

**BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

**Appeal of Oakland Consulting Group, Inc.**

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**MSBCA Docket No. 3092**

**Under**

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**Maryland Department Information Technology  
RFP Number 060B8400039**

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**OPINION AND ORDER BY CHAIRMAN BEAM**

The Board finds that the Appellant’s protest was timely filed and that there was sufficient evidence to support the Procurement Officer’s determination that the offeror who submitted the highest ranked technical and financial proposal met the minimum qualifications set forth in the solicitation.

**FINDINGS OF FACT**

On December 4, 2017, Respondent, the Department of Information Technology (“DoIT”), issued Request for Proposals (“RFP”) No. 060B8400039 seeking to procure

a time clock management system (TCMS) that includes Time Clock Devices (TCDs), schedule management and maintenance services, integration services, subscription services, and optional services (the “Solution”) to integrate primarily with the existing Statewide Personnel System (SPS) Workday timekeeping system.

The intent of the procurement was to obtain and implement a standardized and automated TCMS that would integrate with the State’s existing timekeeping system (*i.e.*, “Workday”) and efficiently capture time and absence data for employees, eliminate the manual processes associated with time entry, schedule the State’s workforce efficiently to reduce overtime, and provide a fair opportunity to all eligible State employees for overtime.

The RFP noted that several agencies currently have a need for a TCMS, including the Department of Public Safety and Correctional Services (“DPSCS”), the Department of Juvenile

Services, the Maryland Department of Health, and the Department of General Services. Each of these agencies are currently using different timeclock systems. The RFP advised prospective offerors that DPSCS currently has an “Emergency Contract” (*i.e.*, Emergency Contract No. 2017-33) with Data Management, Inc. d/b/a TimeClock Plus (“TCP”) that is expected to expire on March 8, 2019, after which the proposed Solution to be obtained through this procurement would be implemented at DPSCS under a new contract.<sup>1</sup> The RFP further advised that via the contract awarded as a result of the RFP, other agencies will be able to issue purchase orders to obtain the Solution.

The RFP specifically identified the needs of the TCMS at DPSCS as follows:

- A. 9,000 Correctional Officers
- B. 90 TCDs
- C. Advance Scheduling will be implemented
- D. Staff of 75 individuals (employees, trainers and supervisors) will be trained
- E. All the complex rules and worktags are required as part of the implementation as described in Appendix 3.

The RFP advised that the State “does not wish to procure a software application still under development.” To ensure that the State is purchasing a Solution with a proven track record, the RFP set forth “Minimum Qualifications” that each offeror was required to meet in order to be eligible for award of the Contract:

- 1.1.1 To be considered reasonably susceptible of being selected for award, an Offeror must **provide proof** with its Proposal that the following Minimum Qualifications have been met.
  - A. The Offeror has demonstrated at least one (1) successful implementation during the last three (3) years, **currently in use in production by an**

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<sup>1</sup> The Emergency Contract initially had a one-year term from March 6, 2017 through March 5, 2018, but it was extended for another year while Respondent conducted a competitive procurement for a Statewide replacement.

**organization with at least 5,000 employees using the Solution and meeting the following requirements:**

- 1) The proposed Time Clock Management System (TCMS) is implemented and hosted in the cloud using a real time or near real time Workday-delivered API (i.e., no batch integration); and
- 2) The proposed TCMS includes **integrated schedule management functions**; and
- 3) The Offeror shall have performed the full lifecycle of the implementation of requirements, design (as applicable), implementation, and operational support in production. A full lifecycle includes all of: requirements elicitation, design/configuration planning, implementation, and furnishing post-implementation services.

As proof of meeting the minimum qualifications, Offeror shall furnish verifiable references for each referenced implementation example. (emphasis added).

According to the Procurement Officer (“PO”), LaShella Miller, these Minimum Qualifications were “pass/fail requirements” that an offeror had to meet to be considered reasonably susceptible for award, and the determination of whether an offeror meets the Minimum Qualifications is an “ongoing process.”

Although the term “integrated schedule management functions” is not defined in the RFP, none of the prospective offerors protested before the due date for submission of proposals that this criterion was vague or ambiguous. According to the PO, “integrated schedule management” means that the device would “need to be able to have some form or capacity to address any sort of scheduling issues, whether it’s a change in schedules or a change in time or shifts for federal employee, but the way to manage the schedule of the employees who are actually using the device.” She further defined it as “a device that can accommodate scheduling, changes in schedules and the overall schedule management in order for the agencies to be able to effectively and properly meet payroll and calculate their overtime.”

The RFP specified the procurement method as Competitive Sealed Proposals per COMAR 21.05.03. The RFP provided that the resulting contract shall be awarded to the responsible offeror who submitted the proposal deemed most advantageous to the State after considering price and the evaluation factors set forth in the RFP. Each offeror's technical and financial proposals would be evaluated separately and then ranked, then each offeror would receive an overall rank. The PO would then determine which responsible offeror's proposal was most advantageous to the State. Technical factors were to receive greater weight than price.

On December 11, 2017, the PO held a pre-proposal conference for prospective offerors, which included a question and answer ("Q&A") period. Representatives from both Appellant and TCP, the Interested Party, attended. The PO provided prospective offerors with written guidance for submitting proposals and instructed them that "only written answers should be relied upon," with instructions regarding how to submit a question seeking a written response as set forth in Section 4.2 of the RFP.

On December 12, 2017, Appellant submitted the following question ("Q&A #2"):

Question: Does the current installation of Time Clocks Plus at the Department of Public Safety and Correctional Services (DPSCS) include the integrated schedule management functions necessary to meet the minimum qualifications as stated in the RFP?<sup>2</sup>

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<sup>2</sup> The same question was previously submitted in connection with Task Order Request for Proposals ("TORFP") No. 060B3490021, which was the procurement undertaken by DoIT immediately prior to this procurement and cancelled for lack of competition. In the TORFP procurement, this question ("Q&A #5") was submitted to the procurement officer, also LaShella Miller, who then forwarded the question to Satish Raghavan, a contractor for Department of Budget and Management ("DBM") serving as a technical advisor to DoIT. Ms. Miller requested a response to the question because she was unfamiliar with the TimeClock Plus implementation at DPSCS.

