD ¶116, p. 3; see also Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD ¶404; The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD ¶459.

Baltimore Motor Coach Company, at pp. 10-11. See also Austin Electronics, 54 Comp. Gen. 60, 63-64 (1974). Compare Raytheon Company, 54 Comp. Gen. 171, 178-179 (1974). As indicated above, we believe the record supports a finding that an offer to provide risk management services was fairly contemplated by this performance oriented RFP if indeed risk management is not a component of claims administration services. However, assuming, arguendo, that the RFP did not include risk management services as a component of claims administration services we nevertheless find that the evaluation committee did afford Appellant the opportunity to revise or modify its proposal at its oral presentation to address risk management and that Appellant consciously chose not to offer risk management services. (See Findings of Fact Nos. 20, 23, 37). Thus any duty respecting discussions, negotiations and clarification of proposals was met in the instant procurement, and, further, because Appellant was given the opportunity to amend its proposal to provide these services, all offerors were competing on an equal basis. Compare Centennial Computer Products, Inc., Comp. Gen. Dec. B-212979, 84-2 CPD ¶295 (September 17, 1984); Computek, Inc., Comp. Gen. Dec. B-182576, 75-1 CPD ¶384 (June 25, 1975).

Since Appellant never proposed risk management services, Ms. Harrell deducted from the M&M proposal the amount included in the claims administration services fee for risk management ($117,500) in order to make the pricing of M&M and Appellant's proposals comparable. We find no infirmity in this adjustment. And, in any event, as with the adjustments for allocated claim expenses discussed below and lease expense, a restoration to the M&M evaluated price of the $117,500 for risk management services deducted by Ms. Harrell would not result in Appellant's overcoming M&M's overall point score. Further, the record does not support the suggestion by Appellant that its rating on the claims administration services and oral presentation evaluation categories may have been materially affected by its failure to propose risk management services.

Allocated Claim Expenses

Appellant contends that since the RFP called for an offeror to absorb allocated claim expenses related to claims adjustment and legal defense it was improper to make any adjustment to its price since its proposal included allocated claim expenses. Instead of making an adjustment to its price, Appellant contends that Ms. Harrell should have adjusted the M&M price upward by $40,000 - $60,000 to reflect its failure to include allocated expenses. However, the RFP permitted an offeror to deviate from its specific provisions as long as the deviations were set forth in its proposal. M&M and A&A did not include allocated claims in their proposals. M&M explained in its oral presentation that a conflict of interest was presented when a claims service provider is required to absorb allocated claim expenses. This is because the claims administration service provider might elect not to incur certain expenses in adjusting claims made against its client so as not to exceed the fixed amount it had put in its bid or proposal for allocated claim expenses. Since the RFP permitted deviations within the scope of offering claims administration services, and since the explanation of why M&M did not include allocated claim expenses associated with providing claims adjusting and legal services had a rational basis, M&M's proposal conformed to the requirements of the RFP and, therefore, was properly considered by the evaluation committee. See: Finding of Fact No. 25. Compare Western Engineering and Sales Co., Comp. Gen. Dec. B-205464, 82-2 CPD ¶277 (September 27, 1982); Northrop Services, Inc., Comp. Gen. Dec. B-184560, 77-1 CPD ¶71 (January 28, 1977). Accordingly, we find that a price adjustment to Appellant's proposal in order to compare it with M&M's price was appropriate.

Appellant next contends that the allocated expense deduction in the amount of $20,228 that Ms. Harrell made to its proposal price to compare it with M&M's price was arbitrarily assigned or derived. In a July 5, 1985 memorandum to the Treasurer commenting on Appellant's protest in this regard, Ms. Harrell stated:

> Not true - There was no arbitrary assignment of allocated expenses. In order to compare all proposals evenly, legal fees had to be compared. One of the major factors was the inclusion or exclusion of allocated expense costs. Transit Casualty's was the only proposal which included allocated expense costs.
>
> Marsh & McLennan estimated allocated expenses at $25,000.00. Alexander & Alexander estimated this expense to be $16,000.00. Transit Casualty was not willing to separate this expense from overall legal costs. Therefore, the Evaluation Committee took the average ($20,666.67) and assigned a credit of $20,228.00 to Transit's bid. We believe this to be correct, considering the average quote for legal fees excluding allocated expenses was $345,000. Giving Transit Casualty a credit for allocated expenses left their quote for legal services at $250,000.00. All members of the Evaluation Committee were in full agreement that this method was the only way (since Transit Casualty would not break out allocated expense costs) to compare all proposals equally.

