

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of UNITED COMMUNITIES )  
AGAINST POVERTY, INC. )  
 ) Docket No. MSBCA 1312  
Under DHR RFP for Energy )  
Assistance Program )

March 13, 1987

Jurisdiction - Protests - The Department of Human Resources' (DHR) award of a contract to the Prince Georges County Department of Social Services did not end the Board's jurisdiction over an aggrieved private offeror's appeal of DHR's denial of its contract formation protest. The bid protest issues involved did not arise under a contract between DHR, a State agency, and a political subdivision of the State that the General Procurement Law expressly excepts from its application pursuant to §11-202 and thus from our jurisdiction.

Competitive Negotiation - Special Consideration - In this 100% Federally funded, negotiated procurement, the RFP's evaluation system gave special consideration as required by Federal statute to incumbent agencies or entities currently administering Maryland Energy Assistance Program (MEAP) funds by rating those agencies up to an additional 10 points under the vendor qualifications criteria. Therefore, any competitive advantage retained by an incumbent agency or entity pursuant to the Federal requirement to give special consideration to an incumbent contractor currently administering a MEAP program did not result in preference or unfair competitive advantage and thus was not unreasonable.

Competitive Negotiation - The DHR procurement officer reasonably scored the proposal of a competing offeror higher than Appellant's proposal under the "assigned key personnel" criteria where the competitor based its proposal on resumes of actual personnel who would do the work. Appellant based its proposal on job descriptions of vacant positions submitted in lieu of resumes, although it was permitted to cast its offer in this manner.

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APPEARANCE FOR RESPONDENT: Sherry L. Kendall  
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OPINION BY MR. KETCHEN

This appeal is taken from a Department of Human Resources (DHR) procurement officer's decision denying Appellant's protest which objected to the award of the instant contract to the Prince Georges County Department of Social Services. Appellant maintains that it was excluded improperly from participation in this competitively negotiated procurement. DHR has moved to dismiss Appellant's appeal for lack of Board jurisdiction over the subject matter.

Findings of Fact

1. On April 18, 1986, DHR issued a Request for Proposals (RFP) soliciting proposals for services from private and public agencies to be local administering agencies (LAA) for the Maryland Energy Assistance Program (MEAP) in each of the 23 counties of Maryland and in Baltimore City for the period September 1, 1986 through September 30, 1988. The program is a 100% Federally funded program providing cash assistance to low-income Maryland residents to meet home heating costs. The MEAP provides this assistance through LAA's pursuant to the Low-Income Home Energy Assistance Act (LIHEAP) (42 U.S.C. §§ 8621-8629). Proposals were due May 20, 1986.

2. RFP, Section 4.5, "Final Ranking and Selection," provided as follows:

Combining the individually evaluated financial and technical rankings, the Committee will determine the final ranking of each vendor's proposal, the recommended selection being that which offers the most advantageous combination of technical merit and cost, e.g., best price/performance ratio.

Contract awards, if any, resulting from the RFP, are subject to appropriate State approvals. Awards exceeding \$100,000 require approval of the State Board of Public Works.

3. RFP, Section 4.6, "Criteria for Technical and Financial Evaluation," listed five criteria for evaluating proposals. Points were assigned to each criteria creating a possible total technical score of 100 points. RFP, Section 4.6, provided as follows:

The criteria that will be used by the Committee for the technical evaluation for the acceptable proposals responding to this RFP are listed below. Each Committee member will score the proposals on each major criterion. Total scoring will be adjusted according to the weighing factors indicated with the major criteria.

| <u>Evaluation Criteria</u>  | <u>Weighing Factor</u> |
|---|------------------------|
| Understanding of MEAP Activities  | 5                      |
| Applicants knowledge of MEAP needs and comprehension of the level of effort and scope of work involved in all three phases of the program   |                        |
| Work Plan   | 25                     |
| Completeness and soundness of applicants proposed workplan management methods, linkages with other agencies, recruiting and training, work productivity oversight, report preparation methods of obtaining projected outreach goals |                        |
| Vendor Qualifications   |                        |
| A. <u>For all Proposing Agencies</u>  | 25                     |
| Related applicant agency experience in administering energy assistance or similar programs.   |                        |
| B. <u>For Existing MEAP Administering Agencies</u>  | 10                     |
| Agency's ability to meet program schedule and productivity standards and to maintain standards established for routine monitoring of MEAP.  |                        |
| Assigned Key Personnel  | 25                     |
| Related Experience<br>Professional Competency<br>Education  |                        |
| Clarity and Organization of Proposal  | <u>10</u><br>100       |