On October 4, 2017, Mr. Raghavan sent his response to this question to Ms. Miller stating: "Answer: No, the current installation of TimeClock Plus in DPSCS does not include Schedule Management."

On October 12, 2017, Ms. Miller received a follow-up question from a potential offeror in response to the Answer to Q&A #5. This potential offeror stated that "[i]t is our understanding that the State of Maryland DPSCS is using TimeClock Plus **schedule management** currently, and we would like to request confirmation and a change in the answer." (emphasis in original). Ms. Miller again forwarded this request to Mr. Raghavan for a response.

Mr. Raghavan responded as follows: "The Schedule Management feature that is being used in DPSCS is of limited nature primarily to facilitate some calculations related to capturing worktags. The Schedule Management functionality as referred in the RFP is to manage schedules and Overtime." Neither Mr. Raghavan, nor DoIT, changed the answer to Q&A #5.

On December 20, 2017, the PO forwarded this Question to Mr. Raghavan and to Gagan Setia, who is also a DBM contractor and Mr. Raghavan's supervisor. On December 21, 2017, Mr. Setia replied to the PO and provided her with the same answer that had previously been provided by Mr. Raghavan in response to TORFP Q&A #5 as the response to RFP Q&A #2:

Answer: No, the current Time Clock Plus installation at DPSCS does not include Schedule Management functions.<sup>3</sup>

On December 21, 2017, the questions and answers were posted on the eMaryland Marketplace.

Notably, the written guidance provided by the PO to prospective offerors at the pre-proposal conference, stating that only written questions could be relied upon, contradicted the RFP, which instructed offerors that "[t]he statements and interpretations contained in responses to any questions, whether responded to verbally or in writing, are not binding on the Department unless it issues an amendment in writing." Q&A #2 was not incorporated into an amendment.

It is clear that the PO was sufficiently unfamiliar with the TimeClock Plus implementation at DPSCS that she needed to rely on Mr. Raghavan's and Mr. Setia's expertise. On two separate occasions (*i.e.*, in the previous TORFP procurement and in the current RFP procurement) the same question was submitted inquiring as to whether the current implementation at DPSCS was using the "integrated schedule management functions" that were being requested in the RFP. On both occasions, the PO was unable to answer this question and deferred to Mr. Raghavan and/or Mr. Setia, both of whom answered this question in the negative.

In addition, Mr. Raghavan responded to a follow-up question in which a potential offeror had requested confirmation that the schedule management functions were, in fact, being used by DPSCS and that the answer to this question be changed. Mr. Raghavan's response was a

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<sup>3</sup> The language of both questions and both answers is the same.

confusing attempt to make some distinction between the current implementation at DPSCS and the “integrated schedule management functions” being requested in the RFP, a distinction that did not sufficiently answer the follow-up question. Mr. Raghavan did not address the request that he change his answer and, therefore, the answer was never changed. As such, the PO should have been aware prior to receipt of the proposals that there was some confusion as to whether the current implementation of TimeClock Plus at DPSCS included the “integrated schedule management functions” that were being sought in the RFP.

Respondent received two timely proposals in response to the RFP: one from Appellant, and one from TCP. TCP proposed to provide its core product, TimeClock Plus (*i.e.*, Version 7 or “v.7”), which included numerous additional optional modules for potential future implementations. As proof that it met the Minimum Qualifications and to satisfy the requirement to provide “verifiable references for each referenced implementation example,” TCP cited its current implementation at DPSCS under the Emergency Contract (*i.e.*, “TimeClock Plus Direct”).

In the Executive Summary of TCP’s Proposal, the example of its current implementation at DPSCS was described as follows:

The current deployment of TCP Direct within the State of Maryland’s DPSCS has addressed many time capture priorities such as efficiently and accurately capturing time and absence data for Recipient Agency employees, eliminating manual processes for timekeepers performing time entry functions, and reducing overtime. To accomplish these tasks, we have leveraged the features/functionality of TimeClock Plus to create an efficient and seamless data exchange through an adaptor between TimeClock Plus and SPS Workday.

TCP then described its proposed Solution as follows:

The TimeClock Plus approach for Phase 2 of the project is to duplicate and expand the current processes and features to address the remaining departments described in this RFP. We will add additional tools such as our Advanced Scheduler to expand our scheduling footprint and address needs such as equal opportunities of

overtime for eligible employees, the reduction in overtime, and the recognition of gaps and shift coverage due to absences.

In Tab D—Minimum Qualifications of TCP’s Technical Proposal, TCP included three “actual screenshots of the [TimeClock Plus] Direct scheduling being utilized in the current deployment of the State of Maryland DPSCS.” These screenshots were titled as follows: (1) Recurring Schedules, (2) Weekly Overall Schedule, and (3) Employee Schedules.

In describing the software at the hearing on the merits of Appellant’s Appeal, Derek McIntyre, Vice President of Operations for TCP, who was charged with implementing the Emergency Contract at DPSCS, explained that TimeClock Plus v.7—the core product—is a standalone software program that is used by numerous customers in numerous locations for a variety of timekeeping needs. Under the Emergency Contract, TCP’s core product was adapted to integrate with Workday so that timekeeping and scheduling data could be incorporated into the State’s Workday system (*i.e.*, TimeClock Plus Direct).

Mr. McIntyre described the core schedule management functions of TimeClock Plus v.7, as follows:

Core scheduling functions include the ability to create a recurring schedule, create a one-time schedule, add a shift to an employee. It includes the ability for the employee to see that schedule, to [s]et up mobile app, pull it up on a clock. It includes the ability to process exceptions. So if somebody came in late, we can see that. If somebody came in three minutes but your union rules allow you to round back or state legislation allows you to round to your schedule, it allows you to do that. It allows us to process shift differentials. It allows us to look at things, like, if somebody worked a double shift or if they worked multiple shifts against their schedule. It allows the ability to calculate overtime and pay premiums based on schedule, to schedule exception reports if somebody hasn't been working their schedule. It's related to contracts. You have contract employees that are contracted to a specific schedule. All of that and more is included in the core product.

