

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of UNITED TECHNOLOGIES CORP.)	
and BELL HELICOPTER, TEXTRON, INC.)	Docket Nos. MSBCA
)	1407 and 1409
Under State Helicopter Procurement)	

January 30, 1989

Competitive Negotiation - Evaluation Factors - An agency may disregard unsolicited information submitted by an offeror in its proposal if evaluation of the proposal based on such information would constitute evaluation based on unannounced evaluation factors or criteria. Use of unannounced evaluation factors or criteria is unreasonable and a violation of the requirements of Maryland's General Procurement Law.

Competitive Negotiation - Discussions - In a competitive negotiation procurement an agency may reasonably reject as unacceptable for evaluation purposes an offeror's revisions to its cost proposal in its best and final offer if the offeror fails to explain sufficiently revisions to its offer in response to the agency request for best and final offers following negotiation discussions.

Protest - Timeliness - An offeror who has filed a timely protest of an agency's contract formation action in a competitive negotiation may await a formal debriefing or explanation by the agency before filing a protest raising additional issues where the information the agency made available to the protester earlier left uncertain whether a basis for protest existed. Doubts about the timeliness of a protest may be resolved in the protester's favor.

Jurisdiction - Amendment of Appeal - Timeliness - The Board may consider an issue raised by an Appellant during hearings on a protest appeal where the procurement officer addressed the issue in a final procurement officer's decision if Appellant timely noted an appeal of denial of the issue raised by the protest. Amendment of an appeal to raise a new issue during the course of a protest appeal hearing is untimely where Appellant had notice in communications received from the procurement officer denying its protest of the basis for his proposal evaluation decision but failed to protest further within seven days of the procurement officer's communications and failed to file a timely appeal of denial of the protest regarding the issue it sought to raise with the Appeals Board.

Competitive Negotiation - Equal Proposals - In a competitive negotiation, selection officials may reasonably determine that two proposals are essentially equal. In this regard, they may reasonably determine that the proposal receiving the greater number of points under the scoring system used is not the superior proposal under circumstances where the variation in scoring is approximately 200 points out of 10,000 total points available for scoring the proposals.

Competitive Negotiations - Evaluation Factors - In a competitive negotiation procurement, in order to compete on an equal basis, offerors are entitled to know the relative importance of each evaluation factor used by the procuring agency to evaluate and score proposals.

Competitive Negotiations - Price Evaluation - In a competitive negotiation procurement, the procuring agency may select the higher priced, technically superior proposal in the State's best interest if the additional cost is warranted by the increase in quality provided by the technically superior proposal.

Competitive Negotiation - Technical Evaluation - Procurement officials may reasonably rely on the technical information made available to them within the parameters of the solicitation and during the negotiation process in order to distinguish between the technical features of equipment based on the solicitation evaluation factors when deciding which equipment is technically superior.

Board of Public Works Procurement Authority - The Board of Public Works possesses independent procurement authority to award contracts pursuant to the Maryland General Procurement Law and regulations.

The Maryland Executive Helicopter Advisory Committee - Evaluation Panel - The Maryland Executive Helicopter Advisory Committee is an advisory and policy making body. Its members include members from the Executive Branch and non-voting members who are members of the Maryland General Assembly. The Maryland Executive Helicopter Advisory Committee does not have procurement authority. In the State helicopter solicitation it functioned as the Board of Public Work's source evaluation committee to evaluate proposals and to advise the Board of Public Works regarding selection of the successful offeror for award.

Competitive Negotiations - Evaluation Factors - Procuring officials enjoy a reasonable range of discretion in evaluating proposals and determining the most advantageous proposal to select for award. Such determinations are entitled to great weight and are not disturbed unless unreasonable or in violation of Maryland General Procurement Law and regulations.

Competitive Negotiations - Evaluation Factors - Procurement officials are required by Maryland's General Procurement Law to evaluate proposals based on the solicitation's announced evaluation factors and criteria or inform offerors of changes to the evaluation factors or criteria so that offerors may submit accurate and realistic proposals and thereby compete on an equal basis.

Competitive Negotiations - Evaluation Factors - Equal Proposals - Evaluation and selection officials are required to select for award the proposal which best meets the State's needs and is the most advantageous proposal consistent with the solicitation's evaluation criteria, if the proposals appear equivalent or numerically tied based on the scoring system used.

Competitive Negotiations - Award Basis - Procurement officials may award a contract to the higher priced, technically superior proposal if the solicitation emphasizes quality over price and the procurement officials determine that the higher priced, technically superior proposal is also the most advantageous proposal.

Competitive Negotiations - Equivalent Proposals - Equivalent Products, Equipment - Procurement officials may use price to select the most advantageous proposal where the proposals are deemed equal or the equipment sought is deemed technically equivalent

based on the technical scoring system used.

Competitive Negotiations - Equal Proposals - In determining the technically superior proposal from equal proposals or technically equivalent proposals when making a procurement decision to award to the most advantageous proposal, selection and evaluation officials may emphasize particular technical evaluation criteria in selecting the proposal that best fulfills the State's needs. In this manner, selection officials may determine the superior proposal from proposals initially deemed technically equivalent or tied on a numerical basis.

Competitive Negotiations - Technical Evaluation - The Appeals Board does not second guess an agency's judgment that one offeror's equipment is technically superior to another offeror's equipment where the Appellant has not demonstrated that the agency's judgment is unreasonable, improper, or in violation of the Maryland General Procurement Law.

Evaluation Criteria - Notice - Appellant was not materially prejudiced by the selection officials' evaluation of proposals by their failure to issue a formal written amendment emphasizing that speed of delivery of emergency medical services and thus speed of the helicopters was an important State goal in the procurement where speed of the helicopters was listed as an evaluation factor and where Appellant was told during the evaluation and discussion process that the speed of the helicopter was an important State goal in affording speedy emergency medical services. A reasonable reading of the solicitation indicated that speed of the equipment in delivery of emergency medical services was an evaluation factor and also an important State goal.

Evaluation - Selection officials evaluated Appellant's proposal on a fair and equal basis consistent with solicitation evaluation criteria when they evaluated the speed of the helicopters under circumstances requiring the selection officials to distinguish between two helicopters found technically equal after the initial phases of the evaluation process.

Competitive Negotiation - Price Evaluation - In order to select the most advantageous proposal, the Maryland Executive Helicopter Advisory Committee, consistent with the solicitation requirements and Maryland General Procurement Law, compared the competing proposals based on the total estimated price offered by the proposals including the purchase price (acquisition cost) and estimated operating costs (life cycle costs).

Competitive Negotiations - Price Evaluation - Cost Estimates - The Appeals Board does not second guess agency procurement decisions regarding technical issues unless clearly shown to be unreasonable or in violation of the Maryland General Procurement Law. This includes a judgment regarding estimates as to equipment's future operating costs and their consideration in selecting the most advantageous proposal for award.

Competitive Negotiations - Evaluation and Selection - Based on the evaluation and recommendation of the Maryland Executive Helicopter Advisory Committee, the Board of Public Works in the exercise of its independent procurement authority reasonably awarded the contract based on the proposal it adjudged offered the technically superior helicopter as well as the most advantageous proposal when considering price and the solicitation evaluation factors.

APPEARANCES FOR APPELLANT:
(United Technologies Corp.)

John H. Morris, Esq.
Thomas J. Madden, Esq.
James F. Worrall, Esq.
Venable, Baetjer,
Howard & Civiletti
Baltimore, MD

APPEARANCES FOR APPELLANT:
(Bell Helicopter, Textron, Inc.)

David A. Churchill, Esq.
Matthew J. McGrath, Esq.
McKenna, Conner & Cuneo
Washington, D.C.

APPEARANCE FOR RESPONDENT:

Ben C. Clyburn
William A. Kahn
Assistant Attorneys
General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:
(Aerospatiale Helicopter Corp.)

Joseph A. Schwartz, III, Esq.
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellants United Technologies Corp. Sikorsky Division (Sikorsky) and Bell Helicopter, Textron, Inc. (Bell) appeal the denial of their bid protests relating to selection of a contractor to provide Emergency Medical System (EMS) helicopters. The appeals were consolidated for hearing and decision.

Findings of Fact¹

1. During the 1986 Session of the General Assembly, the State legislature established the Maryland Executive Helicopter Advisory Committee (MEHAC) to provide ongoing oversight and policy guidelines to the Maryland Institute

¹The Findings of Fact in this section, Findings 1 through 25, relate generally to events leading to the appeals. Specific Findings of Fact germane to particular issues in the two appeals appear below.

for Emergency Medical Services Systems (MIEMSS) and to act as liaison with the Governor's Office, General Assembly, and Department of Budget and Fiscal Planning. MEHAC's duties included:

- (1) Reviewing progress toward enhancement and revitalization of the State Med-Evac Program;
- (2) Reviewing and developing recommendations for improvement of delivery of Med-Evac services in the State, addressing such issues as deployment of helicopters, staffing requirements and experience levels of personnel, support functions, communications systems, training needs, and the optimum utilization of the Maryland State Police Helicopter fleet;
- (3) Serving as the primary body to structure the budget for Med-Evac operations, to include assuring a balanced, mutually supportive request for the MIEMSS and the Maryland State Police Aviation Section Division;
- (4) Monitoring the progress of budget requests and expenditures consistent with guidelines and requirements as established by the Maryland Executive Helicopter Advisory Committee;
- (5) Develop protocols for cooperative use and priority of Maryland State Police helicopter services; and
- (6) Examine reciprocity of helicopter services with adjoining states;

* * *

SJR33, Laws of Maryland, 1987.

2. MEHAC² subsequently developed and adopted, after review by the Legislative Budget Committees of the General Assembly, an updated Helicopter Mission Profile which was used to establish specific aircraft performance requirements and equipment, system, and service specifications. These requirements and specifications were incorporated in a Request for Proposals (RFP) developed by the Maryland Department of Transportation (MDOT) which had

²The members of MEHAC were the Honorable Melvin A. Steinberg, Lieutenant Governor; the Honorable Francis X. Kelly, Maryland State Senate; the Honorable John C. Astle, Maryland House of Delegates; the Honorable Charles L. Benton, Secretary of Budget and Fiscal Planning; Dr. R. Adams Cowley, Director MIEMSS; Dr. Ameen Ramzy, MIEMSS; Colonel Elmer H. Tippet, Superintendent, Maryland State Police; Major Warner L. Sumpter, Aviation Division, Maryland State Police; John M. Staubitz, Department of Health and Mental Hygiene; and Paul H. Reincke, Chief, Baltimore County Fire Department. (October 17, Tr. pp. 79-80; Respondent's Ex. 22).

been charged by MEHAC with responsibility to initiate and oversee a helicopter procurement to replace existing State owned EMS helicopters with new medium-sized, twin-engine, jet-powered helicopters. The RFP was mailed to twenty-two vendors on February 19, 1988.

3. The RFP set up a multi-phased process requiring separate sealed price and technical proposals. After an initial screening to eliminate clearly unacceptable offers, the remaining technical and price proposals would be separately analyzed, evaluated and scored by evaluation teams (collectively, the Procurement Team). The scores would then be used to determine the "relative adequacy" of all the proposals. The proposal comparatives were to be forwarded to the MEHAC Selection Sub-Committee³ which was to make selection recommendations to the full MEHAC. The RFP then stated: "These proposal scores and comparative results, Offeror Technical and Price Proposals, "field" data collected by the Procurement Team, and any other information the Sub-Committee has requested will, in turn, be used by the MEHAC in selecting a "successful Offeror.'" (RFP, Section D, Paragraph 1 C&D)

4. A Pre-Proposal Conference was held at the MDOT Headquarters on March 2, 1988. Amendments to the RFP were developed as a result of the Pre-Proposal Conference and were mailed to all vendors on March 7, 1988 and March 23, 1988. Neither amendment reflected offeror concern with the evaluation scheme.

³The Selection Sub-Committee consisted of:

- a. Chairman - Mr. Charles Benton
Secretary, Department of Budget and Fiscal Planning.
- b. Dr. R. Adams Cowley
Director - MIEMSS
- c. Colonel Elmer Tippet
Superintendent - Maryland State Police

5. Timely proposals were received from five (5) helicopter manufacturers:

- a. Aerospatiale Helicopter Corp. (Aerospatiale)
- b. Agusta Aviation Corp. (Agusta)
- c. Bell
- d. MBB Helicopter Corp. (MBB)
- e. Sikorsky

6. Price and technical proposals were evaluated separately by independent evaluation teams; Technical Evaluation Team, Medical System Evaluation Team and Price Evaluation Team (collectively, the Procurement Team).

7. Performance Verification Demonstrations (PVDs) were scheduled "to provide the State with an opportunity to collect and compare data reflecting actual helicopter performance with that provided by offerors in their Technical and Price Proposals." (RFP, Section D, Paragraph VIII A).⁴

⁴The RFP demonstration specifics are as follows:

1. Performance Verification Demonstrations will consist of two (2) parts. Part I will involve the flight of a helicopter proposed to demonstrate its performance capabilities. Part II will involve the on-ground inspection and evaluation of a helicopter proposed,
2. All appropriate FAA regulations will apply to demonstration flights,
3. Offerors shall provide a pilot who will act as Pilot-in-Command during all flights, (During the flight performance segment of a demonstration, a State pilot will collect and record actual helicopter instrument readings and atmospheric conditions data. Information collected shall be compared with that contained in Manufacturer's Performance Charts provided by Offerors.)
4. Flights will be flown with all **MANDATORY** items of equipment or equivalent weight and all items of **DESIRABLE** equipment or equivalent weight installed, plus thirteen-hundred fifty (1,350) pounds of "Minimum Operational Load", plus sufficient fuel to fly one hundred eighty (180) nautical miles at a minimum of one hundred twenty (120) knots indicated airspeed (no wind condition), plus an additional thirty (30) minute fuel reserve.
5. Flights will begin at Maryland's Martin State Airport, Baltimore, Maryland, and include a three (3) leg, day VFR flight with landings at three (3) locations,

8. During each PVD, speed was observed and recorded at the same two places along the route. In the subsequent evaluation, the highest of the two speeds was used. Sikorsky's PVD took place on April 28, 1988, Bell's took place on April 29, 1988 and Aerospatiale's took place on May 4, 1988. For these three offerors, the highest indicated airspeeds (i.e. "speedometer readings") were:

Aerospatiale	160 knots
Sikorsky	145 knots
Bell	124 knots

9. Oral interviews and site visits were held at all five offeror's assembly plants. At the end of each oral presentation, each offeror was provided with a written request to submit a Best and Final Offer (BAFO) within seven days of the request.

10. In May, 1988, site visits were made to Appellants' assembly plants by the Procurement Team under the direction of Mr. Joseph J. Drach, the Procurement Officer. Following the site visit, Appellants submitted BAFOs.