\* See §2.8.9 in regard to prior experience in delivery of human service programs to low-income households. Existing MEAP Administering Agencies may receive ten points if they are administering satisfactorily. The Committee may give less

than ten points when areas of management weaknesses are identified.

4. RFP, Section 4.7, "Technical Evaluation," provided as follows:

A technical evaluation will be completed by each member of the Selection Committee. All vendors who receive a rating of 70 or more points on the technical proposal evaluation from a majority of the Selection Committee will receive consideration of their financial proposals. Those for whom a majority of the Selection Committee evaluates with a technical rating of less than 70 points will not be considered further. A zero evaluation on any of the mandatory requirements from a majority of the Selection Committee during the preliminary technical evaluation will result in the offer being considered non-responsive.

5. RFP, Section 4.8, "Combined Technical and Financial Evaluation," provided, in pertinent part, as follows:

A final score will be assigned to the combined technical and financial proposals. The vendors with the highest number of points in each jurisdiction will be selected. Technical considerations will be given greater weight than costs in the evaluation.

In evaluating the proposals, DHR weighted technical scores at 60% and cost scores at 40%.

6. RFP, Section 5.23, "Evaluation Panel," provided as follows:

An Evaluation Panel made up of State personnel will review all proposals and make recommendations to the Executive Director, Community Services Administration, for the selection of the agency to supply the services as stated in this request. The Panel reserves the right to disqualify any and all proposals deemed unacceptable as a result of the review. (See Section 4. Evaluation and Selection Procedures).

Contract awards, if any, are subject to appropriate Federal and State approvals.

7. DHR held a pre-proposal conference on May 5, 1986, and DHR informed those in attendance that it would evaluate the technical aspects of proposals based on the points assigned to each evaluation criteria up to the total 100 points available. DHR also informed those attending that it would compute a proposal's technical score based on an average of all evaluation panel members scores. DHR would then combine each proposal's weighted technical score with its weighted financial score to arrive at an overall score. A proposal's final score necessarily provided a ranking relative to the overall scores of the other proposals.

8. Twenty-two proposals were received. Nineteen of the proposals were by existing LAA providers of services under the MEAP program.

9. Offerors financial proposals to operate the MEAP program in Prince Georges County were as follows:

| <u>Table 1</u>        | <u>Financial Proposal*</u> |                 |   | <u>Financial Score (40%)</u> |
|-----------------------|----------------------------|-----------------|---|------------------------------|
|                       | <u>Allowable**</u>         | <u>Proposed</u> |   |                              |
| Appellant             | 23.00                      | 20.95           | = | 44.0                         |
| Prince Georges County | 23.00                      | 22.49           | = | 40.8                         |

\* Formula:  $\frac{\text{Maximum Allowable Cost}}{\text{Application}} \text{ divided by } \frac{\text{Proposed Cost}}{\text{Application}} \times 100 \times 40\% = \text{Financial Score}$

\*\* Maximum allowable administrative cost per application by size of service population.

10. Appellant was one of three offerors that did not currently operate a MEAP program, although it provides similar low-income energy and weatherization services under other similar programs.