Mr. McIntyre explained that the scheduling functions depicted in the screenshots provided in Tab D of TCP's Proposal are included in the core TimeClock Plus v.7, including recurring schedules, schedule assignment, overtime calculation, leave requests and approvals, job codes, schedule overrides, assignment changes, and shift differentials, among others. He acknowledged that some, but not all, of the features depicted in various screenshots throughout TCP's Proposal were in use at DPSCS. According to Mr. McIntyre, the DPSCS implementation does not include: (1) the Offer Log on page 29 of TCP's Proposal; (2) the Overtime Equality Offer Report on page 30; (3) the Scheduling Dashboard on page 31; (4) the Shift Board on page 31; or (5) the Visual Schedule on page 32.

Throughout its Proposal, TCP proposed to implement additional features that were included in the core TimeClock Plus v.7 program, but which were not "currently in use in production" at DPSCS. For example, under the "Employee Self-Service" section of its Proposal, TCP stated that "[i]ncluded within the State of Maryland software package are utilities not currently deployed to the DPSCS but that are standard within the core of TimeClock Plus." In the Management Tools section of its Proposal, TCP stated that "[a] limited set of management features were deployed in TimeClock Plus for DPSCS because Workday is the State's system of record for timekeeping. Below we have showcased additional management tools should they be desired by recipient agencies." On page 49 of TCP's Proposal, TCP stated that it will be solely providing all elements required in RFP Sections 2-3 (the RFP Requirements) including, but not limited to:

the time clock management system and SPS Workday integration services (TimeClock Plus Direct for Workday software), time clock devices (TimeClock Plus RDTg Terminals), schedule management tools (TimeClock Plus Advanced Scheduler), maintenance services, hosting services through Amazon Web Services, as well as training and implementation services via our TimeClock Plus Enterprise Professional Services Team. This complete system by TimeClock Plus will

efficiently capture times and absences, eliminate the manual entry of time by timekeepers, automate the scheduling process to promote efficiency and reduce overtime, and will encourage the advancement of overtime equality.

In summary, TCP proposed to offer the TimeClock Plus Direct software that was currently being used at DPSCS, together with additional features inherent in the existing TimeClock Plus v.7 software, which were available to but not currently being used by DPSCS, such as the Advanced Scheduler.

TCP's Proposal identified Charles Kevin Combs, the Chief Information Officer for DPSCS who is responsible for overseeing implementation of TimeClock Plus Direct under the Emergency Contract, as the only verifiable reference for the proposed Solution implemented at DPSCS (*i.e.*, TimeClock Plus Direct). Mr. Combs was also a member of the Evaluation Committee for this RFP. TCP's Proposal did not identify any other implementation examples besides the implementation at DPSCS.<sup>4</sup>

After receiving the proposals, the PO reviewed TCP's Proposal, particularly Tab D—Minimum Qualifications, to assess whether TCP had provided evidence of meeting the Minimum Qualifications required by §1.1.1 of the RFP. The PO elected not to contact Mr. Combs as a reference because she believed this would be a conflict of interest. The PO also elected not to consider Mr. Raghavan's answer to Q&A #5 (from the TORFP procurement) and Mr. Setia's answer to Q&A #2. She explained that questions and answers are not typically considered as a basis to evaluate the overall proposal, or even the Minimum Qualifications, because this information is provided to give clarification to vendors to assist them in developing their proposals. She explained that once the proposals have been submitted, the proposal would

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<sup>4</sup> According to Mr. McIntyre, the Advanced Scheduler was "in use in production" in "at least 100" locations. However, none of those 100 locations were identified by TCP as a reference for its Proposal.

include whatever information they obtained from the questions and answers, “so there would be no need to reference the Q&A because that’s not part of the review.”

On January 24, 2018, based solely on her review of the Proposal, she made an initial determination that TCP had provided sufficient evidence to prove that it met the Minimum Qualifications and that its Proposal was reasonably susceptible of being selected for award. On the same day, the PO provided Appellant’s and TCP’s proposals to the members of the Evaluation Committee and to its technical advisor, Mr. Raghavan.

Beginning on or about January 25, 2018, the PO held a series of meetings with the Evaluation Committee and Mr. Raghavan. At the first meeting, the PO provided the Evaluation Committee members with an Evaluation Matrix, and asked that each member of the Evaluation Committee review the proposals for Minimum Qualifications, among other items, and provide her with feedback. The Evaluation Committee members were also asked to qualitatively rank various sections of the Proposals using the following factors: “Well Qualified,” “Satisfactory,” or “Unsatisfactory/Poor.”

The RFP also required offerors to conduct oral presentations, which were to be considered part of each offeror’s technical proposal:

4.10.1 Offerors will be required to make oral presentations to State representatives. Oral presentations are considered part of the Technical Proposal. Offerors must confirm in writing any substantive oral clarification of, or change in, their Proposals made in the course of discussions. Any such written clarifications or changes then become part of the Offeror’s Proposal. The Procurement Officer will notify Offerors of the time and place of oral presentations.

4.10.2 Offeror shall be prepared to furnish, as part of its oral presentation, a live demonstration of its Solution with a proposed [timeclock device].

On March 1, 2018, TCP gave an oral presentation of its Proposal to the PO, the Evaluation Committee, and Mr. Raghavan. As part of the presentation, TCP discussed the core

TimeClock Plus scheduling functions currently in use at DPSCS (*i.e.*, TimeClock Plus Direct), along with a live demonstration of the TimeClock Plus v.7 system and devices. TCP also demonstrated what their system could do to “show different functionality that was requested in the RFP.”