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6. Flights will provide Offerors with the opportunity to have a helicopter proposed demonstrate its capability to:
- a. Hover out-of-ground effect,
 - b. Fly with one engine inoperable,
 - c. Perform in-cruise flight over a distance NOT exceeding one hundred fifty (150) nautical miles at maximum continuous power NOT to exceed published airspeed limitations (Vne).

(RFP, Section D, Paragraph VIII C).

11. The Selection Sub-Committee met on June 8, 1988 to review the Procurement Team's evaluation of the offerors' proposals and PVD results. The Sub-Committee decided that the offers of Agusta and MBB were unacceptable. The Sub-Committee further decided that another round of BAFOs was necessary.

12. On the recommendation of the Sub-Committee, on June 14, 1988, MEIHAC directed the Procurement Officer to provide Aerospatiale, Bell and Sikorsky with a request to provide a second BAFO. In addition, letters were sent to Agusta and MBB informing them of their elimination from competition.

13. BAFOs were received and evaluated by the Procurement Team. Numerical evaluation of proposals was based on a scale of 12,360 points of which one-third or 4,120 points was allocated to price proposals. Total acquisition costs and total operating cycle costs were to be added together to determine a total cost for each price proposal.⁵ The proposal which indicated the lowest total proposed cost to the State was to be awarded 4,120 price evaluation points. Those price proposals which were determined to offer a higher cost to the State were to be awarded a lower proportional share of the maximum possible price evaluation points.

Evaluation of technical proposals was made in accordance with RFP Tables VI and VII. The RFP stated:

⁵ Acquisition costs were defined as the firm fixed price specified by offerors for the initial six (6) helicopters to be procured by the State. (RFP Section D, Paragraph VII B). Operating cycle costs were to be provided for a ten-year period and consisted of four major items:

- (1) component, parts and labor costs
- (2) scheduled inspection and labor costs
- (3) fuel and lubricants cost and
- (4) insurance costs.

(RFP Section D, Paragraph VII B).

A. Technical Proposals

1. For the items listed in Table VI and VII (pages 175 through 219), the number of Evaluation Points awarded will be based on a determination by the State as to whether some item of equipment or capability proposed is "unacceptable", i.e., fails to meet some MANDATORY requirement associated with it, is "acceptable", i.e., meets all the MANDATORY requirements associated with it. If an item is judged to be "acceptable", a determination will then be made as to whether, beyond meeting all the MANDATORY requirements established for it, that item is of a quality, or offers some additional capabilities, such that it is "preferred" over similar "acceptable" capabilities proposed by other Offerors. (Offerors should note that for items listed in Tables VI, pages 175 through 217, any item considered to be "unacceptable" will receive zero (0) points regardless of the Point Category to which that item has been assigned. It should be further noted that the number of Evaluation Points that may be awarded for items designated as "Acceptable" or "Preferred" are limited to the specific values indicated in Table VI, pages 175 through 217. Finally, it should be understood that the same number of Evaluation Points will be awarded to all items of a particular type judged to be "Acceptable" and all items of a particular type considered "Preferred.")

(RFP Section D, Paragraph VII A).

In addition to the RFP "mandatory" items, the RFP listed in Table VI twenty-three "desirable" (i.e., optional) items. Prior to the second round of BAFOs, twelve of these "desirable" items were made into "mandatory" items. Eleven items remained as "desirables" in Table VI.

14. At the request of the chairman of the Selection Sub-Committee, made prior to issuance of the RFP but not included in the RFP, price proposals were also evaluated on the basis of the "split method". Under this method, price proposals were evaluated by scoring acquisition and operating costs separately, each on a 2,060 point scale (half of the total of 4,120 points), and adding the results.

15. The numerical ranking of offerors (after the second BAFO) as they were discussed by the Procurement Team with the Sub-Committee and thereafter with MEHAC is set forth below.

		<u>Split Method</u>	<u>RFP Method</u>
	<u>Cost Millions</u>	<u>Points</u>	<u>Points</u>
1. <u>Aerospatiale</u>			
Acquisition Cost	25.858	2060	
Operating Cost	42.665	1827	
Total Cost Points		3887	3913
Total Tech Points		5905	5905
Grand Total	<u>68.523</u>	<u>9792</u>	<u>9818</u>
2. <u>Bell</u>			
Acquisition Cost	27.237	1956	
Operating Cost	<u>37.849</u>	2060	
Total Cost Points		4016	4120
Total Tech Points		5888	5888
Grand Total	<u>65.086</u>	<u>9904</u>	<u>10008</u>
3. <u>Sikorsky</u>			
Acquisition Cost	26.535	2007	
Operating Cost	<u>48.113</u>	1621	
Total Cost Points		3628	3592
Total Tech Points		5720	5720
Grand Total	<u>74.648</u>	<u>9348</u>	<u>9312</u>

Summary:

1. Bell	9904	10008
2. Aerospatiale	9792 (-112)	9818 (-190)
3. Sikorsky	9348 (-556)	9312 (-696)

16. On the basis of these scores, MEHAC judged that Bell's and Aerospatiale's offers were essentially equal (and superior to Sikorsky's). To resolve the "tie", MEHAC concentrated on certain of the technical evaluation factors and discounted operating costs under the belief that they are inherently "soft". The Sub-Committee concluded that selection should be based on the factors of speed, technical quality and acquisition cost. Based on these factors, MEHAC selected Aerospatiale. The Procurement Officer was instructed to notify Bell and Sikorsky that they were no longer being considered as candidates to provide EMS helicopters to the State.

17. On June 30, 1988, Aerospatiale was officially notified that it had been selected for award.

18. On June 30, 1988, Sikorsky protested award to the Procurement Officer. Sikorsky alleged that "[its] proposal was lower in price than the awardee's price..." and that the State procurement officials failed to take into consideration "ten year operating costs" figures.

19. The protest was denied by letter dated July 6, 1988. No appeal to this Board was taken from this denial. In the denial letter (which Sikorsky's counsel, to whom it was addressed, contend was not received until July 11, 1988) the Procurement Officer advised Sikorsky that a \$48.1 million figure for its proposed operating costs had been used in the price calculations. On this same day, July 11, Sikorsky attended a debriefing. At the debriefing, Sikorsky was verbally informed that the State used a \$48.1 million figure for operating costs. This figure was slightly higher than the operating cost figure of \$47.7 million used by Sikorsky in its first DAFO. In its second DAFO, Sikorsky had presented two new scenarios for determining ten year operating cycle costs. Table XIIIa showed a \$41.8 million operating cycle cost and Table XIIIb showed a \$44.7 million operating cycle cost.

20. On July 11, 1988, Sikorsky submitted a request in writing for an explanation of the apparent operating cost discrepancy. This request came at the suggestion of the Procurement Officer who was unable to answer (in the absence of any member of the Price Evaluation Team at the debriefing) the question of how such figure was derived.

21. On July 18, 1988, Sikorsky received a post-debriefing report from the Procurement Officer which informed Sikorsky that the State evaluated Sikorsky's second DAFO using an operating cost estimate from Sikorsky's first DAFO because Sikorsky did not "explain the basis for any changes" as required in the State's request for the second DAFO.

22. By letter dated July 25, 1988, Sikorsky filed a protest with the Procurement Officer on the ground that the State's use of the \$48.1 million figure was improper. The Procurement Officer subsequently denied this protest by letter dated July 28, 1988.

23. On August 4, 1988, Sikorsky filed an appeal with this Board. The sole ground of appeal is the ground raised in Appellant's July 25, 1988 protest letter. At the hearing of the appeal, as discussed below, Sikorsky was permitted to amend its appeal to allege additional grounds.

24. On July 21, 1988, Bell protested award to the Procurement Officer. Bell asserted the following grounds:

- (a) MEIAC erred in declaring a "tie" between Bell and Aerospatiale since Bell's score was 190 points higher than that of Aerospatiale under the RFP Method.
- (b) If Bell and Aerospatiale were judged to be essentially equal, the State could not properly rely upon discrete technical factors, and acquisition cost alone to make selection because:
 - (1) MEIAC cannot properly alter the relative weight of evaluation factors as set forth in the RFP, and
 - (2) the PVD did not provide a valid speed comparison between the two aircraft.

25. Bell's protest was denied on July 28, 1988 and on August 8, 1988, Bell filed a timely appeal with this Board.

Decision (Sikorsky)

A. Motion to Dismiss (The July 25, 1988 Protest)⁶

At the hearing the State and Aerospatiale moved to dismiss the Sikorsky protest of July 25, 1988 on ground that it was not filed within seven days of the time that the basis of the protest was known or should have been known. The Board reserved ruling on the motion pending conclusion of the hearing.

This Board has consistently held that the requirement under COMAR 21.10.02.03B that protests "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier" is substantive in nature and must be strictly construed. Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MSBCA ¶154 (1987). There is no factual dispute that as of July 11, more than seven days before it filed its protest, Sikorsky knew the State used the \$48.1 million figure as representing Sikorsky's actual operating costs rather than the \$47.7 million figure presented in its first BAFO and the \$41.8 million and \$44.7 million figures presented in its second BAFO. The question that arises is whether this knowledge put Sikorsky on notice of a basis for protest.

Sikorsky asserts that neither the Procurement Officer's letter of July 6⁷ denying its initial protest nor the July 11 debriefing contained sufficient information on which to base a protest since there was no explanation of how the State derived the \$48.1 million operating cost figure used in evaluating Sikorsky's proposal. The State asserts on the other hand that Sikorsky was in possession of sufficient information on July 11, 1988 to have realized the essential basis of its protest.

⁶The State's motion to dismiss Sikorsky's amended appeal is discussed below.

⁷Sikorsky contends through counsel that the letter was not actually received by Sikorsky's counsel until July 11. We accept the proffer of counsel.

As of July 11, Sikorsky was aware that the State was using a figure of \$48.1 million in evaluating the operating costs. This was a figure that did not appear in either of Sikorsky's BAFOs. However, the State contends that the relative closeness to the figure of \$47.7 million proposed by Sikorsky in its original proposal and first BAFO was enough to put Sikorsky on notice as to where the figure was derived. Sikorsky was aware that certain adjustments or normalizing formulae might be applied to the operating cycle costs proposed by the offerors. Thus the State contends that Sikorsky should have concluded that the State adjusted the \$47.7 million figure upward by \$400,000 and did not make the adjustments of \$3 million to \$6 million that would be required were the State to have used the figures in Sikorsky's second BAFO.

After the July 11 debriefing, members of the Sikorsky team met and attempted to determine how the State arrived at the \$48.1 million figure. They were unable to derive any formula or set of adjustments using any of the operating cycle costs they proposed which would produce the \$48.1 million cost figure used by the State. Appellant contends, therefore, that it was entitled to wait for the explanation it had requested before proceeding with its protest.

It is generally held that a protestor may only await a formal debriefing (or explanation) before filing its protest where the information available earlier left uncertain that any basis for protest existed. Abt Associates, Inc., Comp. Gen. Dec. B-226130, April 28, 1987, 87-1 CPD ¶445; Fairfield Machine Company, Inc., Comp. Gen. Dec. B-222015.2, December 7, 1987, 87-2 CPD ¶562; Intelcom Educational Service, Inc., Comp. Gen. Dec. B-220192.2, January 24, 1986, 86-1 CPD ¶83. The State contends that as of July 11, Sikorsky was on constructive notice that the State rejected its second BAFO numbers in favor of an adjusted first BAFO figure. In these circumstances, the State

argues that Sikorsky was not entitled to wait for additional information before filing its protest and that therefore Sikorsky's protest filed on July 25 was untimely. We disagree.

As noted, a protester may properly delay filing its protest until after a debriefing where information provided to the protester earlier left uncertain whether there was any basis for protest. In addition, it is appropriate to resolve such doubts about timeliness in favor of the protestor. Fairfield Machine Company, Inc., supra.

At the July 11 debriefing, Sikorsky questioned how the State derived the \$48.1 million operating cost figure. Since members of the price proposal evaluation team were unavailable, the question was left unanswered and Sikorsky was advised to request written clarification. We further note that members of the Sikorsky team met immediately after the debriefing and in good faith attempted to generate the \$48.1 million figure from each of the three figures Sikorsky had proposed; \$47.7 million, \$44.7 million and \$41.8 million. They were unable to derive a formula or set of adjustments using any of the proposed figures which would produce the figure used by the State. Resolving in its favor doubt regarding whether Sikorsky should have been able to determine that the \$48.1 million figure was its \$47.7 million first BAFO figure as adjusted by the State, we find Sikorsky was entitled to wait for a response to its request for information before filing its protest. In the Procurement Officer's response on July 18 to Sikorsky's written request for explanation, Sikorsky was informed that adjusted operating cycle costs from its first BAFO formed the basis of the State's figure. Its protest regarding use of such figure filed on July 25 was therefore within the seven day time limit imposed by COMAR. Accordingly, we deny the motion to dismiss.

B. Merits.

I. The Original Appeal - Use of \$48.1 Million Operating Cost Figure

Findings of Fact

1. The RFP required offerors to provide the following data regarding the component and parts costs section of the projected ten year operating cycle costs:

a. Component and Part Cost -

(1) Offerors shall state a cost per flight hour for overhaul or replacement of all airframe, engine and drive-train components and parts (excluding shipping costs) required to maintain the helicopter airworthy and operationally ready for State missions for a ten (10)-year evaluation period. This cost will be known as the "Hourly Part Cost." The State will use the "Hourly Part Cost" provided by Offerors for purposes of evaluating Price Proposals. The "Hourly Part Cost" assumes that there is no aircraft maintenance or operating negligence on the part of State personnel. (Normally anticipated operating conditions such as rain, dust or blowing sand shall not be considered negligence.)

(2) The State reserves the right to enter into a separate Logistics Support Contract with an Offeror at the "Hourly Part Cost" stated in an Offeror's Price Proposal, adjusted annually as appropriate in accordance with Consumer Price Index (CPI) changes. Under such a contract, Offerors shall overhaul or replace all airframe, engine and drive-train components and parts requiring such action.

(RFP, Section C, Paragraph II B).

2. As set forth above, the RFP detailed a guaranteed fixed price program in which the State agrees to pay a flat fee per hour (as adjusted for inflation) which covers all replacement parts and services for the entire ten year period. This differs from Sikorsky's standard warranty program which warrants defects in workmanship and materials discovered within two years. Under the warranty program, costs resulting from those defects are covered by Sikorsky.

3. Mr. Timothy Cousens, manager of spare parts planning at Sikorsky, testified as to Sikorsky's method of arriving at a proposed hourly parts costs. Sikorsky's hourly parts costs rate is based on an historical evaluation of the particular helicopter model (S-76) costs which is then assessed in terms of the variables involved in a specific procurement and the level of risk acceptable to management.