11. The evaluation panel's scores for Appellant's technical proposal were as follows:

**WEIGHING FACTORS SCORES - TECHNICAL VOLUME**

| Weighing Factors                          | Panelists |    |    |    |    | = | =               | Ave. Score |
|---|-----------|----|----|----|----|---|-----------------|------------|
|   | 1         | 2  | 3  | 4  | 5  |   |                 |            |
| 1. Understanding of MEAP Activities (5)   | 5         | 5  | 4  | 5  | 5  | = | $\frac{24}{5}$  | 4.8        |
| 2. Work Plan (25)                         | 17        | 25 | 20 | 22 | 17 | = | $\frac{101}{5}$ | 20.2       |
| 3. Vendor Qualifications                  |           |    |    |    |    |   |                 |            |
| A. All Proposing Agencies (25)            | 20        | 25 | 18 | 22 | 18 | = | $\frac{103}{5}$ | 20.6       |
| B. Existing MEAP Admin. Agencies (10)     | -         | -  | -  | -  | -  |   |                 |            |
| Assigned Key Personnel (25)               | 10        | 5  | 20 | 15 | 12 | = | $\frac{62}{5}$  | 12.4       |
| Clarity and Organization of Proposal (10) | 9         | 10 | 9  | 8  | 8  | = | $\frac{44}{5}$  | 8.8        |
| <b>Total Ave. Score</b>                   |           |    |    |    |    |   |                 | <b>67</b>  |

12. Appellant's technical score compared to the maximum points available and compared to Statewide technical scores was as follows:

Proposing LAA: Appellant

Technical Score - Each part of the technical score is provided as an average of the evaluation panel's score.

|                                     | <u>Appellant's Score</u> | <u>Maximum Possible Points</u> | <u>State Average (Existing LAA's)</u> |
|-------------------------------------|--------------------------|--------------------------------|---------------------------------------|
| 1. Understanding of MEAP Activities | 4.8                      | 5                              | 3.7                                   |
| 2. Workplan                         | 20.2                     | 25                             | 19.7                                  |
| 3A. Qualifications                  | 20.6                     | 25                             | 21.0                                  |
| 3B. Qualifications                  | 0                        | 10                             | 7.8                                   |
| 4. Key Personnel                    | 12.4                     | 25                             | 21.0                                  |
| 5. Organization and Clarity         | 8.8                      | 10                             | 7.4                                   |
| Total (rounded)                     | <u>67</u>                | <u>100</u>                     | <u>81</u>                             |
| Adjusted (x60%)                     | 40.2                     |                                |                                       |

13. Appellant's financial score (44.0) and technical score (40.2) resulted in an overall score of 84.2. However, DHR notified Appellant on June 10, 1986 that its proposal did not warrant consideration as an acceptable technical proposal within the competitive range.<sup>1</sup> Its technical score was below the minimum technical score required of 70 points.

14. The incumbent LAA was Prince Georges County acting through its Office of Economic Preparedness (PGOEP). Prince Georges County, acting through its Department of Social Services (following a County reorganization), received a combined technical (78 x 60% = 46.8 points) and financial (40.8) score on its proposal of 87.6 points.

15. The LAA contract was awarded to the Prince Georges County on June 10, 1986. The LAA services commenced shortly after that time and have been continually provided.

16. On June 17, 1986 Appellant sent DHR a mailgram protesting its elimination from consideration as an LAA for the MEAP program in Prince Georges County and requested a debriefing regarding its proposal. Following the furnishing of information to Appellant in response to its June 17, 1986 request for a debriefing regarding the procurement, Appellant submitted a letter dated September 18, 1986 to DHR protesting the award to Prince Georges County on two grounds.

17. Appellant's protest first maintained that pursuant to RFP, Section 2.8.9 it should not have received a score of zero (0) for Criterion 3.B., "Vendor Qualifications - For Existing Administering Agencies," based on its previous experience and capability. In this regard, RFP, Section 2.8.9 stated as follows:

The LAA must have prior experience in delivering human service programs to low-income households.

Proposing agencies should be aware that Title 26 of the Low-Income Home Energy Assistant Act (42 U.S.C. 8624 (b)(6)) stipulates:

In selecting an LAA special consideration shall be given to local agencies (public or private non-profit) which were receiving Federal funds under any low-income energy assistance program or weatherization program under either the Economic Opportunity Act of 1964 or any other provision of law, as of the day the Low-Income Home Energy Assistance Act was enacted (1981).