We find that Appellant was afforded an opportunity by the evaluation committee to break out allocated expenses from its proposal (Option No. 1) but it was unwilling or unable to do so (see Finding of Fact No. 20). Appellant's Option No. 2 did not include legal services or allocated claim expenses. Both were included in Option No. 1. By interpolating between Appellant's Option No. 1 offer and its Option No. 2 offer the evaluation committee was able to come up with a price for Appellant for evaluating and comparing proposals based on the desired exclusion of allocated claims expenses. It was thus not unreasonable nor inappropriate for Ms. Harrell to make an adjustment to Appellant's price by deducting an amount for allocated claims expense anticipated in the first year in order to compare the proposals of M&M and Appellant. See: Connelly Containers, Inc., Comp. Gen. Dec. B-183193, 75-1 CPD ¶367 (June 16, 1975). We further find that the methodology Ms. Harrell used to arrive at the amount to be deducted had a rational basis and was not arbitrary.

Appellant's next objection, and the one most strenuously pressed, is that Ms. Harrell should have reduced its price by more than $20,228 for allocated claim expenses. Ms. Harrell took the average of the estimate of first year allocated expenses that would be actually paid in the first year given her by M&M ($25,000) and A&A ($16,000) to arrive at the amount to credit Appellant for allocated expenses. Appellant argues (Nov. 15 Tr. 172-174) that the true figure that should have been deducted from its first year price was from $40,000 to $60,000, to reflect expenses attributable to claims and law suits arising in the first contract year and paid in the first year and expenses arising from such claims and suits in later years. However, assuming, arguendo, that allocated expenses attributable to first year occurrences might aggregate as much as $60,000 (a point on which the evidence is conflicting)[34] and that such figure had been used to evaluate Appellant's price this would not have materially aided Appellant in view of its low score on the technical evaluation criteria. If Appellant had been awarded a full 50 points for price and M&M's price had been lowered to 49, Appellant's total evaluated score would have been 73.66 compared to M&M's score of 94.66.[35]

The Board also finds that it was appropriate for Ms. Harrell to use as a figure for adjustment the estimate of allocated expenses that would actually be paid in the first year. This is so because Appellant's proposal (Option No. 1) was in effect a proposal for a one year contract as permitted by the RFP, with renewals subject to mutually satisfactory negotiation of the second and third year fees, and Appellant's contract offer was subject to Appellant's supposed right to terminate at the end of the first year upon the giving of 90 days (subsequently reduced to 45 days) notice. (Findings of Fact Nos. 16, 23). Consequently, while the Board finds that a contractor may not bargain for a right to terminate a State contract under Maryland procurement law, if Appellant exercised its assumed right to terminate upon a failure to reach satisfactory agreement on the second or third year fee or for other reasons, Appellant would no doubt argue that it had no contractual obligation to pay allocated expenses since such obligation did not survive an exercise of this bargained for right to terminate. While we reject any notion that Maryland procurement law in fact permits an offeror to propose what is in effect a

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[34]Mr. Schaffer testified that allocated claims expenses attributable to any one year would not exceed $35,000 in the aggregate. (Nov. 11 Tr. 69-74).
[35]See Findings of Fact Nos. 28, 29, supra.

termination for convenience clause exercisable by it, we do not find fault with restricting price comparability to the first year as a result of the confusion resulting from Appellant's proposing a right of termination.

In conclusion, therefore, we do not find merit to Appellant's protest on grounds that the adjustment for allocated claim expenses was improper.

Safety Program

Appellant suggests that an adjustment should have been made to the M&M evaluated price by adding to it the cost of the safety program M&M offered to provide through Constitution State Service Company. Appellant presses this suggestion on the grounds that its proposal offered to provide a safety program free of charge within its proposal price. Therefore, it says that true price comparability between its proposal and that of M&M can only be achieved by assuming that MTA would choose to purchase the Constitution State program offered by M&M thereby adding an amount to the aggregate M&M price for the estimated reasonable cost for MTA's purchase of such services. However, the evaluation committee could not have determined what safety programmatic features were being offered by Appellant and it would have been difficult to cost these features for comparison with M&M since the cost of Appellant's safety program was not broken out in its proposal. (Finding of Fact No. 44). We also observe that much of what Appellant's written proposal states would be contained in its safety program is apparently offered by M&M as elements of the risk management and claims administration services to be performed routinely by Edward S. Schaffer, Inc. and M&M. (Finding of Fact No. 44). Accordingly, we do not perceive any error in Ms. Harrell not adjusting the M&M proposal respecting its safety program.