4. Sikorsky's original proposal under the RFP contained a flat fee for the first five hundred hours of flight per aircraft. The flat fee was a sum the State was required to pay whether the aircraft flew the minimum number of hours or not.⁸ The hourly rate was then to be applied for each hour beginning with the 501st hour up to the 780th hour (of estimated annual operational use) specified in the RFP. Sikorsky's first BAFO presented no cost revisions to the ten year operating costs set forth in its original proposal.⁹

⁸The flat fee was arrived at by multiplying the hourly rate by 500 hours.

⁹Sikorsky's second BAFO set out the changes in hourly part costs for the airframe and the engine. However there is no specific reference to the flat fee for the first 500 hours as included in the original proposal. Mr. Cousens testified that the 500 hour minimum flows from the offers in the initial proposals through the first and second BAFOs. Shortly before the hearing in this appeal a mistake was discovered in this calculation. The annual component and part cost figure in Table VIII as carried over into Table XIIIB was \$30,500 per helicopter below what it should have been had Sikorsky calculated correctly. Mr. Cousens testified, however, that Sikorsky would have been prepared to stand behind the lower number. (October 5 Tr. pp. 134-150).

5. On June 16th, Mr. Frank Roberts, Director of Marketing at Sikorsky, met with Mr. Drach, the Procurement Officer, at the MDOT headquarters facilities in Baltimore. Mr. Roberts was informed that Sikorsky's operating costs were considered high.

6. On June 16, Sikorsky received a request for a second BAFO from Mr. Drach which stated in part:

In the event that you find that there can be changes made in the 10 year operating cycle costs of the aircraft which you proposed, it is important that you identify these specifically and explain the basis for any changes if compared with those which you proposed in the offer which you most recently submitted to the State.

(Sikorsky Agency Report, Ex 10).

7. Sikorsky submitted a second BAFO which included two tables of operating cycle costs. Table XHIA, entitled "REVISED 6/17/88 - TABLE XII REVISED TO REFLECT AVERAGE AIRFRAME COMPONENT AND PARTS COSTS NET PROJECTED WARRANTY AND OTHER SERVICE POLICY CREDITS" contained a total cost figure of \$41,857,650. Table XHIB,

entitled "REVISED 6/17/88 - TABLE XII REVISED TO REFLECT PROJECTED AIRFRAME COMPONENT AND PARTS COSTS BASED ON THE REVISED OPERATING COST GUARANTEE PROGRAM (SEE REVISIONS TO PRICING VOLUME)"¹⁰ contained a total cost figure of \$44,471,648.

(Sikorsky Agency Report, Ex 12).

8. Mr. Cousens testified that Table XHIA was calculated to reflect the projected costs the State could be expected to pay if it elected to operate under Sikorsky's warranty program rather than the guaranteed fixed price program specified by the State in the RFP. Mr. Cousens testified that Table XHIB represented costs under the State's guarantee program but with

¹⁰See Paragraphs 1.2.1 and 1.2.2 dealing with the hourly parts cost for the airframe (reduced from \$281.00 to \$220.00 per flight hour) and engine (reduced from \$126.00 to \$116.00 per flight hour).

lower per hour airframe and engine costs. He testified that this represented a decision by Sikorsky management to accept a greater amount of risk in structuring the price to be offered in the second BAFO.

However, the only apparent explanation for the reductions in costs in the BAFOs was found on page 4 of 11 of Sikorsky's second BAFO under Section 3.2 referring to lubricant costs. It read in part:

The capability of the S-76-A to cruise at 145 knots actually reduces the amount of time which must be flown to accomplish a given set of missions when compared to a helicopter which flies at 125 knots... Assuming that the two aircraft flew the same missions over time period, and had the same operating costs, then the variable operating costs (fuel, oil and maintenance) for the faster helicopter will be about 14% lower because it will fly 14% fewer hours.

9. Mr. John DuChez, leader of the Price Evaluation Team, testified as to the reason Sikorsky's second BAFO figures were rejected. According to Mr. DuChez, Table XIIA was rejected because it contained warranty information not requested of the other offerors.¹¹ Mr. DuChez testified that Table XIIIB was rejected as a basis for evaluation because of belief that the figures were "speed adjusted" and because Sikorsky did not sufficiently "explain the basis for any changes".

10. Mr. DuChez testified that based on the absence of any other information the Price Evaluation Team relied on the explanation under Section 3.2 concerning speed adjustment to explain the reduced hourly rates under Paragraphs 1.2.1 and 1.2.2. (October 13 Tr. pp. 89-98). Mr. DuChez calculated the difference in total dollars proposed by Sikorsky for hourly parts cost between its initial proposal and second BAFO and arrived at a 14% difference.

¹¹Bell's second BAFO also included warranty and service credits which were analyzed. Mr. DuChez testified this was a mistake and Bell's warranty figures should also have been rejected. (October 13 Tr. pp. 69-70).

(October 13 Tr. p. 87). Based on this calculation he determined that the reduced hourly rates were the result of the 14% speed adjustment set forth under Section 3.2.

11. Section 3.1 as set forth in Sikorsky's second BAFO included a large reduction in fuel consumption from 107 to 82 gallons per hour. According to testimony at the hearing this figure represented a change from the calculation at maximum continuous power requested in the RFP, and included in the first BAFO, to a calculation at maximum cruise power. However, no explanation was given for the change in powers in the second BAFO.¹²

12. The State did not contact Sikorsky and ask for an explanation of the figures in the second BAFO.

13. Second BAFOs were to be received by the State on June 20. It was the understanding of Mr. DuChes that MEHAC intended to make a selection decision at its meeting on June 23rd.

14. Mr. Drach agreed with the interpretation of Mr. DuChes and forwarded the results to Mr. Ronald Moser, the project director.* Mr. Moser presented all three sets of figures to MEHAC on June 23. He pointed out that the Procurement Team believed Sikorsky did not adequately comply with instructions in submitting its second BAFO figures and for that reason the second BAFO figures should be rejected. (October 17 Tr. p. 147).

Decision

A major factor in Sikorsky's elimination prior to the final consideration by MEHAC of the proposals of Bell and Aerospatiale was the State's determination to use the \$48.1 million dollar operating cost figure derived from its original proposal. Sikorsky maintains that the State acted unreasonably in

¹²Maximum cruise power is used to operate the aircraft steadily under normal operating conditions to the extent of the engine warranty. Maximum continuous power is used for emergency situations to prevent damage to the aircraft or individuals.

* As project director for the procurement, Mr. Moser was, in effect, staff for MEHAC.

rejecting the revised cost figures of \$41.8 million and \$44.4 million set forth in Tables XIIA and XIIB, respectively, of Sikorsky's second BAFO because it did not contain an explanation of the differences between the prior proposal and the revised BAFO. Sikorsky asserts that if the State had any questions about its proposal, it should have requested clarification rather than treating the cost figures as unacceptable. Sikorsky also contends that sufficient explanations were available in the second BAFO and in prior proposals and the changes would be understood in the industry. The State disagrees and also asserts that the Sikorsky second BAFO was deficient in offering costs based on warranties.

The record reflects that the \$41.8 million figure in Table XIIA was rejected by the State because it presented data relating to warranties and service credits not requested in the RFP. Sikorsky's decision to include warranty figures was based on a debriefing by Mr. Drach to Messrs. Roberts and Cousens prior to the second BAFO. Mr. Cousens testified that they discussed the savings the State would receive under Sikorsky's warranty program. Mr. Cousens also testified that Mr. Drach informed them that if they could present their product in a less costly manner they should do so. (October 5 Tr p. 50).¹³

The RFP did not request warranty information from the offerors. While Sikorsky and Bell provided such information, Aerospatiale did not. The Board has held that evaluation based on unannounced factors or criteria may be unreasonable and in violation of Maryland's General Procurement Law. Under such circumstances, offerors are not competing on an equal basis. See AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 14. Since warranty information was not specifically requested from all three offerors

¹³Mr. Drach testified he has no specific recollection of this conversation. (October 4 Tr. pp. 72-73).

and since there was not a sufficient basis for comparison of the three offerors in regard to warranty and service credits (Aerospatiale properly having not provided such information) I would find that the State reasonably rejected Sikorsky's Table XIIA \$41.8 million operating cycle cost figures.

Turning now to the State's rejection of the \$44.4 million figure in Table XIIB the State asserts as one ground for rejecting the cost figures in Table XIIB that Sikorsky did not sufficiently explain the basis for any changes. Sikorsky, however, maintains that an explanation was implicit and further, since Sikorsky was guaranteeing the number in its proposal, the guarantee that Sikorsky would stand behind the number was sufficient for the State. In addition, Sikorsky maintains that the lower costs resulted from a decision to accept additional risk and less profit and the State has no need for knowing the detailed reasons behind these managerial decisions.

I believe it is proper under the General Procurement Law for the State to request supporting data or explanation for proposal revisions when the State feels it is necessary to evaluate the revisions. Without supporting data or explanation the State may not be able to ascertain whether the revisions were made according to the RFP or whether the revisions are in fact in the best interests of the State. Compare Electronics Communications, Inc., Comp. Gen. Dec. B-183677, January 9, 1976, 76-1 CPD ¶15.¹⁴

¹⁴See also Logicon, Inc., Comp. Gen. Dec. B-196105, March 25, 1980, 80-1 CPD ¶218 at pp. 4-5. In Electronics Communications, Inc., a request for a second BAFO was accompanied by the following language, "...should you revise your offer in any way, complete and detailed support for the revision and any other affected part of your proposal must accompany the revision." While the concern was with potential impact of price changes on technical quality (while in the instant case the focus appears to have been exclusively with price) I believe language of the Comptroller General to be instructive. The Comptroller General held that "since offerors must affirmatively demonstrate the acceptability of their proposals, Kinton Corporation [B-183105, June 16, 1975, 75-1 CPD ¶365], we believe that when a request for best and final offers clearly warns offerors to substantiate any changes made in a proposal and an offeror submits a revised proposal without such substantiation, the contracting officer need not reopen negotiations and may reject the proposal if

I also believe it was proper for the State to reject the second BAFO figures on the basis that Sikorsky's explanations were inadequate. Sikorsky provided no explanation for the reduction in Paragraphs 1.2.1 and 1.2.2 dealing with the hourly parts costs for the airframe (reduced from \$281.00 to \$220.00 per flight hour) and engine (reduced from \$126.00 to \$116.00 per flight hour). The only verbiage relating to costs in the revised proposal was contained in Paragraph 3.1 "Fuel Burn Rate" and Paragraph 3.2 "Lubricant Costs." If the decision to reduce hourly part costs was merely a managerial decision to accept more risk, Sikorsky should have stated so in its proposal. Mr. DuChes testified that such an explanation would have satisfied the State. (October 12 Tr. p. 253).

In the absence of an explanation, the Price Evaluation Team (and Procurement Officer) looked to other sections of the BAFO to determine how Sikorsky arrived at its revised figures. Based on the language contained in Paragraph 3.2, they determined Sikorsky was presenting speed adjusted figures. Sikorsky contends that this language was intended only as an example of how such an adjustment could be made. However, I cannot say the Procurement Officer was unreasonable in determining that such language was intended to explain the basis for the reduction in hourly parts costs. Having determined these numbers to be speed adjusted, I believe they were properly rejected by the State.¹⁵ Nor do I find anything in the RFP or the General Procurement Law which required the Procurement Officer to seek

unsupported changes render the proposal unacceptable." In Electronics Communications, Inc., the protestor stated that its revised pricing was attributable to "a decision to accept reduced profit, the change to a dedicated facility, and a revision of the economics price adjustment clause." This explanation however, was held to be insufficient because it was not sufficiently detailed for the agency to make an evaluation.

¹⁵All parties seem to agree and I would find that use of speed adjusted numbers to evaluate offers would have been improper.

clarification concerning the State's belief that the numbers were speed adjusted. As the Comptroller General stated in Sperry Univac, Comp. Gen. Dec. D-202813, March 22, 1982, 82-1 CPD 1264, at 7,

While an offeror may modify its earlier proposals in its best and final offer, in doing so it assumes the risk that its change might result in the rejection of its proposal, rather than in further discussions, if the agency finds the revised proposal unacceptable. (cite omitted).

Thus, I find that the Procurement Officer did not abuse his discretion or otherwise commit error in failing to seek clarification from Sikorsky and rejecting its numbers as speed adjusted.¹⁶

II. The Amended Appeal

Sikorsky's appeal to this Board was on the sole ground that it was eliminated from competition on the basis of the State's use of an improper set of operating costs. Based on evidence adduced at the hearing,¹⁷ Sikorsky sought to amend its appeal contending that such evidence showed that it had not been eliminated on the basis of operating costs as it had originally been led to believe, but rather it was eliminated on the basis of the final selection criteria, including speed, used to evaluate Aerospatiale and Bell. The Board permitted Sikorsky to amend its appeal (to assert error in use of the final selection criteria along the lines of the Bell appeal) and denied an oral motion by the State and Aerospatiale to dismiss the amended appeal on timeliness grounds. In this regard the Board may have erred.

¹⁶COMAR 21.05.03.03(5) provides for confirmation of a proposal when it appears from a review of the proposal before award that a mistake has been made. No one has suggested that Sikorsky's second BAFO contained a mistake.

¹⁷The evidence consisted of the testimony of Mr. Ronald Moser. Mr. Moser testified on October 17 that Sikorsky was in fact also evaluated on the basis of the final determinant factors applied to Bell and Aerospatiale. However, Mr. Moser in subsequent testimony, on October 19 and 25, clarified his testimony asserting that although the factors used to distinguish Bell and Aerospatiale had been applied to Sikorsky, Sikorsky was no longer in the running at the time those factors were applied to it.

Sikorsky's initial protest of June 30 included as a ground of protest:

Sikorsky's proposal was lower in price than the awardee's price and the air speed was virtually identical to that of the winning proposal and substantially better than that of the second proposal.

(Sikorsky Agency Report, Ex 16). The Procurement Officer's denial letter of July 6, stated in part:

B. Speed information measured during the Performance Verification Demonstration and agreed to by Sikorsky's flight crew (Knots Indicated Airspeed (KIAS)):

AEROSPATIALE	160 KIAS	(184 MPH)
SIKORSKY	<u>145 KIAS</u>	<u>166.7 MPH</u>
SIKORSKY WAS		
LOWER BY:	15 KIAS	(17.3 MPH)

* * * *

Given the above information, it is apparent that there is no substance to your assertion that "scores....were essentially equal." Consider the fact that Sikorsky was third of three (3) in the number of points awarded when all factors of the evaluation, acquisition costs, operating costs, and technical provisions were considered.

(Sikorsky Agency Report, Ex 17).

Thus Sikorsky had notice on July 11, when it received the denial letter, that it had been evaluated alongside Bell and Aerospatiale and had ranked last when all factors were considered. Furthermore, in the Procurement Officer's letter of July 28, Sikorsky was informed:

In the event that the 41.85 million which was intended by Sikorsky to be 10 year Operating Cycle Costs had been derived from those specific items requested by the State, we could have used them and Sikorsky would have been continued in third place despite the reduction from 48.113 million.