TCP also demonstrated the Advanced Scheduler, a component feature of its core product that had not been implemented at DPSCS.<sup>5</sup> Mr. McIntyre acknowledged that TCP was proposing to implement several management features that were not “currently in use in production” at DPSCS at the time it submitted its Proposal. According to Mr. Combs’s testimony at the hearing, TCP demonstrated an “integrated scheduling system” that was not “currently in use in production” at DPSCS:

MR. HARP:	Did you see evidence of integrated schedule management functions?
MR. COMBS:	They demonstrated an integrated scheduling system that we currently do not have. That’s correct.

However, it was not clear from Mr. Combs’ testimony whether he was referring to the existing implementation of TimeClock Plus Direct, or whether he was referring to the Advanced Scheduler feature of TimeClock Plus v.7, which was installed but not being used by DPSCS.

TCP also provided Respondent with written materials describing TimeClock Plus v.7, additional information regarding the scheduling functions currently deployed and in use at DPSCS, and information regarding tools and other functionality included in TimeClock Plus v.7 that the State could choose to add to future implementations (*e.g.*, the Advanced Scheduler). Section 2 of those written materials described TimeClock Plus v.7 and its core functions to include the ability to track and create employee schedules, manage leave requests, approve

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<sup>5</sup> According to Mr. McIntyre, DPSCS was licensed to use the Advanced Scheduler, but was not using it under the current implementation.

hours, monitor overtime, and manage compliance with labor regulations in real-time. According to Mr. McIntyre, during TCP's oral presentation, approximately 80% of the questions asked by Respondent's representatives were concerned with the "integrated schedule management functions."

After reviewing TCP's Proposal, each of the Evaluation Committee members and Mr. Raghavan confirmed to the PO that TCP's Proposal and the related proposal materials met the Minimum Qualifications in the RFP. Under the "Strengths" column and "Minimum Qualifications" row of the Evaluation Matrix, the Evaluation Committee's comments regarding whether TCP's Proposal met the Minimum Qualifications were as follows:

**K.Combs Comments:** Well written, clocks implemented in a Workday environment, minimum quals document included. Minimum quals met (page 14).

**L.Buchman comments:** Satisfied the requirement.

**C.Thompson:** satisfied requirements.

Under the "Additional Notes" column and "Minimum Qualifications" row of the Evaluation Matrix, each of the Evaluation Committee members rated TCP's Proposal as "Well Qualified."

After reviewing both Appellant's and TCP's technical proposals and based on the references and documentation in each proposal evidencing project experience, the PO and the Evaluation Committee concluded that both offerors' technical proposals provided sufficient evidence of meeting the RFP's Minimum Qualifications, as well as the required verifiable references.

After evaluating both Appellant's and TCP's technical proposals and financial proposals, the Evaluation Committee assigned rankings to the proposals as follows:

<u>Offeror</u>	<u>Technical Ranking</u>	<u>Financial Ranking</u>	<u>Overall Ranking</u>
TCP	1	1	1
Appellant	2	2	2

On April 13, 2018, Appellant was notified that its proposal was not the most advantageous to the State and that it had not been selected for award.

Appellant requested a debriefing, which was held on April 20, 2018, seven days after being notified that its proposal had not been selected for award. At its debriefing, Appellant submitted its First Bid Protest (“Protest”) arguing that (1) Respondent should have classified TCP’s proposal as not reasonably susceptible of award for failure to meet the Minimum Qualifications, and (2) Respondent failed to communicate with Appellant’s references and likely did not communicate with TCP’s references to confirm whether TCP met the Minimum Qualifications, as required by the RFP; however, if Respondent did communicate with TCP’s references but not Appellant’s, then Appellant was not treated equally or fairly.<sup>6</sup> On April 27, 2018, Appellant filed a Second Bid Protest, asserting additional grounds for protest, which were later withdrawn.

On June 18, 2018, the PO issued a 16-page Decision and final agency action denying both protests. In short, the PO concluded that both she and the Evaluation Committee determined that TCP had submitted sufficient evidence to demonstrate that its Proposal met the Minimum Qualifications and that Respondent’s “admission” in its Answer to Q&A #2 was erroneous because the TCMS in use at DPSCS does, in fact, contain “integrated schedule

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<sup>6</sup> At this time, Appellant had not been informed of the identity of the proposed awardee.

management functions” and, therefore, satisfies the RFP’s Minimum Qualifications. The PO also concluded that both parties were treated equally because she made reasonable attempts to contact the other references identified in TCP’s Proposal, with the exception of Mr. Combs, and all of the references provided by Appellant, and she acted within her discretion in so doing.

On June 28, 2018, Appellant filed this Appeal, which was docketed as No. 3092. On November 20, 2018, the Board heard argument on Respondent’s Motion to Dismiss and for Summary [Decision], which was denied. A hearing on the merits of Appellant’s Appeal was held on November 28, 2018 and January 15, 2019. The parties agreed on the record at the beginning of the hearing to proceed with only two members of the Board in the absence of Member Ann Marie Doory. Post-hearing briefs were filed by the parties on January 29-30, 2019.

#### **STANDARD OF REVIEW**

We recently discussed in detail our role in reviewing the decisions of evaluators of proposals submitted in response to RFPs in competitive negotiations. *See, Wexford Health Sources, Inc.*, MSBCA 3066, 3081 (2018); *see also, Eisner Communications, Inc.*, MSBCA No. 2438 (2005) at 18-19. We have consistently held that we will only review whether a PO’s determination regarding the evaluation of the technical merits of proposals are arbitrary, capricious, unreasonable, or contrary to law or regulation, since a PO’s determination concerning the relative technical merits of proposals are discretionary and entitled to great weight. *See, Delmarva Cmty. Servs, Inc.*, MSBCA No. 2302 (2002) at 8-9; *see also, Covington Machine and Welding Co.*, MSBCA No. 20516 (1998); *Environmental Controls, Inc.*, MSBCA No. 1356 (1987).