B. Run-Off

Appellant challenges the price of the M&M proposal on grounds that it contained hidden costs for the claims administration services of Edward S. Schaffer, Inc. and legal services of William J. Wiseman, III. These costs are said to double the actual cost of the proposal from that evaluated and presented to the Treasurer.[36] This is so according to Appellant because M&M had a right to terminate,[37] a contention we reject. (See Findings of Fact Nos. 38, 39). Thus Appellant contends that if M&M exercised that so called right at any time during the contract term the actual cost of the claims administration services would be the cost of the claims service fees paid up until the date of termination plus fees for handling run-off claims (i.e., claims reported up until termination and claims incurred but not reported

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[36]This ground for protest was first asserted after Appellant filed its notice of appeal with the Board and its counsel was provided access to the M&M proposal. Accordingly, it was never the subject of a procurement officer's decision as required by statute and regulation. However, neither the Respondent nor interested party have raised this jurisdictional issue. In view of the Board's determination that Appellant's so called run-off argument lacks merit we will not remand the appeal for a procurement officer's decision on this ground of protest. Compare: The CTC Machine & Supply Corp., MSBCA 1049 (April 20, 1982).

[37]We have also found that the run-off provision was intended to apply only where the State exercised its right to terminate the contract for convenience (Finding of Fact No. 39), a circumstance that is within the State's control.

until after termination). The additional fee for run-off claims would be charged at 60% of the fee for the year in which termination occurred for the first year following termination, 40% of the fee for the year in which termination occurred for the second year following termination and 20% of the fee for the year in which termination occurred for the third year following termination.

In similar fashion, Appellant contends that the actual first year cost for legal fees assuming termination by M&M is not $180,000 but $180,000 plus additional fees to reflect the cost of legal services for suits relating to claims occurring during the contract term prior to termination but not reported (served or filed) until after contract termination. Once again this contention is contrary to the Board's finding that the legal services portion of the M&M proposal was predicated on an hourly rate for suits served or filed and that $180,000 was merely a cap (not to exceed figure) on the cost of handling suits filed in the first year to conclusion. Costs for suits served or filed in the second and third year were subject to negotiation as to the hourly rate and cap based on experience in first year costs. (See Finding of Fact No. 43). Second and third year fees thus were not $180,000 plus negotiated hourly rate and cap in the second and third years.

While the Board's finding that M&M if awarded the contract would have no right to terminate (and that no such right is available under State procurement law) might make it academic to further pursue Appellant's argument, we shall do so since Appellant's so called run-off argument lacks merit on an alternative basis.

In its post hearing brief, Appellant makes the following summary analysis of its run-off argument.

> In her calculations, Jane Harrell arrived at "adjusted" prices of $1,036,492 for Transit Casualty and $1,006,454 for M&M. Ms. Harrell arrived at Transit's figures by the faulty process already described. Her price for M&M was arrived at by deducting $117,500 for risk management, a deduction which will be left intact for present purposes. Ms. Harrell's fundamental error, however, was failure to make necessary corresponding adjustments for M&M. As shown below, had Jane Harrell brought proper analysis to bear, the Transit price would have been $967,492 and the M&M price would be between $1,532,236 and $2,263,833. For ease of analysis, the starting point will be Jane Harrell's figures for both Transit and M&M. The correct figure of $967,492 for Transit Casualty is arrived at by making the following corrections discussed above.
>
> | | |
> |---|---|
> | Jane Harrell's adjusted figure for Transit Casualty | $1,036,492 |
> | Less additional deduction to reflect true allocated claims expenses for all occurrences | (30,000) |
> | Less $39,000 additional rent improperly attributed | (39,000) |
> | | $ 967,492 |

Assuming that a contract for claims administration runs its three-year course, and that the third year contract fee remains unchanged for the first year fee, the M&M price is $1,532,236 if the necessary adjustments discussed earlier in this memorandum are made.