(Sikorsky Agency Report, Ex 24).

This cumulative information may well have placed Sikorsky on constructive if not actual notice of the grounds set forth in its amended appeal requiring it to file a protest pursuant to COMAR 21.10.02.03B within seven days of its receipt of the July 28 letter, or at least have (1) sought immediate clarification of why it was ranked last when all factors were considered even under the assumption the State had used the figure of \$41.8 million for Sikorsky's operating costs; or (2) taken at that time an appeal based on the information contained therein. See General Elevator Company, Inc., MSBICA 1253, 2 MSBICA 1111 (1986); Dasi Industries, Inc., MSBICA 1112, 1 MSBICA 149 (1983). Therefore Sikorsky's amended appeal on the basis that use of the final determinant factors was improper and that the State used incorrect airspeed figures was quite probably untimely.

Assuming Sikorsky's appeal was timely, however, I would find that the record fails to reflect that operating costs were not a factor in its elimination or that it was carried over into a final round of competition with Bell and Aerospatiale.

Secretary Benton testified that:

Sikorsky was the first one to have been eliminated and the two factors, the total points and the reliability was the basis for making this judgment. (September 29 Tr. p. 234).

Mr. Moser's testimony on Wednesday, October 19, confirmed that Sikorsky was eliminated on the basis of high operating costs and an absence of operating history. (October 19 Tr. pp. 58-60). Mr. Moser described the process after Sikorsky's elimination as follows:

We are looking now at Bell and (Aerospatiale), and the question comes up in the MBIIAC, or the subcommittee, what about the acquisition costs for those two. Answer, \$25 million is shown, \$27 million. And then someone says, what about Sikorsky, and right next to it is the Sikorsky value.

The same thing occurred as it related to navigation, the same thing occurred as it related to Medical, that is as we went through, people would say, okay, we're looking at Bell and Aerospatiale, that's what we're down to. And people would say, "What was [the] Sikorsky number?" and they would look.

For example, look at cruise speed on page 1 of the document. We're sitting there looking at the difference between Aerospatiale and Bell of the 73 points, the 100 points, they're asking, what does that mean in terms of the speedometer, and the question was what was Sikorsky's speedometer reading. Sikorsky is already out of it, but that didn't preclude the members asking the questions.

(October 19 Tr. pp. 62-63).

This testimony I would find may be read consistently with Mr. Nizer's testimony two days previously (which led to the Amended Appeal) to demonstrate that operating costs were a major factor in its elimination and that Sikorsky was not carried over into the final round of competition.

Decision (Bell)

I next turn to consideration of the Bell appeal on its merits. To reiterate, Bell contends that:

- (a) MEHAC erred in declaring a "tie" between Bell and Aerospatiale since Bell's score was 190 points higher than that of Aerospatiale under the RFP method.
- (b) If Bell and Aerospatiale were judged to be essentially equal, the State could not properly rely upon discrete technical factors, and acquisition cost alone to make selection because:
 - (1) MEHAC cannot properly alter the relative weight of evaluation factors as set forth in the RFP, and
 - (2) the PVD did not provide a valid speed comparison between the two aircraft.

A. Declaration of Tie

After the second BAFO, the point totals for the three offerors were as follows:

	<u>Split Method</u>	<u>RFP Method</u>
1. Bell	9904	10008
2. Aerospatiale	9792 (-112)	9818 (-190)
3. Sikorsky	9348 (-556)	9312 (-696)

(Finding of Fact No. 15).

On the basis of these scores, MEHAC judged that Bell's and Aerospatiale's offers were essentially equal (and superior to Sikorsky's). (Finding of Fact No. 16). Bell seems to agree that the RFP did not require award to the offeror with the highest point score.¹⁸ However, Bell contends that given the comprehensiveness of the numerical evaluation, Bell's higher score evidenced a clear superiority over Aerospatiale requiring award to it.¹⁹ Bell also contends that MEHAC disregarded the RFP in its decision to also use the split method (which narrowed the point gap between Bell and Aerospatiale by 78 points) to evaluate and compare cost proposals. In addition, Bell contends that it deserved additional points for "desirable" items and airspeed which would increase the differential between the two offerors.

¹⁸See discussion of award requirements below. Bell acknowledges that the RFP provides that selection under the specific term of the RFP was to be based on "These proposal scores and comparative results, Offeror Technical and Price Proposals, "field" data collected by the Procurement Team, and any other information the Sub-Committee has requested...." and not simply on proposal scores used to determine the "relative adequacy" of all proposals. Bell focuses instead on the detailed nature of the information to be scored as indicating the importance of the point score.

¹⁹Bell's argument here differs from that discussed below where it argues that its lower overall cost (acquisition and operating) requires award to it.

Split Method

Under the split method, price proposals were separated into operating costs and acquisition costs and evaluated separately on a 2,080 point scale. (Finding of Fact No. 14). The decision to use the split method was made by the Selection Sub-Committee before the RFP was issued. It was Secretary Benton's testimony that the RFP gave them the latitude to use this method (September 29 Tr. pp. 178-179).²⁰ I do not believe the RFP evaluation criterion contemplated deriving proposal scores by use of the split method comparatives. However, the MEIAC was aware of the comparative scores under the RFP method and use of the split method did not alter the relative rankings of any of the offerors. The issue remains whether, assuming arguendo that the split method should not have been used, MEIAC erred in not awarding the contract to Bell because of the 190 point differential under the RFP method and whether as claimed by Bell the differential is even greater because of its claimed entitlement to additional points for desirable items and airspeed.

Desirables

In addition to the mandatory items in the RFP, Table VI listed twenty-three "desirable" (i.e., optional) items. By letter dated June 15, Bell was informed that twelve items originally listed as "desirable" were now made "mandatory." (Bell Agency Report, Ex 10). Bell's technical proposal indicates that Bell received a total of 460 points for the remaining eleven desirable items. These points were not included in Bell's total technical evaluation score nor were points for these eleven desirable items added into the total scores of any of

²⁰ As noted above, the language in the RFP that Secretary Benton was alluding to provided as to evaluation methodology that: "These proposal scores and comparative results, Offeror Technical and Price Proposals, "field" data collected by the Procurement Team, and any other information the Sub-Committee has requested will, in turn, be used by the MEIAC in selecting a "successful Offeror." (RFP, Section D, Paragraph 1 D).

the offerors. Bell argues that comparing the desirable scores on the eleven items for Bell, Aerospatiale and Sikorsky, Bell achieved a 90 point differential of superiority which was required by the RFP to be counted in making a selection decision.

The RFP did not specify that points for desirable items were to be included in the total technical score. In fact, there is language in the RFP which perhaps suggests the opposite. On page 17 of the RFP it is stated that "[o]fferor failure to propose delivery of "DESIRABLE" items will NOT constitute a basis for elimination from procurement competition." Elsewhere in the RFP, desirable items were set apart from mandatory items. See, for example, RFP Section D, Table VI.²¹ In any event, I do not find that a reading of the RFP compels the conclusion that points for desirable items were required to be included in the total technical score and I would reject Bell's argument in this regard. ²²

21 Mr. Muser testified:

[I]t was never imagined that desirables held over would be used in any numerical values which were going to be used for selection purposes, which is to say that they weren't going to be used in terms of the technical score of a firm for selection purposes.

(October 19 Tr. p. 140).

22 Furthermore, insofar as Bell is protesting that the exclusion of desirables was unreasonable, I would find such protest is untimely having been raised for the first time on appeal (more than seven days after such grounds would have been known). See COMAIL 21.10.02.03B.

Airspeed Proration

Bell contends it was due an additional 27 points in the category "cruise flight 120 KIAS". Bell contends this category, as listed in Table VI of the RFP, did not allow for the proration of points.²³ Bell interpreted this category to mean that every offeror who met the 120 KIAS requirement would receive the "Acceptable" point total of 70 points and any offeror who flew faster than 120 KIAS would receive the "Preferred" point score of 100 points. Thus Bell claims that it should have received 100 points rather than the 73 points it received based on its speed in relation to the speed of others.

The record clearly reflects that Sikorsky and Aerospatiale were advised prior to the PVD that points in this category were to be prorated. Mr. Drach testified that the proration of points was mentioned at a briefing prior to the PVD, attended by Mr. Wright of Bell and the Bell pilot who was to fly the PVD. (October 3 Tr. p. 165). Mr. Moser and Sergeant Wenrich also testified that proration was mentioned at the Bell briefing. (October 17 Tr. p. 110; October 10 Tr. p. 142). It was the recollection of Mr. Drach and Mr. Moser that Mr. Wright was in and out of the Bell briefing and might have missed any discussion of proration. We accept the testimony of the State witnesses and conclude that Bell was informed orally that airspeed points were to be prorated.

²³RFP Section D, Paragraph VIIA states: "[T]he number of Evaluation Points that may be awarded for items designated as "Acceptable" or "Preferred" are limited to the specific values indicated in Table VI, pages 175 through 217. Finally, it should be understood that the same number of Evaluation Points will be awarded to all items of a particular type judged to be "Acceptable" and all items of a particular type considered "Preferred.""

I therefore conclude that all offerors were competing on an equal basis at the PVD. However, COMAR 21.05.03.02E requires that amendments to an RFP be in writing. Since this oral amendment regarding prorating of points for airspeed was never reduced to writing the State may have technically erred in not according Bell the additional 27 points. Compare I.E. Levick & Associates, Comp. Gen. Dec. B-214648, December 26, 1984, 84-2 CPD 1695. I also believe as discussed below that, assuming arguendo, Bell was entitled to receive an additional 27 points, such addition to Bell's total point score would not have affected the reasonableness of MEHAC's decision that Bell and Aerospatiale were "essentially equal".

Clear Superiority

Based on my conclusion that Bell is not entitled to any additional points for desirables and only possibly entitled to an additional 27 points for speed, the differential between Bell and Aerospatiale stands at either 139 (112+27) under the split method or 217 (190+27) points under the RFP method. I find that it does not make any difference for the purposes of my decision which method was used to determine that the proposals were tied or "essentially equal". Under either method, I believe it was not unreasonable for MEHAC to conclude that a tie in any meaningful sense of the word existed and that Bell's proposal was not clearly superior to Aerospatiale's. Secretary Benton recalled the differential between Bell and Aerospatiale as "anywhere from a difference of about fifteen points to well in excess of 100 but less than 200. A difference of perhaps one percent." (September 29 Tr. p. 206-207). He further testified that a differential of one or two percent is not sufficient to distinguish two offerors. (September 29 Tr. pp. 207-208).²⁴ I believe based on

²⁴Combining both the points claimed for improper proration (27) and use of the split method (78) the percentage difference between the two offerors based on total points is only slightly above 2%.

the record before the Board that the MEHAC reasonably determined that given the one to two percent point differential spread over several thousand points the two offers were essentially equal. Thus Bell's offer was not clearly superior and further consideration was therefore necessary to reach a decision concerning selection.

B. Final Determinants for Selection

1. Alleged Alteration of Relative Weights

Bell next contends that MEHAC, after two BAFO's failed to indicate a statistically meaningful difference in the numerical sense between the Aerospatiale and Bell aircrafts, violated the General Procurement Law when it then based its decision to award the contract to Aerospatiale on the basis of the alleged superiority of Aerospatiale's aircraft in overall technical capability, its greater speed, and its lower acquisition costs. Bell contends that award was instead required to be based on factors set forth and as weighted in the RFP.

Section 11-111 of Division II of the State Finance and Procurement Article of the Maryland Annotated Code (1987 Cum. Supp.) required that when the State employs the competitive sealed proposal method in obtaining proposals, the proposals shall be solicited by an RFP which includes "a list of the factors and the relative importance of each factor, including price, that will be used in evaluating proposals." (§11-111(b)(2)).

Section 11-111(e) provided:

"After all approvals required by law or regulation have been obtained, the contract shall be awarded to the responsible offeror whose proposal or best and final offer is determined to be the most advantageous to the State, considering price and other evaluation factors set forth in the request for proposals."

Similarly, COMAR 21.05.03.03A states: "evaluation shall be based on the evaluation factors set forth in the request for proposals," and COMAR 21.05.03.03C(6) states the overriding criterion to select the "proposal [which is] most advantageous to the State, considering price and the evaluation factors set forth in the request for proposals."

In dealing with construction of these statutory and regulatory provisions, the Board has opined that "[i]t is essential that offerors be informed in an RFP of all evaluation factors and the relative importance to be attached to each such factor so that they may submit accurate and realistic proposals and compete on an equal basis." B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58, at 9 (1983). Offerors are entitled to rely on the stated evaluation criteria, and the relative weight of those criteria, so as to configure their proposals in the manner they consider most advantageous. Id., See Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116, at 15 (1985) ("Once offerors are informed of the criteria against which their proposals will be evaluated, the procuring agency is required to adhere to those criteria, or inform all offerors of the changes made in the evaluation scheme"). See also Arltec Hotel Group, Comp. Gen. Dec. B-213788, April 4, 1984, 84-1 CPD ¶381, at 3 ("procuring agencies . . . do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation."); Genasys Corp., 56 Comp. Gen. 835, 838 (1977) (same).

I find that what remains for this Board to determine, however, is whether the procuring agency, here the MEHAC, is locked into the RFP criteria and their stated relative weights, even after initial proposals and two best and final offers fail to indicate a "winner" between two offerors,²⁵ or whether the

²⁵The RFP contains no guidance on how to resolve a tie.

agency may then choose (in the absence of a "tie-breaker clause") which technical criteria most meaningfully distinguish what it is the State seeks to procure without soliciting further proposals based on such criteria. We must also determine under the circumstances before us the degree to which consideration of stated cost factors is required to determine final selection.

When faced with the "statistical tie" situation, MEHAC assumed it was free to use any rational tie breaking criteria to distinguish between the two proposals. The technical subgroups which it focused on (and in which Bell rated lower than Aerospatiale) were (1) cruise flight speed as indicated by PVD results, which according to Secretary Benton, was the most important of the technical criteria "tie-breakers"; (September 29 Tr. p. 218); (2) overall aircraft performance; (3) mandatory support service requirements (specifically, warranties, spare parts inventory, pilot training, and maintenance technical training); and (4) mandatory medical equipment systems. The MEHAC was also impressed with Aerospatiale's lower acquisition cost although the MEHAC had before it total cost information (operating and acquisition) and Secretary Benton testified to his belief that the Aerospatiale aircraft was so technically superior that MEHAC should have procured it even at greater overall cost. (September 29 Tr. p. 218).

The State initially took the position in the Agency Report that by the terms of the RFP itself, it was entitled to break the tie by using any factors rationally related to the selection decision for the particular procurement involved whether set forth in the RFP or not. It pointed to RFP Section D, Paragraph I D which states that the Selection Sub-Committee and the MEHAC would consider offerors' proposal scores and comparative results, technical and price proposals, field data, and any other information the Sub-Committee has requested as authorizing selection without regard to the factors set forth in

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the RFP. Following the hearing the State takes the somewhat narrower approach that although the factors used by MEHAC to make the selection decision: technical superiority, greater speed, and lower acquisition costs, are factors included in the scoring formula, MEHAC was not thereby precluded from considering these same elements according to different relative values.