The evaluation of proposals in a competitive negotiation procurement is a matter left in the PO’s sole discretion after receiving the advice of an evaluation panel, if one is used. *Id.*

(citing *United Communities Against Poverty, Inc.*, MSBCA No. 1312 (1987)). The PO and agency head are required by COMAR 21.05.03.03A(6) to make the final evaluation of proposals.<sup>7</sup> When an evaluation committee is used to evaluate proposals, then the PO and head of the agency have the discretion to either accept the recommendation of the evaluation committee, or to substitute their judgment for that of the evaluation committee. *Aramark Corp., d/b/a Aramark Healthcare Support Services*, MSBCA No. 1893 (1995) at 4-5. If the PO did comply with Section 1.1.1A of the RFP, then, as the Board recently held in *Rustler Construction, Inc.*, MSBCA No. 3075 (2018), it will uphold their determination:

A procurement officer has discretion and latitude in determining whether or not the bidder has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance. COMAR 21.01.02.01(77). When a procurement officer has reached a determination regarding responsibility based on facts and specified criteria, the Maryland State Board of Contract Appeals ("Board") upholds that decision.

*Id.* at 5 (citing *American Powerzone, Inc.*, MSBCA No. 3017 at 4 (2017)). The fact that another conclusion is possible under a set of facts does not invalidate the PO's determination of responsibility where the latter also is reasonable. *Aquatel Industries, Inc.*, MSBCA No. 1192 (1984) at 5.

In *Covington Machine and Welding Co.*, we reiterated the rationale for granting procurement officers such discretion, as we discussed more fully in *Charles Center Properties*, MSBCA No. 1629 (1992):

Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the [procurement] contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any

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<sup>7</sup> COMAR 21.05.03.03A(6) provides that "[i]nitial evaluations may be conducted and recommendation for award made by an evaluation committee. Final evaluations, including evaluation of the recommendation of the evaluation committee, if any, shall be performed by the procurement officer and the agency head or designee."

difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the State's [Government's] behalf.

*Id.* at 5 (internal citations omitted). The Board does not serve as a "Procurement Super-Evaluation Committee that reviews in minute detail every aspect of a procurement officer's decision to award a contract." *Eisner Communications, Inc.*, MSBCA No. 2438 (2005) at 19. We do not second-guess the evaluation of a proposal but will determine whether or not a reasonable basis exists for the conclusions reached. *Id.* (citing *Baltimore Industrial Medical Center, Inc.*, MSBCA No. 1815 (1994)). "Mere disagreement with the evaluation of proposals or the recommendation for an award is insufficient to meet an appellant's burden to show that the evaluation of proposals and/or the award of a contract, has been unreasonable." *Id.* (citing *Delmarva Cmty. Services, Inc.*, MSBCA No. 2302 (2002)).

In sum, because it is the agency that will have to live with the results of a procurement officer's decision, unless the decision was clearly erroneous and/or unreasonable because it was not supported by facts and evidence in the record, or unless the decision was made in bad faith, was arbitrary or capricious, or was contrary to law or regulation, this Board will not disturb or interfere with a procurement officer's decision.

The Board notes that the PO's responsibility determination is an ongoing process until the time of contract award. An offeror who otherwise meets the responsibility criteria set forth in a solicitation may be deemed not responsible by a turn of events (*e.g.*, bankruptcy, death or resignation of key personnel identified in carrying out the work, *etc.*). There is nothing in COMAR or prior decisions of the Board that prevents a PO from revisiting an initial responsibility determination made upon receipt of proposals, or even reversing a determination once the PO has been provided with new or additional information. Moreover, the Board has

held that materials relating to the determination of a bidder's responsibility can be submitted by the bidder after bid opening. *See, Aquatel Industries, Inc.*, MSBCA No. 1192 (1984) at 3-4.

## DECISION

### The Timeliness of Appellant's Protest

Before we can address the merits of Appellant's Appeal, we must first determine whether its Protest was timely filed in accordance with COMAR 21.10.02.03B, a procedural defense raised by TCP. TCP argues that Appellant knew or should have known the basis for its April 20, 2018 Protest no later than December 21, 2017, which is the date when Q&A #2 was published, and thus the date that Appellant was informed that the current implementation of TimeClock Plus at DPSCS did not include "integrated schedule management functions." According to TCP, this is the date when Appellant should have known that any proposal that might be submitted by TCP, which might identify TimeClock Plus as its proposed Solution, and which might further identify the DPSCS project as its implementation example, would require rejection for failure to meet the minimum qualification that the proposed Solution require "integrated schedule management functions."

TCP relies on *Facchina-Trumbull-Skanska JV*, MSBCA No. 2630 (2009) ("FTS"), a decision by this Board wherein we granted summary decision on behalf of the proposed awardee and interested party, MD200, in response to its contention that the appellant, FTS, failed to protest within seven (7) days of when it knew or should have known that Greenman-Pedersen, Inc. ("GPI") was working with the appellant and improperly participating in the procurement. In that case, there was conflicting information within the solicitation as to whether GPI was allowed to participate with one of the qualified teams. Although appellant learned about GPI's involvement on the project before bid opening, it waited 63 days to protest. The Board found

that there was “overwhelming evidence” that appellant had “actual certain knowledge” of GPI’s involvement as early as May 28, 2009, but waited 63 days to file its protest.

We believe that case is distinguishable. In *FTS*, the Board found overwhelming evidence that appellant had “actual certain knowledge” of the basis of its protest, whereas here, Appellant made a “lucky guess” that TCP had submitted a proposal that identified the DPSCS project as its implementation example.<sup>8</sup> TCP’s untimeliness argument is built on pure speculation—that Appellant should have known on December 21, 2018 (when it was informed that the DPSCS implementation did not contain “integrated schedule management functions”) that TCP might submit a proposal, which might identify the DPSCS project as its implementation example, which proposal would require rejection for failure to meet the Minimum Qualifications.