- A. The State shall, before giving special consideration, determine that the agency involved meets program and fiscal requirements.
- B. If there is no such agency because of any change in the assistance furnished to program [sic] for economically disadvantaged persons, then the State shall give special consideration in the designation of local administering agencies to a successor agency which is operated in substantially the same manner as the predecessor agency which did receive funds for the fiscal year preceding the fiscal year for which the determination is made.
- C. The Prior Experience and References sections should describe selected agreements that the vendor had with other clients in which similar services to those of this RFP were successfully performed. Include the name and location of the clients referenced in this section. Should the applicant lack such agreements, references should be included which would support the applicant's proposal and workplan as a viable effort for the applicant agency. (Underscoring added).

18. Appellant's protest next maintained that it was unreasonably downgraded with respect to its technical score for the "Assigned Key Personnel" criteria. It received 12.5 points out of a maximum possible score of 25 points.

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<sup>1</sup>DHR indicated at the pre-proposal conference that it was modifying its method of computing the technical scores, although it did not amend the RFP. However, Appellant waived any right to protest regarding this procedure and withdrew its objection to the scoring method by which DHR determined that Appellant's proposal was below the minimum score for an acceptable technical proposal. See COMAR 21.10.02.03; COMAR 21.05.03.03B; Tr. 78. We thus do not address this issue further.

19. The RFP, Section 3.3.6, states, in pertinent part, as follows:

The personnel section must include individual resumes for the key personnel that are to be assigned to this project if the vendor is awarded the contract. Indicate the role or assignment that each individual is to have in this project. The key person identified in the Offeror's Proposal is considered to be essential to the work being performed under this RFP.

\* \* \*

20. DHR informed offerors at the pre-proposal conference that in lieu of resumes of key personnel required by RFP, Section 3.3.6, an offeror could submit job descriptions for those positions in its organization that were vacant at the time the offeror submitted its proposal. However, DHR clearly indicated that it intended to rate proposals based on identified personnel who would do the work using their resumes describing their related experience, professional competency, and education. The RFP clearly preserved DHR's discretion to rate proposals that contained the qualifications of actual persons higher than proposals that contained only job descriptions of positions not yet filled.

21. Appellant's proposal included general descriptions of its staff positions, descriptions of the operation of its facility, and a description of services. However, it did not include any resumes of key personnel that it currently employed and would assign to perform the instant contract.

22. Appellant's scores on the "Assigned Key Personnel" criteria ranged from 5 to 20 points, out of a possible 25, with an average score of 12.4. The evaluators' comments on Appellant's proposal included the following:

No key personnel or resources.

No key personnel identified - some experience in program.

23. The Director of MEAP (the DHR procurement officer) denied Appellant's protest, and Appellant filed a timely appeal with this Board.

### Decision<sup>2</sup>

#### I. Motion to Dismiss

DHR maintains that its award of a MEAP contract to the Prince Georges County (LAA) ended this Board's jurisdiction over Appellant's appeal, since Maryland procurement law does not apply to contracts with political subdivisions of this State. Resolution of this jurisdictional issue turns on the following:

§11-202. Application of Division.

(a) in general. — This Division II of this article applies to:

(1) Every expenditure by a State agency for supplies, services, and construction under any contract or similar business agreement;

\* \* \*

(b) Exceptions. — Except as provided in subsection (e) of this section and §§13-405, 13-501, 18-501 through 18-515, 18-701 through 18-705, 19-106, and 19-206 of this Division II of this article, this Division II of this article does not apply to:

(1) Contracts or like business agreements between a State agency and another State agency or a political subdivision of the State or other governments;

<sup>2</sup>The Board's decision was issued orally shortly after the close of the evidentiary record. This is the Board's written decision issued pursuant to the notice requirements of the Maryland Administrative Procedure Act, Md. Ann. Code, State Government Article §10-214. See generally: Nuger v. State Ins. Comm'r, 231 Md. 543, 191 A.2d 222 (1963).

- (2) Procurement by bistate or multistate governmental agencies;
- (3) Procurement by bicounty or multicounty governmental agencies;
- (4) Procurement by political subdivisions of the State, including counties, municipalities, sanitary districts, drainage districts, soil conservation districts, and water supply districts;
- (5) Procurement for purposes of direct resale or remanufacture and subsequent resale in support of enterprise activities;
- (6) Procurements by the Maryland State Planning Council on Developmental Disabilities for services to support demonstration, pilot, and training programs; and
- (7) Procurements by the Maryland State Arts Council for the promotion or support of the arts. (Underscoring added).