In support of this position, the State points to language in this Board's decision in Systems Associates, Inc., supra which states that "...unless a solicitation sets forth a precise numerical formula, with price included as a factor, and provides that award will be made to the offeror whose proposal receives the highest number of points, award need not be made on that basis," 2 MSBCA ¶116 at p. 15 (emphasis added), citing Telecommunications Management Corp., Comp. Gen. Dec. B-190298, January 31, 1978, 78-1 CPD ¶180 (1978).

Furthermore, where, as here, the RFP scoring formula are not made binding, the State cites Bellers Crop Services, MSBCA 1066, 1 MSBCA ¶25 (1982) and Frank E. Basil, Comp. Gen. Dec. B-208133, January 25, 1983, 83-1 CPD ¶91 (1983) in support of its contention that procuring officials retain a reasonable amount of discretion in evaluating proposals and may make trade-offs between the cost and technical criteria set forth in the RFP.

Appellant argues, however, that if it is found that the State did not err in declaring a statistical tie between Aerospatiale and Bell (i.e., Bell's superiority arguments are rejected), MEHAC should have used Bell's lower overall (acquisition and operating) costs as the deciding factor and that the State erred in focusing on certain technical criteria to the exclusion of others and in discounting operating costs, thus impermissibly reweighting the RFP evaluation factors.

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The State disagrees, analogizing this case to Sun Ship, Inc. v. Ildako, 484 1356 (D.D.C. 1980) in which the Navy determined that there had been "a tie between two offerors in both technical/management and cost criteria:"

It cannot be contested that the RFP clearly advised the offerors of the evaluation factors to be used, notwithstanding the tie situation, and the relative importance of those factors. The RFP did not envision fully nor offer guidance respecting resolution of tie situations. The [source selection authority] rationally reverted to the underlying principle which guides procurement decisions, i.e., select the proposal offering the greatest value to the Government. General Electric Co. v. Kreps, 456 F.Supp. 468, 473 (D.D.C. 1978). Moreover, in a recent decision directly addressing the issue of use of unannounced criteria to resolve a tie, the Comptroller General stated:

When . . . competing proposals are measured against the evaluation factors established for the procurement and the selection official, in the good faith exercise of the discretion vested in him, is unable to discern an appropriate choice on the basis of that evaluation, we think that official properly may take into account other factors which are rationally related to a selection decision for the particular procurement involved.

Group Hospital Service, Inc., 58 Comp. Gen. 263, 270 (1979). The Court concurs in the judgment of the Comptroller General on this issue. Sunship at 1369; See also, Saco Defense Systems Division v. Weinberger, 629 F. Supp. 385 (D. Me. 1986).

Bell counters citing Dynaléctron, Comp. Gen. Dec. B-187057, February 8, 1977, 77-1 CPD ¶95 (1977) for the proposition that award must be based on factors set forth and as weighted in the RFP.

In Dynaléctron, the solicitation specified three main evaluation factors (technical, management, and financial) listed in descending order of importance, and included twelve subfactors. After an initial evaluation by a "Source Selection Evaluation Board" using all of the sub-factors, a "Source Selection Advisory Council" re-evaluated the proposals using only six of the twelve sub-factors.

The Army contended the award was proper so long as the six subfactors that were used were definitively descriptive and sufficiently related to the factors and subfactors contained in the RFP, thus giving offerors adequate notice of the evaluation factors and their relative importance. 77-1 CPD at 11. The Army also argued, as the State does here, that the Board's initial numerical rankings were not outcome determinative, but merely guides for rational decision making. *Id.* at 8 (citing Grey Advertising, Inc., 55 Comp. Gen. 111 (1976), 76-1 CPD 1325).

The Comptroller General held, however, that the government improperly failed to follow the evaluation approach set forth in the RFP. In considering only six out of twelve subfactors, and in treating the six considered subfactors equally (three of which related to price), the council effectively increased the relative importance of price as a factor from 30% to 50%. Thus, the Comptroller General concluded that the advisory council improperly departed from the weighting scheme originally selected and recommended that the contract be terminated for convenience and recompeted.

With Dynalectron as a backdrop, Appellant points to the following disparities between the weighting of criteria (speed, acquisition costs and other technical factors) ultimately relied upon by the MENAC and the weight afforded these criteria in the RFP.

(a) Airspeed Disparity

To illustrate its claim of error in the alleged reweighting of technical factors, Bell principally focuses on airspeed. In the RFP, airspeed was worth a maximum of 100 points out of 8,240.* Airspeed was given the same relative weight as other flight parameters such as hover flight and one engine capability (RFP Section D Table VI). Furthermore, three times more weight was attributed to engine reliability, availability, and maintainability as well as to airframe reliability, availability and maintainability (RFP Section D Table VII). According to Appellant's Mr.

* Total technical points including desirables.

Wright, if Appellant had been aware that speed was to be elevated to the most important technical criterion, Appellant could and would have taken steps to improve its speed. Mr. Wright testified as follows:

"We certainly would have calibrated the air speed indicator and meter to make sure that we weren't disadvantaged by any instrument errors. We obviously would have dropped out. I mean we would have reduced the weight by dropping the desirable items because weight equates the speed and the lower the weight the faster I go. So I would have dropped the desirable items especially (INAUDIBLE). I could have and would have changed the CG. I would have biased the CG of the aircraft. The center of gravity of the aircraft to the rear so that the aircraft would travel for example more level in flight which presents less drag configuration. I would have done that. I would have — I could have increased the — our helicopter is limited by transmission on it, I would have approached engineering and asked them to allow me to put more shaft horsepower for example, through the transmission and trade off the overhaul (INAUDIBLE) which is very high at 5000 hours. I would have asked if I could do that in let's say 2500 hours and maybe get more shaft horsepower through the transmission. So there is you know, four or five items that a drag clean-up program for example, that would attack, attack little things, things like that."

(September 29 Tr. p. 63-64).²⁶

In like manner, Bell complains about the alleged reweighting of the factors of overall aircraft performance, support service requirements and medical equipment systems. Furthermore, Bell objects to the use of the speeds achieved in the Performance Verification Demonstrations as the determinant speed. It contends that the PVD was only designed to provide the State with an opportunity to verify the data provided by offerors in their proposals. (RFP at 170). It points to the language in the RFP at 169-170, "Evaluation Points will be awarded based on written representations made by Offerors" as making it clear that the PVD was not to be scored at all.

²⁶The record does not reflect whether these changes (which would have had to be incorporated into the aircraft actually delivered to the State) would have increased the cost of the Bell aircraft and/or affected adversely other technical criterion.

(b) Cost Disparity

Bell next notes that by discounting operating costs, the relative weight of acquisition cost was doubled. In this regard, Bell argues that the State erred in not according operating costs the relative weight stated in the RFP. Operating cost proposals were worth one-half of a maximum attainable 4,120 points out of 12,360 total evaluation points. However, the MEIAC gave operating costs zero weight when comparing the two offerors.

Bell also argues that (at least absent explicit justification for an upward to a more costly offeror) cost or price becomes the determinative factor between two offerors whose proposals are technically acceptable.

(c) Technical Scoring Disparity

Bell finally argues that because only 17 points separated it and Aero-spatiale in technical scoring an obvious disparity arises to accord significance to this difference where technical score comprised two thirds (8,240) of total evaluation points.

1. Speed and Other Technical Factors Disparities

Turning now to consideration of these arguments (I will first address speed and technical scoring) I recognize that as a matter of sound procurement policy to insure fair competition, offerors are entitled to know the relative importance of each of the evaluation factors to be used by the procuring agency. Section 11-111(b)(2), Division II, State Finance and Procurement Article, supra. See Grey Advertising, Inc., supra; Signatron, Inc., Comp. Gen. Dec. D-181782, December 26, 1974, 74-2 CPD 1388 and cases cited therein. Furthermore, it is incumbent upon the procuring agency to adhere to those stated criteria. See Grey Advertising, Inc., supra; Signatron, Inc., supra.

However, I do not believe in a case such as this that evaluation formulas should be used to "straight-jacket" an agency by preventing it from exercising

any discretion in its award determinations. See Systems Associates, Inc. supra; Telecommunications Management Corp., supra, Frank F. Basil, supra. Here I would hold that where after two BAFO's the offeror's proposals were essentially equal* that the goal of adequate competition has been met. Thus where the solicitation, as here, did not provide that award would be made to the offeror whose proposal receives the highest number of points I would find that Maryland's General Procurement Law did not prohibit determination of the superior product by an evaluation of certain specific technical factors in the RFP (to the exclusion of others) as long as factors used rationally related to the ultimate task of selecting the best aircraft to accomplish the ends of the procurement. I would so hold even though the method of final selection had the effect of reweighting the scoring of the technical factors actually used (or not used). I would further find that the selection of the specific factors for final determinants herein was rational. In this case, the MEHAC determined that Aerospatiale's advantage in specific technical areas was meaningful. This was a determination that was for the State alone to make. As the Comptroller General stated in 52 Comp Gen 886, 890 (1973) "...technical point ratings are useful as guides for intelligent decision making in the procurement process, but whether a given point spread between two

* Only 17 points separated the technical proposals of Bell (5888) and Aerospatiale (5905). According Bell the 27 points it seeks for airspeed, the result places Bell in the lead by a mere 10 points. I believe the record clearly reflects that MEHAC did not make its determination to select Aerospatiale on the basis of total technical points. It based its determination on the basis of specific technical factors; i.e. PVD speed (which I find was intended to be scored, contrary to Bell's assertion) and mandatory medical equipment systems in particular, along with overall aircraft performance and support service requirements.

competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency."²⁷

I also believe the MEIAC was not required to support the conclusion that Aerospatiale had the technically superior aircraft by finding that this differential occurred in the categories given the most weight in the scoring formula. It was free to make its own judgments about relative importance, as long as these judgments were rational and not contrary to the RFP. Given the nature of this procurement, the technical factors focused on by the MEIAC, that emphasized the medical mission aspect of the procurement, i.e., speed and configuration for medical purposes of the aircraft, clearly in my opinion were not irrational. These helicopters are to be used primarily for extremely rapid response in critical and life-and-death situations to reach the victims of accidents and disasters at the earliest time possible under the circumstances. They are equipped with life-support systems because, although these helicopters will bring victims to fully equipped facilities, minutes are determinative of survival; equipment aboard these airborne ambulances will

²⁷This observation is poignantly underscored by the testimony of Dr. Stafford of the Medical System Evaluation Team contrasting the user friendliness of the Aerospatiale aircraft with the Bell aircraft for medical missions.

The Bell 412SP had the highest skids which increased the height of the helicopter from the ground to the entrance level of the doorway. This translated into a higher patient loading height which the Medical System Evaluation team regarded as a disadvantage. In addition, Aerospatiale offered an adjustable patient litter support structure which Bell did not offer. A support structure such as the one offered by Aerospatiale, which can be adjusted to various heights, was considered an advantage since it allows flight attendants to work on patients while seated. Also, in the Aerospatiale helicopter, the transmission housing is located farther back which provides more unobstructed cabin space than the Bell helicopter, facilitating patient treatment. Finally, Dr. Stafford was a member of the PVD crew for Bell and Aerospatiale and he determined that the Aerospatiale aircraft had the smoother ride. (October 13 Tr. pp. 150-170).

buy valuable time and offer the gift of life. The faster, better, and more reliable they are, the greater the likelihood for survival for victims. (October 13 Tr. pp. 150-170).

Finally, I believe that the facts in this case distinguish it from Dynallectron Corp., supra, which Bell relies on for the proposition that where a RFP's scheme is adequately disclosed but not followed in evaluating best and final offers, the award cannot stand. In Dynallectron, best and final offers were not numerically scored at all. Instead, the award decision became a price only contest among bidders who met minimum requirements, departing from the RFP's established relative importance of technical, management excellence and price. This situation is not analogous to the present situation where the MEIAC was faced with two competitors who had fared equally according to the numerical RFP standards through two DAFO's and who more than met minimum requirements. The choice of one over the other was then made based on criteria which the MEIAC determined truly distinguished two excellent aircraft in terms of best achieving the goals of the procurement. I find that what Bell characterizes as the reweighting of speed and other technical factors to make this choice was lawful.

2. Discounting of Operating Costs

Bell argues that the State erred in not evaluating operating costs and also argues alternatively that because its aircraft was technically acceptable (although second to Aerospatiale's) it was required to be selected by MEIAC because its total proposed price (operating and acquisition costs) after the second DAFO was less than Aerospatiale's (\$65 million versus \$68.5 million). In other words, Bell argues that since its proposed helicopter met the State's needs (although not the best aircraft in terms of speed and other technical factors) the General Procurement Law requires award to it because its price was lowest.

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It is clear that while cost cannot be ignored by a procuring agency in a negotiated procurement, it need not be the controlling factor. Even if a lower priced, lower technical scored offer meets the government's needs, acceptance of a higher priced, higher technical scored offer is still permissible under the General Procurement Law. Information Control Systems Corporation, MSBCA 1198, 1 MSBCA ¶81 (1984); Systems Associates, *supra* at 15-16. Compare Bell Aerospace Co., Comp. Gen. Dec. B-183463, September 23, 1975, 75-2 CPD ¶168 (1976); 52 Comp. Gen. 198 (1972). However, I believe such acceptance should be supported by a specific determination that the technical superiority of the higher priced offer warrants the additional cost involved in the award of a contract to that offeror, i.e. that the acceptance of such offer is in the best interests of the State. See 51 Comp. Gen. 153, 161 (1971); Compare COMAR 21.05.03.03C(6).

Thus I reject Bell's alternative argument that its lower overall costs required award to it and had MEHAC made its award on the basis of total costs (where on paper Aerospatiale was more expensive) my inquiry would be over.