Appellant did not know and could not have known that TCP would submit a proposal until after its debriefing on April 20, 2018. Appellant did not know and could not have known that TCP would submit a proposal that identified the DPSCS project as its implementation example until after its debriefing on April 20, 2018.<sup>9</sup> Appellant did not know and could not have known that the PO would conclude that Q&A #2 was incorrect and that the DPSCS project did, in fact, meet the Minimum Qualifications until after its debriefing on April 20, 2018. We refuse to impute actual knowledge of these events to Appellant based solely on Appellant’s speculation that certain events might occur prior to the rejection of its proposal, however fortuitously correct Appellant may have been. We disagree with TCP’s contention that the “allegations in Appellant’s protest may have been a ‘lucky guess,’ but that merely brings them within the ‘should have known’ prong of COMAR 21.10.02.03.”

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<sup>8</sup> Appellant was not informed at the debriefing on April 20, 2018 that TCP was the proposed awardee, therefore Appellant made a “lucky guess” about the identity of the proposed awardee when it contended in its Protest that TCP’s proposal should have been rejected.

<sup>9</sup> TCP might have submitted a proposal that used an entirely different project as its implementation example.

The simple facts are this: Appellant learned that its Proposal was rejected on April 13, 2018. Appellant was not informed about the identity of the proposed awardee. Appellant submitted its Protest seven days later, on April 20, 2018, the same day as its debriefing, on the grounds that TCP's Proposal did not meet the Minimum Qualifications based on Q&A #2. Appellant could not have known its basis for protest until its proposal was actually rejected and TCP was selected for award. We will not require a party to file a protest based purely on speculation that another potential offeror *might* submit a proposal in response to a RFP, and that potential offeror *might* propose a solution that the party has reason to believe does not meet the minimum qualifications set forth therein, and that the PO *might* determine that the proposed solution offered does, in fact, meet the minimum requirements and select the other offeror for award over it.<sup>10</sup> We refuse to entertain complaints about events that might never occur. Until a bidder or offeror is actually harmed by the rejection of its bid or proposal, it has no basis to protest. In the same vein as the law stating that the basis for a claim does not accrue until damages have been incurred, the basis for protest does not accrue until a proposal or bid has been rejected. *See, e.g., Bacon v. Arey*, 203 Md. App. 606, 652 (2012)(stating that a "cause of action does not accrue until all elements are present, including damages, however trivial."); *see also, Archdiocese of Washington*, 114 Md. App. 169, 177 (1997); *Mattingly v. Hopkins*, 254 Md. 88, 95 (1969); *Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145, 187 (1993); *American Home Assurance v. Osbourn*, 47 Md. App. 73, 86 (1980). We therefore hold that Appellant's Protest was timely filed. To the extent that our holding is inconsistent with prior decisions, those decisions are overturned on these limited grounds.

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<sup>10</sup> Our holding applies only to protests alleged to be untimely filed under COMAR 21.10.02.03B.

### The Merits of Appellant's Protest

We turn now to the merits of Appellant's Appeal. The crux of Appellant's argument is that the PO's denial of Appellant's Protest was arbitrary, capricious, and unlawful because she improperly determined that sufficient evidence existed to show that TCP's implementation example included the current use of "integrated scheduling management functions" by DPSCS and that, therefore, TCP's Proposal met the RFP's Minimum Qualifications. In its Notice of Appeal, Appellant contended that:

[Respondent] should have rejected TCP's proposal or otherwise classified TCP's proposal as '[n]ot reasonably susceptible of being selected for award' due to TCP's failure to satisfy RFP §1.1.1A. The Procurement Officer's final decision that TCP met the minimum qualifications was arbitrary, capricious, and otherwise not in accordance with the General Procurement Law. [Respondent] failed to present substantial evidence to support its conclusion(s) that TCP met the minimum qualifications and [Appellant's] protest should be sustained.

In its post-hearing brief, Appellant summarized the grounds of its Appeal as follows:

TCP failed to provide "adequate, objective evidence" from which a procurement officer could reasonably conclude that TCP's proposed Solution met the minimum qualifications. To the point, no procurement officer could review TCP's technical proposal and reach a conclusion that the proposed Solution was "currently in use in production" at DPSCS and that the DPSCS Project included integrated schedule management functions.

Appellant breaks its argument into three parts:

1. The RFP set forth definitive responsibility criteria that an offeror was required to satisfy in order to be eligible for contract award;
2. There was not adequate, objective evidence from which the PO could reasonably conclude that TCP's proposed Solution met the minimum qualifications; and
3. Respondent's conclusion that TCP's proposed Solution met the minimum qualifications was arbitrary, capricious, and unreasonable.

Appellant argues that the Minimum Qualifications in the RFP are the equivalent of "definitive responsibility criteria" as that term is defined under federal procurement law. According to

Appellant, “definitive responsibility criteria” are “specific and objective standards established by an agency for use in a particular procurement for the measurement of a bidder’s ability to perform the contract.” *See, Charles H. Tompkins Co. v. United States*, 43 Fed. Cl. 716, 720 (1999). Appellant relies on this Board’s previous decision in *Michael Scott Cohen, LLC*, MSBCA No. 2223 at 4 (2001) (“MSC”) and asserts that “the government may set forth certain minimum or pass/fail requirements that an offeror must meet for its proposal to be considered acceptable for evaluation purposes” and that these requirements are “mandatory conditions[s] to the acceptability of a proposal” and may not be waived. *Id.* at 4-6 (citing *ATI Systems and Federal Signal Corporation*, MSBCA 1911, 1913 and 1918 (1995)).

Citing a long list of federal caselaw, Appellant asserts that “the question before this Board is whether TCP submitted evidence with its proposal from which the Procurement Officer could reasonably conclude that the minimum qualifications set forth in §1.1.1 of the RFP had been met.” *See, e.g., Reyna-Capital Joint Venture*, B-408541, 2013 U.S. Comp. Gen. LEXIS 230, \*4-5 (Comp. Gen. Nov. 1, 2013)(stating that “[a]lthough the relative quality of the evidence is a matter within the contracting officer’s judgment, the contracting officer may only find compliance with the definitive responsibility criterion based on adequate, objective evidence.”); *see also, Prime Mortg. Corp.*, B-238680.2, 1990 U.S. Comp. Gen. LEXIS 710, \*9 (Comp. Gen. Oct. 9, 1992) (holding that the contracting officer lacked “objective evidence” that the apparent successful bidder met a minimum qualification). Appellant concludes that in the absence of adequate “objective evidence” showing compliance with a definitive responsibility criterion, a PO lacks discretion to award a contract to an offeror.