Jane Harrell's adjusted figure for M&M	$1,006,454
Plus additional adjustment to reflect minimum cost for legal services for all first year occurrences no matter when suit is filed or served	175,000
Plus 1/3 of total runoff cost if contract terminates at end of first year	350,000
	$1,532,236

Given the very conservative assumptions made, the $1,532,236 figure is truly a low ball figure. If the assumption is made that the contract is terminated at the conclusion of the first year, also a very real possibility, the M&M price is $2,263,837 [sic] [$2,233,799]. The pertinent calculations are

Jane Harrell's Adjusted figure for M&M	$1,036,492 [sic] [$1,006,454]
Plus additional minimum adjustment to reflect cost of legal services for all first year occurrences no matter when suit is filed or served	175,000
Plus cost of handling runoff, i.e., 120% of expiring year contract fee	1,052,345
	$2,263,937 [sic] [$2,233,799]

Using simple ratios, if Transit is awarded 50 evaluation points for price, M&M would receive (1) 31.6 points assuming the contract ran its full term and (2) 21.3 points, assuming termination at the end of the first year.

Based on these calculations Appellant would have this Board sustain its appeal. However, the reality of both the M&M proposal and Appellant's proposal is that they were proposals for one year contracts with renewal options for the second and third years subject to mutually acceptable negotiations of contract price. The Appellant's proposal price, despite its protestations to the contrary, was simply not firm beyond one year. Neither was M&M's. Appellant's price for the second and third years was subject to mutually acceptable negotiations as to all aspects including claims administration and legal work, and its proposal incorporated a supposed right to terminate upon its giving the State 90 (subsequently reduced to 45) days notice prior to any July 1st. There was absolutely no way for the evaluation

committee or the procurement officer to determine what Appellant would propose by way of price to handle claims and suits arising in the second and/or third years.[38] Furthermore, should the Appellant attempt to exercise the supposed right of termination that it proposed by giving the requisite notice prior to the end of the first year, it would no doubt argue that its legal obligation to handle any claims or suits, whether existing or yet to be reported or filed, would cease despite the RFP language that some contract obligation continues beyond or survives contract termination. We have noted that an offeror's proposed unilateral right of termination in terms of Maryland procurement law is both a nullity and completely repugnant to a requirement that a contractor continue to perform services after either the natural (end of term) or sudden (termination) expiration of a contract awarded for claims administration services (as distinct from cancellation of a policy of insurance by a regulated offeror/insurer). Therefore, assuming, arguendo, that M&M also had a unilateral right to terminate and noting that Appellant assumed that it had successfully bargained for such right in the event it was awarded the contract, the legal or practical feasibility of such a run-off provision was properly disregarded by the evaluation committee in the evaluation of proposals. Therefore, Ms. Harrell properly priced both Appellant's and M&M's proposals based on a one year term without regard to M&M's run-off proposal.[39]

C. Technical Evaluation

Appellant contends that the respective ratings assigned by the evaluation committee relating to the capacity of the offerors (Appellant on the one hand and M&M on the other) to provide the requested claims administration and legal services were contrary to all objective facts and were therefore arbitrary, capricious and illegal.

The scoring by the evaluation committee of the technical aspects of the proposals of M&M and Appellant (claims service and oral presentation, see Finding of Fact No. 28) was as follows:

Evaluator	Appellant			M&M		
Harrell[40]						
Claims Service (40 pts.)	5	20		40	38	
Presentation (10 pts.)	1	8		10	10	
	6	28	= 17	50	48	= 49

[38]At least the M&M claims service fee for the second and third years was capped by a formula utilizing factors of claim frequency and the CPI but in no event to exceed 10% of the expiring year fee. Similarly, while the Wiseman legal fee proposal did not contain a not to exceed formula for second and third year fees, increases in fee, if any, could be grossly measured based upon the hourly rates and per case caps proposed for the first year.

[39]Since the State has the absolute right under Maryland procurement law to terminate a contract for convenience in whole or in part it would have the option to terminate M&M's contract in whole and have a third party handle run-off work if it appeared fiscally advantageous to the State to do so.

[40]Ms. Harrell rated each proposal twice, before and after the oral presentation, and averaged the results.

Finnegan		
Claims Service (40 pts.)	25	35
Presentation (10 pts.)	7	9
	32	44
Hall		
Claims Service (40 pts.)	20	35
Presentation (10 pts.)	2	10
	22	45

The Board has held that in competitive negotiations it is necessary to evaluate technical factors along with price to determine which proposal is most advantageous to the State and that the review of these technical factors requires the exercise of judgment which necessarily is subjective. B. Paul Blaine Associates, Inc., supra, at p. 13. Further, counsel have cited no authority that requires evaluators to possess expertise with respect to the subject matter they are called upon to evaluate. Therefore, in addition to being a subjective process there is also no experiential benchmark from which to review the bona fides of an evaluator's judgment.