Md. Code Annotated, State Finance and Procurement Article, Division II, General Procurement Law §11-202 (hereinafter "General Procurement Law").

These provisions clearly distinguish between "contracts" and "procurements" in excepting certain entities from the General Procurement Law.

DHR states that "unquestionably the Board has jurisdiction to decide disputes relating to the formation of human service contracts, which the subject solicitation was, . . ." However, it contends that the above §11-202(b)(1) exception ended our jurisdiction over this appeal when DHR awarded the MEAP contract to Prince Georges County as the LAA, State funds were advanced to Prince Georges County, and Prince Georges County began serving DHR's third party clients. Thus, DHR's position is that the Board's explicit statutory authority to review contract formation issues raised by a disappointed offeror came to an abrupt halt by DHR's award of the instant contract to Prince Georges County, a political subdivision of the State. We disagree.

This Board does not view our jurisdiction in such narrow terms given the statutory provision that excepts only contracts with political subdivisions of this State from our jurisdiction and the fairness criteria set out in Maryland procurement law.<sup>3</sup> See: Solon Automated Services, Inc., 1 MSBCA (MICPEL) ¶71 (February 29, 1984). In this regard, Maryland procurement law throughout distinguishes between issues involving formation of contracts and contract disputes that may arise under contracts after performance begins.

Maryland procurement law thus preserves the inherent difference between the two substantive areas throughout the provisions delineating Maryland's public contracting process by providing two separate procedures for resolving disagreements involving offerors vis-a-vis contractors. The General Procurement Law on this point states as follows:

<sup>3</sup>§ 11-201. Construction; purposes.

(a) Liberal construction. — Unless otherwise indicated, this Division II of this article shall be liberally construed and applied to promote the underlying purposes and policies specifically enumerated in subsection (b).

(b) Purposes and policies. — The underlying purposes and policies of this Division II of this article are, among others to:

(1) Provide for increased public confidence in the procedures followed in public procurement;

(2) Insure the fair and equitable treatment of all persons who deal with the procurement system of this State;

\* \* \*

(6) Provide safeguards for the maintenance of a procurement system of quality and integrity;

General Procurement Law, §11-201.

"Upon timely demand, . . . the responsible procurement officer of the using agency may . . . negotiate and resolve disputes relating to the formation of a contract with the State or a contract which has been entered into by the State. Disputes relating to the formation of a contract include but are not limited to those concerning the qualification of bidders or offerors and the determination of the successful bidder or offeror. Disputes relating to a contract which has been entered into by the State include but are not limited to those concerning the performance, breach, modification, and termination of the contract." (Underscoring added).

General Procurement Law §17-201(a).

The separate procedures provided for appealing contract formation issues and for appealing contract dispute issues to the Board are articulated in the General Procurement Law as well. See: General Procurement Law §17-201(e). The Code of Maryland Regulations (COMAR) preserves the dichotomy between contract formation issues (bid protests) and contract disputes. It provides procedures, including time limits for appeal, for resolving bid protests in COMAR 21.10.07, "Maryland State Board of Contract Appeals - Procedure for Appealing Protests." (Underscoring added). Separate procedures, including different time limits for appeal, are provided in COMAR 21.10.06, "Maryland State Board of Contract Appeals - Procedures for Appealing Contract Disputes" (Underscoring added) for resolving contract disputes arising during contract performance between the State and its contractors.

Examination of the treatment in §11-202, supra, which excepts contracts<sup>4</sup> with political subdivisions of this State and procurements involving other, named public entities from the General Procurement Law sheds additional light on this issue. Thus, §11-202 excepts only "contracts" with political subdivisions. However, it excludes "procurement"<sup>5</sup> by the other specifically named public agencies. "Procurement," which encompasses both the formation of contracts as well as performance under consummated contracts, is by design a much broader term that the Legislature used to except these other public entities from the General Procurement Law. Given the broadness of one term and the narrowness of the other, the General Procurement Law plainly means to except only disputes arising under "contracts" with political subdivisions of this State from the effect of its provisions. Procedures involving formation of State contracts in which political subdivisions may elect to become involved expressly are not excepted.