Appellant contends that one of these “definitive responsibility criteria” is that the proposed Solution be “currently in use in production.” Appellant argues that many of the

features included in TCP's Proposal were not currently being used by DPSCS under the Emergency Contract, in particular, the "integrated schedule management functions"; therefore, there was not "adequate, objective evidence" that TCP's proposed Solution was "currently in use in production" at DPSCS. Appellant concludes that "[n]o procurement officer could reasonably conclude that the DPSCS Project included the necessary 'integrated schedule management functions' to meet the minimum qualifications to compete for award of the Contract." According to Appellant, TCP failed to produce "adequate, objective evidence" within its Proposal that its proposed Solution satisfied each of these "definitive responsibility criteria."

Highlighted in the Minimum Qualifications provision of the RFP set forth verbatim *infra*, are the purported "definitive responsibility criteria" that must be satisfied in order for a proposal to be susceptible for award. These requirements are that offerors "**provide proof**" that the proposed Solution include "**integrated schedule management functions**" and that the Solution be "**currently in use in production by an organization with at least 5,000 employees using the Solution.**" The plain meaning of the words in this provision is that it was not enough to propose a Solution that included the *capability* of performing integrated schedule management functions. *The Proposal must also provide proof that the integrated schedule management functions in its proposed Solution were currently being used by an organization with at least 5,000 employees.*

We return briefly to our previous decision in *MSC*, which was cited by Appellant for the proposition that minimum qualifications in an RFP are the equivalent of "definitive responsibility criteria" and may not be waived. In that case, we considered whether the PO's waiver of a requirement in the RFP that an offeror have "a minimum of two (2) years experience in preparing and representing juvenile and adult cases in a court of law" was proper. *Id.* at 2.

Although the proposed awardee had not been licensed to practice law for two years, the PO exercised her discretion and substituted the proposed awardee's experience as a law student. The Board found that the PO erred because the issue was not one of general responsibility within the discretion of the PO to determine, but a "definitive responsibility requirement," which is a "mandatory condition to the acceptability of a proposal" that cannot be waived by the PO.

*MSC* is distinguishable from the facts in this case. There, the two years of legal experience requirement was specifically delineated, quantified, and thus "definitive." Here, however, the RFP required that the proposed Solution include "integrated schedule management functions," a criterion that is undefined in the RFP and, therefore, not "definitive." Accordingly, we believe the PO has discretion in determining whether this Minimum Qualification was met.

This Appeal would appear to turn on what, if any, "integrated schedule management functions" are currently being used in the current implementation of TimeClock Plus Direct at DPSCS. We could easily get sidetracked and seduced into attempting to answer this question for ourselves. But that is not our role. We do not second-guess a PO's determination and substitute our own independent judgment.

The question before us is not whether DPSCS is currently using any "integrated schedule management functions" in the current implementation of TimeClock Plus Direct. That is one of the questions the PO was required to answer when determining whether TCP's Proposal satisfied the RFP's Minimum Qualifications. Rather, the question we must answer is whether the PO's determination (that TCP's Proposal met the RFP's Minimum Qualifications) was supported by adequate, objective evidence that TCP met each of the Minimum Qualifications set forth in the RFP given the information the PO had available to her when she made her determination. Stated differently, we must review whether there was adequate, objective evidence to support the PO's

determination that “integrated schedule management functions” are currently being used by TCP’s implementation example at DPSCS. If so, then the PO’s decision to deny the Protest was reasonable.

We start by looking at the evidence available to the PO when she made her initial determination. First, before reviewing any of the proposals, the PO was privy to two separate rounds of Q&As, both of which raised the issue of whether the TimeClock Plus Direct software installed at DPSCS included the “integrated schedule management functions” necessary to satisfy the Minimum Qualifications set forth in the RFP. In both cases (*i.e.*, the TORFP procurement and the instant procurement), the technical advisors (*i.e.*, Satish Raghavan and Gagan Setia, respectively) responded in the negative. During the TORFP procurement, the accuracy of Mr. Raghavan’s answer was questioned, but it was never sufficiently addressed. However, the PO disregarded the Q&A information when she made her initial determination, concluding that the information in the Q&A process was not relevant or part of her review. Nevertheless, because this issue was raised twice, and the accuracy of the answers were questioned, the PO should have been aware of the need to conclusively determine what was actually being used at DPSCS.

Next, we consider the contents of TCP’s Proposal. Throughout its Proposal, TCP touted its “integrated schedule management functions” and proposed to implement additional features, such as its Advanced Scheduler. In pages 14-16 of its Proposal (Tab D—Minimum Qualifications) TCP states that “the system deployed by DPSCS combines TimeClock Plus Direct with our existing scheduling tools for a comprehensive solution.” TCP then states that what follows are “[a]ctual screen shots of the TCP Direct scheduling being utilized in the current deployment of the State of Maryland DPSCS” and then provides screenshots titled as follows:

“Recurring Schedules,” “Weekly Overall Schedule,” and “Employee Schedules.” While TCP’s Proposal provides objective evidence that some form of “integrated scheduling management functions” are being used by DPSCS, what is not clear is whether the integrated scheduling management being used by DPSCS is sufficient to satisfy the RFP Minimum Qualifications requirement of “integrated schedule management functions,” since this term was not clearly defined in the RFP.