However, the MEHAC never did make a determination to award on the basis of total costs. Instead, it made a determination that operational costs are inherently "soft" and therefore not a true indicator of what the ultimate cost to the State would be after the 10-year operating cycle was complete.²⁸ It therefore discounted operating costs where Bell's proposed costs (\$37.8 million) were lower than Aerospatiale's proposed costs (\$42.6 million) and

²⁸Secretary Benton testified that although operational costs were used in arriving at the point scores, when the MEHAC was faced with its final decision, it determined that operational costs should not "be given the same weight and the same consideration as the so-called hard numbers, the acquisition costs, which we would actually have to write out a check. These other costs are spread over a ten-year period. When they are translated to the annual costs and particularly per aircraft they are not significant and again, represent only an estimate". (September 29 Tr. p. 221).

looked at acquisition costs where Aerospatiale's costs (\$25.9 million) were lower than Bell's costs (\$27.2 million).²⁹ In this regard I find that the State erred. The analysis set forth above concerning evaluation of technical factors to determine the superior product in a tie situation does not apply to evaluation of price. There is some interrelationship (as reflected in this record) between acquisition and operating costs in terms of the offerors' making trade-offs between the two. The record herein reflects that the various offers through the second BAFO were made with the belief that they would be evaluated according to the evaluation scheme set forth in the RFP where operating costs were stated to be as important to the competition as acquisition costs. And, indeed, operating costs were evaluated and fully considered through the second BAFO resulting in the elimination of Sikorsky. However, to thereafter ignore for purposes of final selection a stated evaluation factor related to cost, even in the face of a statistical tie after two BAFOs, in my opinion, may contravene the requirement of the General Procurement Law and COMAR that in negotiated procurements selection be based on a determination of the proposal or best and final offer which is the most advantageous to the State, considering price and other evaluation factors set forth in the request for proposals. In making such a determination I reiterate that it is lawful under the General Procurement Law to select a technically superior product at a higher cost. It is probably not lawful to select a superior product by only considering those aspects of total price evaluation factors under which the price of the product is lowest. This is not to suggest, however, that I disagree with the conclusion of MEHAC that operating costs are inherently "soft".

²⁹As noted above this has been attacked by Bell as an improper reweighting of acquisition costs.

Operating cost under the RFP consists of four elements: component and part cost; scheduled inspection labor cost; fuel and lubricant cost; and insurance cost. (RFP Section D Paragraph VII B). The offerors were required to guarantee hourly parts cost (Category I) and number of labor hours necessary to perform scheduled inspections (Category II).

The record reflects that while certain costs (Category I and Category II) were guaranteed, the aggregate ten year life cycle costs are not fixed and certain and that the State will have to pay whatever the operating costs ultimately turn out to be. At the hearing of the appeals it was revealed that there were significant errors in the proposed operating costs of two of the three offerors. Mr. Cousens testified that Sikorsky's operating costs were understated by \$30,500 per helicopter for each year of the ten-year period, amounting to a total understatement of costs of approximately \$1.8 million. Bell's operating costs were discovered to have been understated by approximately \$1.4 million due to a disallowance of Bell's operating costs using pro-rated retirement parts and warranty figures. (Sikorsky Ex 21). Projected costs for avionics³⁰ varied widely between offerors. (October 12 Tr. p. 188). I therefore do not find that the MEIAC's belief that operating costs are inherently "soft" was unreasonable.

³⁰ Radio equipment such as navigational radios and communications radios and "all the electronic devices that are not essential to the engine and air frame coming apart." (October 4, Tr. p. 33).

Nevertheless, operating costs, having been stated in the RFP to have equal importance with acquisition costs, were ultimately eliminated from the consideration of price and other factors in determining the offer most advantageous to the State.³¹ There is thus no determination in the record by MEHAC that the superiority of the Aerospatiale aircraft warrants its acquisition despite higher comparative total (acquisition and operating) costs of the Aerospatiale aircraft relative to the Bell aircraft. As noted above, I conclude such specific determination is required by Maryland's General Procurement Law. While a close question as to whether the matter should be remanded to the MEHAC for such a formal determination, I believe that the record does reflect that MEHAC in fact understood that its selection of the Aerospatiale aircraft might ultimately cost the State more than had it selected the Bell aircraft. Secretary Benton testified that he understood that "there is no assurance that the operating costs, no matter how carefully determined and derived, would actually turn out to be precisely those that were estimated." (September 29 Tr. pp. 220-221). It further appears that the MEHAC would have understood that at least on paper it was purchasing the more expensive aircraft because it had in front of it the total cost figures (operating and acquisition) for comparison showing Aerospatiale's total cost to be higher than Bell's. Under such circumstances I believe that to remand the matter would be to elevate form over substance since it appears obvious to me from the record that MEHAC would make the required determination that it desires to purchase the Aerospatiale aircraft at the higher price that is yielded by the required consideration of operating costs along with acquisition costs as set forth in the RFP. Thus I would deny the appeal on such grounds.

³¹In other words, competition under the General Procurement Law requires actual consideration of a cost factor, whether "soft" or not, that is stated to be an evaluation factor rather than an informational item.

II. Use of the PVD Results for Speed Comparison

Bell contends that even if the State acted properly in determining to select an aircraft based in part on speed, the State erred in determining that the Aerospatiale aircraft was faster than the Bell aircraft. The following findings of fact are germane to this issue.

1. Professor Gessow, a professor at the University of Maryland, and Director of the Center for Rotocraft Education and Research, testified on behalf of Bell that the PVD was not a valid method for comparing the maximum cruise air speeds of the two aircraft. (September 29 Tr. p. 158). He testified that errors may have occurred as a result of uncalibrated instruments. Also, since the aircraft used for the PVD were in the clean configuration, i.e., minus external equipment, computations of drag may have been off depending on where the external equipment was added to the aircraft actually proposed to be delivered to the State. Furthermore, he testified that instantaneous readings of air speed as taken at the PVD are not as accurate compared with continuous readings. (September 29 Tr. pp. 158-163).

Based on his own assessment of true air speed using the Bell and Aerospatiale flight manuals he concluded that there was no substantial difference in true air speed between the Bell 412SP and the Aerospatiale 365NI aircrafts at the Maryland mission configuration, altitude and temperature. (September 29 Tr. p. 140).

2. The Bell flight manual indicated maximum cruise air speed of 123 knots for the 412SP at the Maryland mission weight³² at the specified altitude and atmosphere (2,000 feet and ISA plus 15 degrees centigrade), with sliding

³²Maryland mission weight corresponds to the empty weight of the helicopter, (including weight to simulate the external equipment for the proposed aircraft), plus the crew weight, plus the amount of fuel required to fly the 180 nautical mile range at a minimum of 120 knots indicated airspeed (no wind condition), plus an additional 30 minute fuel reserve. (October 3 Tr. p. 6; RFP Section D Paragraph VIII, C 4).

doors (which are standard on the 412SP), flir, night sun and hoist. (Bell Ex 2; September 29 Tr. pp. 141-143). The Aerospatiale flight manual indicated a maximum cruise air speed for the 365N1 in a clean configuration at the Maryland mission weight at sea level standard atmosphere of 152 knots. (Bell Ex 3; September 29 Tr. p. 149).

Professor Gessow calculated a reduction of 14 knots in Aerospatiale's air speed using a chart in Aerospatiale's flight manual to account for the Maryland altitude and atmosphere. Based on the chart, he further reduced Aerospatiale's air speed by 5% or 9.7 knots to account for drag produced by the addition of sliding doors and a hoist. (Bell Ex 4; September 29 Tr. p. 151). Professor Gessow then ran a computer program and prepared charts to estimate the effect of the flir and night sun on maximum cruise speed. He estimated the drag produced by these two items to be 6 knots. (Bell Ex 5; September 29 Tr. p. 155). Based on these computations he estimated a maximum cruise speed for the Aerospatiale 365N1 of 122 knots.

3. Mr. Jean-Marie Giraud, technical coordinator for Aerospatiale, criticized the methodology and the results of Professor Gessow. Mr. Giraud testified that flight manual data is not a very accurate source to base calculations upon because such data is based on old flight test results and flight manuals are written very conservatively.³³ In addition, Mr. Giraud contended that Professor Gessow erred in his interpretation of Aerospatiale's flight manual. Mr. Giraud asserted that the drag penalty for hoist installation in the Aerospatiale flight manual includes the penalty for sliding doors and thus Professor Gessow erred in calculating separate drag penalties totalling 9.7

³³ Mr. Wright testified on rebuttal that in his experience flight manuals are in fact accurate. (October 20 Tr. pp. 155-156).

knots. According to Mr. Giraud, the drag penalty for the hoist and sliding doors would be only 7 knots under a proper interpretation of the Aerospatiale flight manual.

4. Mr. Giraud made his own true airspeed calculations based on flight test results for an Aerospatiale 365N1 sold to the Irish Coast Guard. The Irish helicopter was utilized by Mr. Giraud because of the similarity in configuration to the Maryland helicopter. The Irish helicopter has a hoist and sliding doors as does the Maryland helicopter. The Irish helicopter has the same flir as the Maryland helicopter but it is located in a different area. The Irish helicopter does not have a night sun but does have an antenna (with somewhat comparable drag effect) in the area where the Maryland night sun is to be located. (October 20 Tr. pp. 9-11). The flight test indicated speed of the Irish helicopter was 146 knots which differed from the flight manual speed of 140, which Mr. Giraud testified was conservative.

Mr. Giraud calculated a drag penalty for the flir based on the flight test of the Irish helicopter of 4 knots and a drag penalty for the hoist (including the sliding door) based on the flight test of 4.5 knots. This comparison produces a maximum cruise speed of 137.5 knots for the Maryland helicopter (Aerospatiale Ex. 17). He then calculated a greater speed of 139.5 knots for the Maryland helicopter based on the drag produced by a difference in flir location between the Irish and Maryland helicopters.³⁴ (October 20 Tr. pp. 32-34).

5. At the MEHAC meeting of June 23 the focus of the air speed discussion was indicated air speed. As Sergeant Wenrich testified:

³⁴ Using similar methodology, Jake Hart, director of flight operations for Aerospatiale, took the Aerospatiale PVD results and utilizing characteristics of the U.S. Coast Guard Dauphin helicopter, derived a true airspeed of 138.6 knots for the Maryland Aerospatiale helicopter. (October 12 Tr. p. 172).

They asked me to explain the air speed and I started in with the calibration and the changes to it and then I was asked well what was on the speedometer at the time....At that particular meeting as I remember, the air speed was discussed as knots indicated airspeed.

(October 12 Tr. pp. 74-76).

Sergeant Wenrich never discussed the true airspeed calculations to be derived from the PVD results with the full MEIAC or with the Selection Sub-Committee. The only numbers ever discussed with the full MEIAC or the Selection Sub-committee were the indicated air speeds of 160 knots for Aerospatiale, 145 knots for Sikorsky and 124 knots for Bell. (October 12 Tr. pp. 74-78). However, the conversions and air speed penalties were discussed by Sergeant Wenrich with Colonel Tippet, Major Sumpter and Delegate Astel, all of whom had aviation experience and were familiar with the methodologies for determining true airspeed in the Maryland configuration.

6. It appears that at least one member of MEIAC, Secretary Benton, relied on indicated air speed. Secretary Benton testified that the Aerospatiale "is about twenty-nine percent faster than Bell." (September 29 Tr. pp. 215-216). He did not know the origin of the numbers presented. He testified, "[t]hey were simply presented to us and we accepted them." (September 29 Tr. p. 216). It is probable that the 29% differential Secretary Benton referred to is the result of comparing the indicated air speeds of 160 knots for Aerospatiale versus 124 knots for Bell.

7. Secretary Benton considered speed to be a "very significant factor." He testified speed "was the factor that swayed me as an individual member of the procurement team and I believe others also to recommend the Aero-spatiale." (September 29 Tr. p. 218). He also testified:

If the technical people, the procurement team, indicated that both aircraft were about equal so far as speed was concerned, yes it would have had a significant difference or significant bearing upon our final recommendation.

(September 29 Tr. p. 216).

8. Sergeant Wenrich testified that based on his calculations for conversion of indicated airspeed to true airspeed under the PVD conditions, the true airspeed difference between Bell and Aerospatiale was the difference between 124 knots for Bell and 137 knots for Aerospatiale or 11%. (October 31 Tr. pp. 80-97).

Decision

Based on the significance of air speed in this procurement, Bell argues that it was unreasonable for the State to rely on indicated air speed in comparing relative speeds of aircraft. The Bell and Aerospatiale aircraft, as flown during the PVD, were configured differently, with different external equipment and flown at different altitudes.³⁵ The data obtained, Bell asserts, cannot be used as a reasonable basis for comparison unless standardized in some manner. While there is evidence that three members of MEHAC with aviation experience understood the calculations necessary to produce an "apples to apples" comparison of air speed, at least Secretary Benton and perhaps other members of MEHAC apparently relied on the raw PVD data. Was such reliance unreasonable? I think not. Procurement officials have to

³⁵The Aerospatiale aircraft flew at 1,000 feet because weather conditions on that particular day would not permit a safe flight at 2,000 feet. (October 12 Tr. p. 157).

make decisions based on information available to them. Compare Transit Casualty Company, MSBCA 1260, 2 MSBCA ¶119 (1985) at pp. 55-56. Use of the PVD results by MEHAC was consistent with the RFP instruction that the PVD would be used to verify speed as set forth in the proposals of various offerors.

Nor do I believe that the PVD indicated air speed results which were available to MEHAC vary from the speeds derived from the conversions to true airspeed performed by Sergeant Wenrich to a degree that otherwise makes use of the PVD indicated airspeeds unreasonable.³⁶ The State placed great importance on air speed and how that translated into minutes saved in the Golden Hour.³⁷ The 29% PVD indicated air speed differential translated into a saving of 9 minutes per mission. Under the true air speed analysis performed by Sergeant Wenrich, which was discussed with certain members of MEHAC, the speed differential was 11%. Under the analysis of Mr. Giraud or Mr. Hart, the speed differential would be approximately 12%. Given the significance of the Golden Hour and importance of every minute in transporting a patient to a treatment center, I believe the record reflects that MEHAC would have concluded that the Aerospatiale 365N1 was the significantly faster aircraft if all the members of MEHAC had been utilizing true airspeed

³⁶ There is evidence in the record (presented at the hearing) that the speed advantage of the 365 NI over the Bell 412 increases as temperature decreases. Mr. Giraud testified (October 20 Tr. pp. 38-46) that at the average temperature in Baltimore in January, the 365 NI has a 27.4% speed advantage over the 412 which advantage decreases to 12% in July. The average annual speed advantage under this comparison is 20.3%. (Aerospatiale Ex 19). I believe this testimony to be credible and had such evidence been presented to MEHAC I would find a determination of significant true air speed advantage between the two aircraft based thereon to be reasonable.

³⁷ The Golden Hour is a term that refers to patient survival. In essence it means that if a patient has sustained multiple traumatic injuries, the patient has sixty minutes more or less from the time of impact to be transported to a definitive treatment center in order to have a reasonable chance of survival. The record reflects tremendous concern of the MEHAC with the concept of the Golden Hour.

comparisons which still results in a several minute per mission air speed differential. It is only under the analysis of Professor Gessow performed for the hearing of Bell's appeal which was not available to MEHAC that a different decision may have been reached. However, Bell has failed, in my opinion, to demonstrate that Professor Gessow's conclusion is factually more correct than that of Sergeant Wenrich on a comparison of flight manual data nor for that matter does the record demonstrate that Messrs. Hart and Giraud are incorrect in their conclusions. Nor do I think that use of PVD results injected error into the selection process of such magnitude as to otherwise require that we sustain Bell's appeal. While some members of the MEHAC may have erroneously believed that the Aerospatiale aircraft flew at a rate of speed 29% greater than Bell, such belief does not require that the procurement be overturned.³⁸ I would therefore deny the appeal on this ground as well.