This Board has also noted that:

> "The determination of the needs of the . . . [State] and the method of accommodating such needs is primarily the responsibility of the procuring agency which therefore is responsible for the overall determination of the relative desirability of proposals." Health Management Systems, Comp. Gen. Dec. B-200775, 81-1 CPD ¶255 (1981). Accordingly, procuring officials enjoy a reasonable degree of discretion in evaluating proposals and such discretion may not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations. Beilers Crop Service, MSBCA 1066 (September 16, 1982) at p. 6; Health Management Systems, supra; Comp. Gen. Dec. B-179703, 53 Comp. Gen. 800 (1974); compare Biddison v. Whitman, 183 Md. 620, 624-25 (1944); Hanna v. Board of Education, 200 Md. 49, 51, 87 A.2d 846, 847 (1952); B. Paul Blaine Associates, Inc, supra, at p. 14.

Therefore, this Board may only sustain the appeal if it finds that the ratings assigned by the evaluators were contrary to all objective facts, i.e., were patently arbitrary. Further, the Board may only review an evaluator's judgment based on what was before the evaluator to review. Appellant's assertion that the evaluation committee's scoring of the claims service and oral presentation evaluation factors was contrary to all objective facts is largely based on (1) its contention that the evaluation committee failed to properly account for the fact that Appellant had been performing the services for MTA and its predecessor for 30 years and (2) the contention that (a) Edward S. Schaffer, Inc. lacked experience in adjusting public mass transportation claims and (b) that William Wiseman, Esquire lacked jury trial experience in particular and expertise in public transit litigation in general.

Appellant's written proposal consisted of its price proposal (options 1 and 2) prepared by personnel in Appellant's Los Angeles office accompanied by an eight (8) page descriptive narrative of Appellant's proposed services, staff and capabilities prepared in Baltimore by Mr. Karey with input from Mr. Althoff. All three evaluators testified that they found Appellant's written

proposal to be somewhat vague and lacking in detail. This led to the evaluation committee's request for additional information which was by-in-large not provided. (Findings of Fact Nos. 18, 20). All three evaluators testified that had Appellant not been the encumbent provider of services for a number of years they would have rated Appellant's proposal even lower than they did. (Finding of Fact No. 18). Therefore, contrary to Appellant's assertion, the evaluation committee did take Appellant's prior experience into consideration in a positive vein.

The record simply does not support Appellant's contention that Edward S. Schaffer, Inc. and William Wiseman, Esquire lacked experience in Mass Transit claims adjustment and legal matters, respectively. However, this is not the issue. The issue is what the evaluation committee had before it for review and whether they exercised their subjective judgment inappropriately. Here, the experience of both Messrs. Schaffer and Wiseman was set forth in the M&M proposal in greater detail and depth than was the experience of their counterparts set forth in Appellant's proposal (Compare Confidential Ex. 16, AR with Ex. 15, AR) and this gap was not closed during Appellant's oral presentation. Thus any alleged lack of experience that may have been shown during the hearing of this appeal is not necessarily relevant to whether the evaluation committee's evaluation was arbitrary, capricious, or unreasonable. What is relevant is what the evaluation committee had before it to evaluate. Any deficiencies, or for that matter strengths, in the experience of personnel providing services under the respective proposals it had to glean from the proposals and oral discussion. There is nothing in this record to show that based on what was before the evaluation committee during the evaluation process that its subjective judgment was exercised unreasonably. The contention regarding Mr. Wiseman's alleged lack of jury experience was not a matter that was before the evaluation committee. This contention was apparently first surfaced by Appellant when it took Mr. Wiseman's deposition after noting its appeal to this Board. However, Mr. Karey was advised by Ms. Harrell that Mr. Wiseman would be performing legal services on June 27, 1985. (Nov. 14 Tr. 135-136). Accordingly, its protest on such grounds is untimely for the reasons set forth in the Board's discussions on timeliness requirements, supra.

In summary, we do not conclude that the ratings assigned by the evaluation committee based on the proposals as submitted and the oral interviews conducted with regard to those proposals were arbitrary or contrary to all objective fact.

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