We next consider the fact that the PO elected not to check the verifiable reference provided in TCP’s Proposal before she made her initial determination that TCP’s Proposal met the RFP’s Minimum Qualifications. Although the reference provided by TCP was Kevin Combs, the Chief Information Officer for DPSCS, Mr. Combs was not consulted prior to the PO making her initial determination because he was one of the members of the Evaluation Committee. The PO believed that the responsibility determination was an ongoing process and, although she did not solicit any input from Mr. Combs in making her initial determination, she sought and relied upon Mr. Combs’ participation and opinions throughout the evaluation process.<sup>11</sup>

For example, Mr. Combs reviewed TCP’s written Proposal, attended TCP’s oral presentation and witnessed the live demonstration of TCP’s proposed Solution, and he participated in the question and answer session regarding the “integrated scheduling management functions” therein (which, according to Mr. McIntyre, comprised approximately 80% of the

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<sup>11</sup> At the hearing, Appellant argued that any evidence of events that occurred after January 24, 2018, the date when the PO made her initial determination that TCP’s Proposal satisfied the Minimum Qualifications, was not relevant to the question of whether there was adequate, objective evidence to support her determination. Appellant took the position that the PO was required to determine whether the Minimum Qualifications had been met before allowing the Evaluation Committee to review the proposals. We disagree. With respect to responsibility determination, “the time of contract award is the important time for the determination of an offeror’s responsibility.” *Louise T. Keelty, Esq.*, MSBCA No. 1195 at 7-8 (1984). As such, we agree with the PO that responsibility determination is an ongoing process.

questions at the oral presentation). Mr. Combs indicated in the Evaluation Matrix that TCP had met the Minimum Qualifications and was “Well Qualified,” and at no time did he express any doubts about whether TCP’s Proposal had met the Minimum Qualifications.

We cannot ignore, however, Mr. Combs’ testimony at the merits hearing that TCP, at its oral presentation, demonstrated “integrated schedule management functions” that DPSCS currently did not have. Although it was not clear from his testimony whether he was referring to the existing implementation of TimeClock Plus Direct, or whether he was referring to the Advanced Scheduler feature of TimeClock Plus v.7 (which was installed but not being used by DPSCS), in light of his conclusion that TCP’s Proposal met the Minimum Qualifications and was “Well Qualified,” as evidenced by his comments on the Evaluation Matrix, we conclude that his testimony at the hearing referred to TCP’s demonstration of the Advanced Scheduler.

The Evaluation Matrix demonstrates that all of the members of the Evaluation Committee were satisfied that TCP’s proposed Solution satisfied the RFP’s Minimum Qualifications. All of the members of the Evaluation Committee ranked the Minimum Qualifications section of TCP’s Proposal as “Well Qualified.” No one expressed any doubts about TCP’s qualifications, including Mr. Raghavan, who previously responded to Q&A #5 (and whose supervisor, Mr. Setia, responded likewise to Q&A #2) that it did not have “integrated scheduling management functions.”

In sum, the PO reviewed TCP’s Proposal and made the initial determination that the Minimum Qualifications had been met. Because she believed this determination was an ongoing process, the PO sought input from the Evaluation Committee and its technical advisor as to whether they believed that TCP’s Proposal satisfied the Minimum Qualifications. Kevin Combs, one of the members of the Evaluation Committee who was personally familiar with the DPSCS

implementation, also believed, as reflected in the Evaluation Matrix, that TCP had satisfied the Minimum Qualifications. And all of the other members of the Evaluation Committee, along with its technical advisor, agreed that TCP's Proposal satisfied the Minimum Qualifications.

The only evidence offered by Appellant to rebut the PO's conclusion that TCP's Proposal satisfied the Minimum Qualifications in the RFP are (1) the Answers to Q&A #5 and Q&A #2 provided by Respondent's technical advisors, and (2) Mr. Combs' subsequent testimony at the hearing that TCP demonstrated at its oral presentation "integrated scheduling management functions" that were not currently being used at DPSCS. We have already addressed our conclusion with respect to Mr. Combs' testimony.

With respect to the Q&As, in light of the documentation contained in TCP's Proposal, including the screenshots showing scheduling functions currently being used at DPSCS, as well as the opinions of Mr. Combs and the other Evaluation Committee members, we are convinced that Mr. Raghavan and Mr. Setia failed to diligently perform their obligations in this procurement and that they answered these questions incorrectly. We are disturbed that they did not take the time to verify their answer to this question in the current procurement, especially in light of the email request from a prospective offeror in the TORFP procurement requesting confirmation that the answer was not correct. If their answer *was correct*, then they failed to speak up during the evaluation process and properly advise the PO and members of the Evaluation Committee that TimeClock Plus Direct did not have, and DPSCS was not currently using, the "integrated schedule management functions" necessary to meet the Minimum Qualifications in the RFP. If their answer *was incorrect*, then it should have been changed once they discovered their error. Either way, but for the erroneous answer to this question, Appellant would have had no basis to protest.

Notwithstanding the foregoing, we do not believe that the erroneous answers provided by Mr. Raghavan and Mr. Setia, or the subsequent equivocal testimony of Mr. Combs at the hearing, outweigh the evidence relied upon by the PO. We believe that there was adequate, objective evidence found in TCP's Proposal and demonstrated at its oral presentation, which was also confirmed by members of the Evaluation Committee and its technical advisor, to support the PO's determination that "integrated scheduling management functions" were currently being used in TCP's implementation example, that is, TimeClock Plus Direct at DPSCS. We conclude that there was adequate, objective evidence from which a reasonable person could conclude that TCP's Proposal satisfied the Minimum Qualifications in the RFP, and that the PO's determination was not arbitrary, capricious, unreasonable, or unlawful.

Accordingly, Appellant's Appeal is denied.

**ORDER**

For the foregoing reasons, it is this 28<sup>th</sup> day of February 2019 hereby:

ORDERED that the above-captioned Appeal is DENIED; and it is further

ORDERED that a copy of any papers filed by any party in any subsequent action for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

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Bethamy N. Beam, Esq.  
Chairman



**Certification**

**COMAR 21.10.01.02 Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing contested cases.

**Md. Rule 7-203 Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within ten days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3092, Appeal of Oakland Consulting Group, Inc. under Maryland Department Information Technology, RFP Number 060B8400039.

Dated: 2/25/19

15/  
Ruth Foy  
Deputy Clerk