For all the foregoing reasons I would deny the appeals of Appellants Bell and Sikorsky.⁵

³⁸See Footnote 36.

Concurring Opinion by Messrs. Ketchen and Levy

We concur in the findings of fact and the results of the opinion of Chairman Harrison ("Harrison Opinion") for the following reasons.¹

1. The Board of Public Works Exercised Its Procurement Authority Pursuant to Maryland General Procurement Law In Selecting Aerospatiale As The Successful Offeror.

The Maryland Executive Helicopter Advisory Committee ("MEHAC") conducted an evaluation of the offerors' proposals in the helicopter procurement and recommended to the Maryland Board of Public Works (BPW) award of the instant contract to the Aerospatiale Helicopter Corp. As its name suggests, MEHAC is an advisory and policy making body consisting of members from the Executive Branch and non-voting members from the Maryland General Assembly. Harrison Opinion, Findings of Fact No. 1, p. 2, e.g., Joint Resolution, SJR 33, Laws of Maryland, 1987. In this competitive negotiation, MEHAC on this record served in a unique capacity, and functioned as a source evaluation board without procurement authority as an advisor to the Board of Public Works.

The Board of Public Works exercised its actual, independent procurement authority here pursuant to Maryland's General Procurement Law and regulations. Board of Public Works Transcript (hereinafter "BPW Tr") 166, 168, Agency Report Exhs. 21 & 26, Sikorsky Exh. 3. See COMAR 21.02.01.02.B. ("The Board may exercise any authority conferred on a department by State Finance and Procurement Article of the Code and, to the extent that its action in exercising this authority is inconsistent with the action of any

¹We concur in the conclusions concerning the Sikorsky appeal (MSBCA 1407). Our analysis focuses on the Bell appeal (MSBCA 1409) and only refers to the Sikorsky appeal and evaluation as appropriate.

department, the action of the Board shall prevail."); Md. Ann. Code, State Finance and Procurement Article ("SF") §12-101 (1988) (SF §11-105 (1987 Cum. Supp.)).

After hearing presentations from MEHAC and the offerors, the Board of Public Works awarded the contract to Aerospatiale as having the most advantageous proposal considering price and the solicitation's evaluation factors. In addition, the Board of Public Works approved the contract's execution without delay because this was necessary to protect substantial State interests. See COMAR 21.10.02.10.

II. The Board of Public Works Properly Awarded The Contract Consistent With the General Procurement Law Based on the Most Advantageous Proposal Considering Price and the Solicitation Evaluation Factors.

We address here whether Bell was treated fairly and on an equal basis in this procurement consistent with the solicitation evaluation factors. We initially discuss the State's technical evaluation, although the technical evaluation and the price evaluation are intertwined under the Maryland statutory requirement to select the most advantageous proposal based on the consideration of price and evaluation factors specified in the solicitation. SF §13-104 (1988) (SF §11-111 (1987 Cum. Supp.)). See COMAR 21.05.03.05 ("It is the policy of the State to procure supplies, services, and construction from responsible sources at fair and reasonable prices calculated to result in the lowest overall cost to the State").

Bell essentially challenges the integrity of the procurement procedure. Bell maintains that it was not treated on an equal basis with Aerospatiale consistent with the RFP evaluation criteria. It specifically maintains that MEHAC improperly changed the evaluation criteria by reweighting and emphasizing certain stated evaluation criteria on a selective basis, i.e., certain technical-medical factors, the speed of the helicopters, and acquisition

costs, without notifying the offerors or amending the RFP as the procurement regulations require. In this regard, Bell contends that it could have made adjustments to its helicopter to enhance speed had it known that speed was to become significant in the competition. Further, Bell contends that State officials did not inform it during the helicopter performance verification demonstration of the importance of speed or of the State's intended method of scoring the performance verification demonstration results. Even if the State did inform Bell, it maintains that such a verbal briefing would not constitute notice that the State was amending RFP evaluation criteria.

As to evaluation of proposals in a competitive negotiation, we agree with the Comptroller General of the United States that,

It is not the function of this [Board] to evaluate proposals in order to determine their relative technical merits. TGI Construction Corporation, et al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167; Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 169; Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. The contracting agency is responsible for determining which technical proposal best meets its needs, since it must bear the major burden for any difficulties incurred by reason of a defective evaluation. Training Corporation of America, B-181539, December 13, 1974, 74-2 CPD 337. Accordingly, we have consistently held that procuring officials enjoy "a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award," and that such determinations are entitled to great weight and must not be disturbed unless shown to be unreasonable or in violation of the procurement statutes or regulations. METIS Corporation, 54 Comp. Gen. 612, 614-5 (1975), 75-1 CPD 44; Riggins and Williamson Machine Company, Incorporated, et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 168; B-178220, December 10, 1973. (Underscoring added).

Olin Corp., Energy Systems Operations, Comp. Gen. Dec. B-187311, January 27, 1977, 77-1 CPD ¶68 at 4. See Tracor, Inc., Comp. Gen. Dec. B-186315, November 8, 1976, 76-2 CPD ¶386 at 16; RKFM Products Corp., Comp. Gen. Dec. B-186424, September 15, 1976, 76-2 CPD ¶247; Radiation Systems, Inc., Comp. Gen. Dec. B-222585.7, February 6, 1987, 87-1 CPD ¶129; Frank E. Basil, Jets Services, Inc., Comp. Gen. Dec. B-208133, January 25, 1983, 83-1

CPD ¶91. A protester may establish that a procurement determination is unreasonable by demonstrating that the procurement procedure followed involved a clear and prejudicial violation of applicable statutes and regulations. General Electric Co. v. Kreps, 456 F. Supp. 468, 472 (D.D.C. 1978).

We agree that evaluation of proposals in a negotiated procurement based on unannounced evaluation factors or "criteria" is unreasonable and in violation of Maryland's General Procurement Law, since competition on an equal basis is thereby thwarted. AGS Genasys Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987). Procurement agency officials thus must evaluate proposals based on the solicitation's evaluation criteria or inform offerors of changes to the evaluation criteria so that offerors may submit accurate and realistic proposals and thereby compete on an equal basis. Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116 (1985). B. Paul Blaine Associates, Inc., 1 MSBCA ¶58 (1983).

With regard to the evaluation scheme used in the instant procurement, we note that detailed point scoring systems, including price as a weighted part of the scoring scheme, are used as guidelines to select the most advantageous offer, unless the solicitation expressly states that the procuring agency must award to the offeror receiving the highest point score. If the overall proposal point scores are so close that the proposals appear equivalent, evaluation and selection officials still may select the offer which best meets their needs consistent with the solicitation's evaluation criteria. Grey Advertising Inc., Comp. Gen. Dec. B-184825, May 14, 1976, 76-1 CPD ¶325 at 9-11, 15-16.

We are making a significant distinction here. On the one hand, the technical evaluation conducted by evaluation and selection officials focuses on the determination of the technically superior proposal - a technical evaluation

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matter under the solicitation's evaluation criteria. On the other hand, evaluation and selection officials in accordance with the Maryland General Procurement Law and regulations must also determine the most advantageous proposal. The most advantageous proposal determination requires a business judgment that involves considerations of both technical matters and price to determine the best deal for the State. In a competitive negotiation, often a general goal is to award to the technically superior offer at the lowest price. Telecommunications Management Corp., Comp. Gen. Dec. B-190298, January 31, 1978, 78-1 CPD ¶80 at 4. In evaluating proposals, if a proposal found technically superior is also the higher priced one, selection officials still may award to that offeror, if the solicitation emphasizes quality over price. Id. In such a case, they must determine that the technical superiority of the higher rated proposal is worth the additional cost in order to meet the statutory requirement to select the most advantageous proposal. Selection officials on occasion may have difficulty in deciding which proposal is the superior proposal from among the highest rated technical offers. They may conclude that apparently equivalent proposals also offer technically equivalent equipment or products, when using point scores as a guideline in their evaluation. If selection officials determine that proposals are equal or the equipment technically equivalent, they may use price to select the most advantageous proposal. See Grey Advertising, Inc., Comp. Gen. Dec. B-184825, May 14, 1976, 76-1 CPD ¶325; Olin Corporation, Energy Systems Operators, Comp. Gen. Dec. B-187311, January 27, 1977, 77-1 CPD ¶68; Bunker Ramo Corporation, Comp. Gen. Dec. B-187645, June 15, 1977, 77-1 CPD ¶427; SETAC, Inc., Comp. Gen. Dec., B-209485, July 25, 1983, 83-2 CPD ¶121; Group Hospital

Service, Inc. (Blue Cross of Texas), Comp. Gen. Dec. B-190401, February 6, 1979, 79-1 CPD ¶245 (price may be used to discriminate between technically equivalent proposals).

Turning to the facts of record on this appeal, there came a time when MEHAC in its judgment based on the scoring that had been done by its staff advisors (the MEHAC Selection Subcommittee and under it the price evaluation and technical evaluation teams) believed that it could not choose from among the competing offerors' proposals. See the Harrison Opinion, Findings of Fact Nos. 15 and 16, page 8. MEHAC determined that the overall differential in scoring among the offerors' total scores, considering both technical factors and price, did not clearly distinguish between the Aero-spatiale and Bell proposals. At one point, Bell clearly was ahead of Aero-spatiale in overall total points (price and technical points) but not by a significant margin. Bell's overall proposed price was less expensive (\$65.086 million versus Aerospatiale's price of \$68.523 million). However, as discussed below, Aerospatiale had a slight advantage in technical points.

MEHAC's discussions and actions indicate that it obviously came to believe based on the purpose of the State's emergency medical services mission that the Aerospatiale helicopter was better suited as the technically superior helicopter to fulfill the State's needs under the solicitation's criteria. E.g., Appellant's Exh. 10, (MEHAC meeting minutes of September 23, 1988); BPW Tr. 38-172. At this point in the selection process, there was only a marginal technical point differential between Aerospatiale and Bell. The differential after the Second BAFO was only 17 points between Aerospatiale, (5905 points, or 5930 points if the mistake pointed out by the State had been included) and Bell (5888 points) with Aerospatiale having an insignificant technical point advantage. Under such circumstances, selection officials

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reasonably may decide that they cannot determine proposal superiority strictly on the basis of point scores when they are close, given that the point scores themselves have a subjective basis. They therefore may use their personal, reasonable business and technical evaluation skills to determine in their judgment the superior proposal. Grey Advertising Inc., supra, 76-1 CPD ¶325 at 9-11. MEHAC functioning as an evaluation and advisory entity had the reasonable discretion to determine that the Aerospatiale and Bell proposals were technically equivalent even had Bell received a technical point score numerically higher than that of Aerospatiale.

However, in spite of the apparently equal proposals and helicopters, as determined by MEHAC and its advisors at one point in the evaluation and selection process, MEHAC sought to go further in meeting its evaluation responsibility. It undertook to determine the technically superior proposal as well as the most advantageous proposal. Essentially, as the State argues, MEHAC stepped back, and took another, generalized look at Aerospatiale's and Bell's helicopters and proposals. MEHAC wanted to see if there were distinguishing factors that came to the fore regarding these helicopters based on the State's needs as set forth in the solicitation. MEHAC wanted to see if there were such distinguishing factors within the criteria that permitted it to recommend to the Board of Public Works the technically superior helicopter, based on the technical evaluation, as well as the most advantageous proposal in accordance with the requirements of the General Procurement Law. BPW Tr. 86-88; Appellant's Exhibit 10. As reported to the Board of Public Works by MEHAC, the Aerospatiale helicopter stood out as the technically superior one when compared to the Bell helicopter for a number of reasons. BPW Tr. 50-52, 56-57.

MEHAC identified certain solicitation factors that distinguished in favor of Aerospatiale over Bell in looking at the "big picture" (BPW Tr. 45-51) that resulted in its final selection of Aerospatiale's helicopter. In this regard, MEHAC laid out its evaluation process fully for the Board of Public Works. BPW Tr. 38-172. The factors that MEHAC used to distinguish in favor of the Aerospatiale helicopter (BPW Tr. 43-50, 166; Harrison Opinion, pages 33, 39-40) were clearly consistent with the specified RFP evaluation criteria upon which the procurement was based. In this regard, both the Aerospatiale helicopter and the Bell helicopter were compared on the same basis utilizing evaluation considerations that correlate with or flow directly from the RFP evaluation criteria. Compare SETAC, Inc., Comp. Gen. Dec. B-209485, July 25, 1983, 83-2 CPD ¶121; Group Hospital Services, Inc., supra, 79-1 CPD ¶245 at 12, (evaluation officials may use criteria reasonably related to the solicitation criteria to choose between equivalent proposals without notifying offerors.) Littleton Research and Engineering Corp., Comp. Gen. Dec. B-191245, June 30, 1978, 78-1 CPD ¶466 (use of new evaluation criteria is permissible where there is sufficient correlation between the new factor and generalized criteria in the solicitation to put offerors on reasonable notice of the evaluation criteria applied to their proposals).

We find that MEHAC did not reweight or re-evaluate the factors to place the evaluation factor of speed and the other technical, medical evaluation factors above the others. Rather, as the State suggests in its argument, MEHAC, based on the personal, reasonable technical and business judgment of its members, made an overall subjective technical judgment that it liked Aerospatiale's helicopter better than Bell's helicopter on a technical basis. Thus the reasons MEHAC set forth regarding the technical, medical factors as well as speed of delivery of medical services were the reasons why, to

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MEHAC, the Aerospatiale helicopter stood out based on the State's needs as expressed in the solicitation, and were the reasons why MEHAC selected Aerospatiale. Appellant's Exhibit 10. While Bell's position was to emphasize that MEHAC reweighted the speed factor, acquisition cost and the technical-medical factors each at one third value, we do not view MEHAC's evaluation process in this manner. In fact, these categories really were MEHAC's shorthand method of referencing a number of factors it considered within the solicitation's parameters on a subjective basis when it stepped back to look at the big picture and make its final choice. See BPW Tr. 43-50; Harrison Opinion, pages 33, 39-40.

Accordingly, our determination that the State actions were reasonable and not illegal does not turn on whether MEHAC selected factors from within the solicitation and reweighted them and re-evaluated them to resolve the perceived scoring closeness in total points. Our determination turns on the fact that MEHAC essentially looked past the point scores under circumstances where there were equivalent proposals and helicopters and did what the Maryland General Procurement Law and regulations require it to do. It used its business and technical judgment in recommending the most advantageous offer based on price and evaluation factors.