We note one further important point. It would be egregious to invite private enterprise entities to expend their time and resources to prepare and submit offers under Maryland's competitive procedures with its remedies expressly stated as being available to aggrieved bidders and then to block access to those specified remedies by the simple expedient of contract award and argument that Maryland procurement law excepts contracts with political subdivisions from its provisions.<sup>6</sup> The Legislature clearly did not intend to impose such a whimsical procedure when it promulgated the statute excepting, not "procurement," but contracts with political subdivisions from the General Procurement Law.

In summary, contracts between the State and political subdivisions of this State and, necessarily, contract disputes arising under them, are expressly excepted from the General Procurement Law. Therefore, we do not have jurisdiction over them. However, the General Procurement Law provides that this Board has the requisite jurisdiction over appeals involving the contract formation process (bid protest appeals) in which political subdivisions of this State may elect to participate along with private enterprise. Accordingly, we have jurisdiction to determine Appellant's bid protest appeal.

<sup>4</sup>"Contract" means "every agreement entered into by a State agency for the procurement of supplies, services, construction, or any other item and includes:

(i) Awards and notices of award;"

<sup>5</sup>"Procure" means buying, renting, leasing, purchasing, or otherwise obtaining any supplies, services, or construction. "Procure" includes all functions that pertain to the obtaining of any public procurement, including description of requirements, selection, and solicitation of sources, preparation and award of contract, and all phases of contract administration. General Procurement Law §11-101(k). (Underscoring added).

<sup>6</sup>We note that in a similar procurement a private, nonprofit entity stated that it spent as much as \$24,000 attempting to obtain a Maryland contract to provide human, educational, or social services as an LAA for DHR. See Automated Health Systems, Inc., 1 MSBCA (MICPEL) ¶113 (October 9, 1985).



For the foregoing reasons, therefore, we deny DHR's motion to dismiss.

## II. The Merits of the Appeal

We turn now to the concerns Appellant raises about the instant procurement under the competitive negotiation procedure. Appellant first maintains that DHR acted improperly when it awarded no points to Appellant in the category of Vendor Qualifications, Category B, "For Existing MEAP Administering Agencies." This criterion carried a maximum possible score of 10 points.

DHR contends that Appellant was not eligible to receive points for this criterion, since Appellant was not an "existing MEAP administering agency" entitled to special consideration under Federal requirements and thus ineligible for evaluation under Vendor Qualifications, Category B. (Findings of Fact Nos. 3 and 17; Tr. 12, 22). DHR maintains that it was required to give "special consideration" only to existing MEAP, LAA's and did so by applying the provisions set forth in RFP, Sections 2.8.9, 2.11<sup>7</sup> and 4.6. These RFP provisions, in part, implement Federal requirements.<sup>8</sup> These requirements provide that States distributing Federal funds under low-income energy and weatherization programs in selecting an LAA are to give special consideration to existing LAA's receiving Federal funds for low income energy assistance programs and weatherization programs on August 12, 1981. (Findings of Fact Nos. 3 and 17).

DHR implemented this Federal requirement by rating only existing (incumbent) MEAP, LAA agencies up to 10 points for Vendor Qualifications, Category B. Appellant was not an existing MEAP, LAA and thus DHR did not evaluate Appellant under Category B.

We find that DHR's method of giving special consideration to LAA's administering existing MEAP programs was an authorized procedure in this 100% Federally funded procurement and thus a reasonable means of complying with Federal requirements.<sup>9</sup> 49 Comp. Gen. 88 (1969). Since the procedure followed by DHR was dictated by Federal statute, any competitive advantage retained by an existing MEAP, LAA provider did not result from preference or unfair action by DHR and thus was not unreasonable. See: 49 Comp. Gen. 88 (1969); Price Waterhouse & Co., Comp. Gen. Dec. B-186779, November 15, 1976, 76-2 CPD 1412 (1976).

Appellant next contends that DHR erroneously evaluated its proposal under the "Assigned Key Personnel" category. To reiterate, Appellant received an average score of 12.4 points out of a possible score of 25 points under this criterion. Evaluation panel members gave Appellant scores ranging from 5 to 20 points. The panel also commented that Appellant did not identify any key personnel who would perform the contract services nor did Appellant describe the resources it would use to perform these services.