In this regard, MEHAC's use of the results of the technical evaluation and price evaluation developed by its selection subcommittee and the price and technical evaluation teams, we agree, was consistent with the established evaluation factors. BDM Corporation, Comp. Gen. Dec. B-211129, August 23, 1983, 83-2 CPD ¶234. Accordingly, Bell has failed to show that MEHAC did not treat Bell on an equal basis with Aerospatiale during the course of MEHAC's final deliberations in reaching its conclusion to recommend the Aerospatiale helicopter to the Board of Public Works as the technically

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superior helicopter and the Aerospatiale proposal as the most advantageous proposal. In any event, the Board of Public Works, as the actual procurement authority here, reasonably exercised its independent authority in deciding to award the contract to Aerospatiale. BPW Tr. 166, 168. See Littleton Research and Engineering Corp., Comp. Gen. Dec. B-191245, June 30, 1978, 78-1 CPD ¶466.

The Board of Public Works considered MEHAC's evaluation process, its recommendations and advice. In making the final decision and selection of Aerospatiale, the Board of Public Works considered among other factors: good lifting capacity (BPW Tr. 43), patient access and service area configuration (Tr. 44, 50), safety features (BPW Tr. 45), single engine flight capability of two engine aircraft as well as two engine performance (BPW Tr. 46, 49), communications capability (BPW Tr. 50), as well as speed of delivery of medical services (BPW Tr. 166). The evaluation factors, including speed, used to distinguish between Bell and Aerospatiale were set forth in the solicitation, or directly flow from or correlate to the solicitation's evaluation criteria. See Littleton Research and Engineering Corp., Comp. Gen. Dec. B-191245, June 30, 1978, 78-1 CPD ¶466. In this regard, examine as well the Harrison Opinion at pages 32-33 and 39-40 and Appellant Exhibit 10.

Based on the foregoing, Bell has not demonstrated, as is its burden, that it was materially prejudiced by the MEHAC's evaluation or by the Board of Public Works evaluation and selection of Aerospatiale for award based on MEHAC's recommendation and its consideration of the information presented to it. We find that neither Bell nor Sikorsky met its burden of proof to show that award to Aerospatiale was unreasonable, arbitrary, an abuse of discretion, or that the procurement procedures followed involved clear and prejudicial violations of applicable statutes or regulations. Nor have they met their

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burden to show that the contract award is clearly illegal as being outside the statutory standard requiring award in a competitively negotiated procurement to the responsible offeror whose proposal, or best and final offer, is determined to be the most advantageous to the State considering price and the evaluation factors set forth in the solicitation. SF S13-104 (1988) (SF S11-111 (e) (1987 Cum. Supp.)). See generally John Reiner and Co. v. United States, 163 Ct. Cl. 381, 325 F.2d 438 (1963) cert. denied 377 U.S. 931 (1964); Brown and Son Electric Co. v. United States 163 Ct. Cl. 465, 325 F. 2d 446 (1963) (contracts should not be cancelled unless clearly illegal.); Four Seas and Seven Winds Travel, Inc., MSBCA 1372, _____ MSBCA _____ (August 18, 1988). See also Dynalectron Corporation, 659 F. Supp. 64 (D.D.C. 1987); Telecommunications Management Corp., Comp. Gen. Dec. B-190298, January 31, 1978, 78-1 CPD ¶80, Bunker Ramo Corp., Comp. Gen. Dec. B-187645, June 15, 1977, 77-1 CPD ¶427; Hansa Engineering Corp., Comp. Gen. Dec. B-187675, June 13, 1977, 77-1 CPD ¶423.

We turn next to consider specifically whether the MEHAC's use of speed of helicopters to deliver emergency medical services was unfair, inconsistent with the specified RFP evaluation factors, or contrary to the General Procurement Law and procurement regulations such that offerors were not competing on an equal basis. Bell maintains that had it known of the importance of speed in the evaluation it could have made adjustments to its helicopter to increase its speed at the performance verification demonstration (albeit at a trade-off for increased maintenance requirements, Wright, Sept. 29, 1988 Hearing Tr. 63-64) and thereby have received more evaluation points. Bell also contends that by using speed as one of the final three

selection factors, i.e., with the acquisition cost and the other technical medical factors, speed inappropriately became re-weighted at one-third in value as a selection factor.

The fastest delivery of emergency medical services based on helicopter speed was no different than any of the several other technical, medical evaluation factors used to distinguish between the Aerospatiale and the Bell helicopters. In this regard, MEHAC's determination that the Aerospatiale helicopter potentially allows Maryland to provide emergency medical services faster than with Bell's helicopter was neither improper nor unreasonable.² Speed of helicopters translated to speed of delivery of medical services was just one of the several criteria in the State's overall goal to deliver emergency medical services on a high quality basis.

In any event, as early as April, 1988, long before the time of the Second BAFOs, State procurement officials orally informed Bell representatives at the appropriate time during Bell's performance verification demonstration of its helicopter that speed of helicopters was very important to the State, although Bell representatives may not have adequately analyzed the importance of such communication. Notwithstanding this, however, Bell clearly understood that delivery of emergency medical services in as fast a manner as possible was a significant State goal. As Bell later acknowledged: "Speed is important. There's no question about it." BPW Tr. 127 (Troutman). See NBL, Inc., Comp. Gen. Dec. B-206285.2, September 28, 1982, 82-2 CPD ¶290 at 4 (based on oral communication regarding contract requirements a protester was not prejudiced by any failure to issue a formal written

²We find that Aerospatiale's helicopter was faster than Bell's on a speed basis. In this regard, we will not second guess an agency's technical judgment unless shown to be arbitrary or unreasonable. Bell has not made that case here. See Olin Corp, Energy Systems Operations, supra, B-187311, 77-1 CPD ¶68 at 4.

amendment to the solicitation); Decilog, Inc., Comp. Gen. Dec. B-206901, April 5, 1983, 83-1 CPD ¶356 at 4 (based on an oral communication concerning agency contract requirements protester was not materially prejudiced by failure to issue a formal RFP amendment). In this regard, a reasonably prudent offeror reading the RFP reasonably would understand that one of the State's goals in the instant solicitation was to obtain a helicopter for delivery of emergency medical services in as fast a manner as possible consistent with the other complementary State goal of delivery of quality emergency medical services. BPW Tr. 87.

Based on these considerations, we find that Bell was treated fairly and on an equal basis consistent with the RFP evaluation criteria and was not materially prejudiced by the State's failure to issue a written amendment to the RFP which specified fast delivery of emergency medical services, or speed, as an evaluation criteria when it became necessary to distinguish between the two helicopters found technically equal after the initial phases of the solicitation and evaluation process. We find that it was proper, therefore, for MEHAC to use potential speed of delivery of medical services as a distinguishing factor as well as the other technical-medical factors and price in arriving at its recommendation to the Board of Public Works that the Aerospatiale helicopter was the most technically superior helicopter and the Aerospatiale proposal the most advantageous proposal based on price and the solicitation's evaluation criteria.

III. The Board of Public Works Appropriately Considered Price in Approving Award to Aerospatiale As The Most Advantageous Offer

Consistent with the Maryland General Procurement Law, the request for proposals stated that Maryland intended to purchase helicopters, services, and equipment based on performance potential and related costs that best meet Maryland's helicopter needs. RFP SA, p.8, see RFP, SA, p.9.

In this regard, the RFP in part provides as follows:

III. PROPOSAL EVALUATION ELEMENTS -

In broad terms, the primary proposal elements to be evaluated as a basis for selecting a successful Offeror are as follows.

- * * *
- C. Cost Analysis- The acquisition and operating cycle costs stipulated by an Offeror, as well as any supporting data and cost estimates contained in an Offeror's Price Proposal will be evaluated in terms of realism, reasonableness and completeness. In this regard, it is MANDATORY that Offerors provide actual and/or extrapolated operating cycle cost data in their Price Proposals that is applicable to a helicopter proposed and that covers a period of ten (10) years.
- * * *

RFP, pp. 162-163.

The request for proposals also reflects the State's intent to consider helicopter costs in their entirety, i.e., both acquisition costs and operating costs. See, for example, the RFP at p. 112 ("The State intends to consider certain elements of helicopter operating costs in its evaluation of Offeror Price Proposals") and RFP pages 113-115, 166-69, 171-72, 220-244, among others. In this regard, the RFP made a relatively positive statement that the "the State reserves the right to enter into a separate Logistics Support Contract with an Offeror at the 'Hourly Part Cost' stated in an Offeror's Price Proposal, adjusted annually as appropriate in accordance with Consumer Price Index (CPI) changes." RFP SC, p. 113.

Thus, whether the State intended to enter an agreement with the successful offeror with respect to operating costs and the purchase of spare parts, etc., the RFP, reflecting the requirements of the General Procurement Law, called for an offer of a price to include the initial cash outlay (acquisition cost) and estimated operating costs for ten years (life cycle costs). This conforms to the Maryland General Procurement Law's mandated

statutory policy in a competitively negotiated procurement to purchase equipment based on the most advantageous proposal. COMAR 21.05.03.05 ("It is the policy of the State to procure supplies, services, and construction from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate cost to the State."..."Some form of price or cost analysis should be made in connection with every negotiated procurement action.")

To comply with the policy of purchasing the most advantageous product or service requires procurement agencies to exercise their independent judgment regarding "cost realism" and "cost reasonableness". Grey Advertising, Inc., supra, 76-1 CPD ¶325 at 15-17; Page Communications, 50 Comp. Gen. 390 (1970). See RFP, pp. 162-63. Maryland procurement law requires the analysis even though the analysis may be difficult and involve judgments about the reasonableness and realism of those costs. SETAC, supra. See RFP, pp. 162-63; COMAR 21.05.03.05. However, "...the extent to which cost proposals need be examined is within the discretionary judgment of the procuring agency, and the fact that the agency did less than it might have or even made an outright error in judgment does not render the judgment illegal or improper." Grey Advertising, supra, 76-1 CPD ¶325 at 29. See SETAC, Inc., Comp. Gen. Dec. B-209485, July 25, 1983, 83-2 CPD ¶121 at 16. In summary, in this solicitation in order to evaluate offers on an equal basis, the RFP, consistent with Maryland's General Procurement Law, expressly required the evaluation and selection officials to make an informed judgment as to the total cost (both acquisition costs and estimated operating costs) of the helicopters in distinguishing between them as to the most advantageous offer.

In this regard, MEHAC considered the overall total costs of the helicopters offered in reaching its determination to recommend purchase of the Aerospatiale helicopter to the Board of Public Works, although the record is not as clear as it could be on this point. One witness testified that operating costs may have been set aside as a final distinguishing factor because these costs were determined to be essentially equal by MEHAC in reaching the final decision to recommend the Aerospatiale helicopter over the Bell helicopter. October 19, 1988 Hearing Tr. 154-55 (Moser). Another witness testified that operating costs were considered but given less weight and consideration than acquisition cost, i.e., discounted, in choosing between the Aerospatiale helicopter and the Bell helicopter. September 29, 1988 Hearing Tr. 221-23 (Secretary Benton). This witness essentially indicated that the price of the Aerospatiale helicopter was lower than that of the Bell helicopter in the total cost picture. This was based on the fact that Aerospatiale's acquisition costs were lower than Bell's and the fact that Aerospatiale's and Bell's operating costs were considered very close or essentially equivalent. Aerospatiale's operating costs and Bell's operating costs were best estimates of projected life cycle costs. They could not be estimated precisely. October 19, 1988 Hearing Tr. 154-55 (Moser). However, these considerations by MEHAC show that MEHAC evaluated operating costs as well as acquisition costs in formulating its recommendations to the Board of Public Works. It is also clear that the operating costs of the Sikorsky helicopter were considered and evaluated in eliminating Sikorsky.

Under the reasonableness standard we apply, we do not second guess agency decisions on technical issues. This clearly includes estimates of future costs. See Olin Corp., supra; Grey Advertising, Inc., supra; Page Communica-

tions, supra. Accordingly, we find from the record that MEHAC considered the full price or cost of the Aerospatiale and the Bell helicopters as Maryland Procurement Law requires it to do.

Notwithstanding the extent of MEHAC's price evaluation and recommendation based thereon, the Board of Public Works, the actual procurement authority here, had placed before it the costs, i.e., acquisition costs as well as operating costs. The Board of Public Works clearly considered these costs in their entirety when it made its decision to award to Aerospatiale pursuant to the statutory requirement that award is to be to the most advantageous offer based on price and the evaluation factors set forth in the solicitation. In this regard, the presentation to the Board of Public Works, as set forth in the Board of Public Works transcript of the meeting where the matter was considered, includes the following:

* * * Aerospatiale received the highest rating on acquisition cost, being the lowest of the three. However, Bell received the highest rating on the basis of the ten-year life cycle cost for the six aircraft. The differential in favor of Bell in reference to the price proposals, both acquisition and life cycle, was approximately two million dollars. The differential between the third-ranked proposer, Sikorsky, and the low bidder was approximately nine million dollars. [BPW Tr. 53-54, Secretary Benton].

* * *

Before consideration of the life cycle cost, which you have displayed before you, Aerospatiale was clearly the winner. There's a difference of approximately two million dollars between Bell and Aerospatiale, in favor of Bell, and a difference, as I pointed out, of about nine million between Bell and Sikorsky.

The substantial differential between the high score, Bell, and the low score on the basis of points, Sikorsky, eliminated Sikorsky for further consideration and the fact that this differential translated in dollars was about eight million dollars. * * *

[BPW Tr. 54-55, Secretary Benton].

* * *

As previously indicated, Bell ranked number one because of a differential in the ten-year life cycle costs. I would point out, however, that these are not guaranteed life cycle numbers. The

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state will pay whatever is necessary to maintain the fleet of ten helicopters over a ten-year period. This represents our best estimates as to what these costs would be, but they are not guaranteed, as is the case of the acquisition. In the initial acquisition, as the Lieutenant Governor has pointed out, the check that we will initially have to write, Aerospatiale was about one million four lower than Bell. [BPW Tr. 57, Secretary Benton].

* * *

Ten-year cost on six vehicles is what is before you.

[BPW Tr. 59, Lt. Gov. Steinberg]. (Underscore added.)

* * *

Accordingly, we find that the Board of Public Works based on MEHA's recommendation, and within the General Procurement Law and regulations, exercised its actual procurement authority and reasonably decided that the Aerospatiale helicopter was the technically superior helicopter consistent with the solicitation's evaluation criteria and that the Aerospatiale proposal was the most advantageous proposal based on price and the evaluation factors. Grey Advertising, Inc., supra, 76-1 CPD ¶325.

For the foregoing reasons, therefore, we find that Bell's proposal was evaluated fairly and equally with Aerospatiale's proposal and that Aerospatiale's proposal was reasonably selected as the most advantageous proposal based on the solicitation's evaluation factors and price. We also find that award to Aerospatiale was reasonable and not arbitrary, nor an abuse of discretion, nor in violation of the Maryland General Procurement Law and procurement regulations.

Accordingly, we concur that the appeals in MSBCA 1407 and MSBCA 1409 should be denied.