DHR told potential offerors at the pre-proposal conference that DHR would not reject proposals as unacceptable if offerors submitted job descriptions of positions in their organization that were vacant in lieu of resumes of actual persons who would do the work. However, DHR by its comments at the conference did not revise the "Assigned Key Personnel" criterion, as Appellant argues, so as to amend the RFP to indicate that offerors submitting only job descriptions were guaranteed that their proposals would receive as high a rating as

<sup>7</sup>See Appendix A.

<sup>8</sup>See 42 U.S.C. 8624(b)(6).

<sup>9</sup>We note that DHR arguably may have inappropriately limited the scope of the Federal requirement only to existing MEAP agencies since the Federal requirement for special consideration applies to any non-profit LAA receiving Federal funds under any low-income energy assistance program or weatherization program in 1981 as of the day the Low-Income Energy Assistance Act was enacted. Appellant may have met this requirement, although its proposal did not clearly demonstrate this fact. This point eventually was addressed at the hearing on the appeal. (See RFP, Section 2.8.9; Appellant's Exhibit 1). However, Appellant waived any right to complain about the RFP limitation giving special consideration only to existing MEAP participants, since it did not protest the restriction clearly set forth in the RFP prior to the date specified for receipt of proposals. COMAR 21.10.02.03 requires prospective offerors to file protests based on alleged improprieties in a solicitation before the closing date for receipt of proposals. Neoplan USA Corp., 1 MSBCA (MICPEL) ¶84 (Sept. 18, 1984).

those offerors submitting resumes of actual persons assigned to do the work.<sup>10</sup> Appellant thus unreasonably assumed, if it did, that it could receive maximum possible scores on the "Assigned Key Personnel" criterion based solely on job descriptions of positions rather than resumes of actual persons who would do the work, although it was permitted to cast its offer in this manner.

In any event, evaluation of proposals in a competitive negotiation procurement is a matter for the agency procurement officer's sole discretion based on the advice of an agency evaluation panel if used. We may act to overturn a procurement officer's determination to award to an offeror he deems the most qualified based on an RFP's evaluation criteria only if he acts unreasonably, abuses his discretion, or fails to follow a legal requirement in making the award. Compare Communications Products Co., Comp. Gen. Dec. B-186333, December 21, 1976, 76-2 CPD ¶508; UCE, Inc., Comp. Gen. Dec. B-186668, September 16, 1976, 76-2 CPD ¶249; Stephen J. Hall & Associates, Comp. Gen. Dec. B-180440, B-132740, July 10, 1974, 74-2 CPD ¶17; 54 Comp. Gen. 60 (1974). Appellant has the burden of proof to establish that the DHR procurement officer failed to meet the required standard. Appellant has not made the necessary showing here. Accordingly, its appeal on this ground is denied.

For the foregoing reasons, therefore, the Board denies Appellant's appeal.

#### Appendix

##### RFP S2.11 Evaluation of Services of Existing Providers

If the applicant currently operates a local MEAP agency, the following additional information will be evaluated by the Evaluation Committee:

- A. Error Rate - the actual percentage of errors performed in the completeness of energy assistance applications. Errors that affect eligibility and/or benefit level as well as errors in procedures which constitute internal weaknesses will be reviewed for the LAA prior year performance.
- B. Timeliness of Service - The ability of the agency to process applications and issue payments to energy suppliers within the prescribed time frame.
- C. Percentage of potentially eligible households served.
- D. Coordination with other energy related efforts and human service agencies within the jurisdiction including written agreements with local human service agencies.
- E. Compliance with MEAP Specified Internal Control Procedures and Reporting Requirements.

As a part of the evaluation of agencies with no previous MEAP administrative experience, MEAP will review prior performance on other human services contracts including but not limited to outreach to eligible populations, coordination with other agencies, and timeliness of service.

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<sup>10</sup>In this regard, COMAR 21.10.03.02E requires RFP amendments to be identified as such, to be in writing, and to be issued pursuant to the procurement officer's authorization.