

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of)
Accenture, LLP)
)
) Docket Nos. MSBCA 2640 & 2669
)
)
Under)
DHR RFP OTHS/OTHS-08-005-S)

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OPINION BY CHAIRMAN BURNS

Appellant appeals the denial of two of its protests raising numerous issues regarding the proposed award of a contract under a solicitation by the Maryland Department of Human Services to acquire technical and subject matter expertise to maintain its mainframe systems, non-mainframe systems, and web-based applications, and to provide enhancements and modifications to the Department's systems.

FINDINGS OF FACT

1. Respondent, the Maryland Department of Human Resources ("Department" or "DHR") was established to administer the State's public assistance, social services, child support enforcement, and community-based programs.
2. The Office of Information Technology ("OTHS") is responsible for developing, enhancing and maintaining the information technology systems that support delivery of the Department's numerous social services.
3. The Department's Information Technology ("IT") infrastructure includes personal computers, hardware and software, office applications and network upgrades, DHR Internet and Intranet, and telephone systems and equipment.
4. In order to facilitate the delivery of social services, track activities and manage outcomes, OTHS maintains three divisions within the Department. The Systems Development Division supports the Department's programs and administrative support services, business needs, and the customers they serve through software application development, implementation, operations and maintenance of the Department's IT systems. The Systems Management Division supports customers by developing and maintaining the Department's hardware, network, infrastructure and security. Finally, the Enterprise IT Policy and Planning and IT Procurement division sets the strategic direction of OTHS, and ensures compliance with statewide policies and projects.
5. On June 13, 2008, the Department issued a Request For Proposals ("RFP") **"FOR APPLICATION**

MAINTENANCE/OPERATIONS AND ENHANCEMENT SERVICES

OTHS/OTHS-08-005-S" in order to acquire technical and subject matter expertise to maintain the mainframe systems, non-mainframe systems, and web-based applications, and to provide enhancements and modifications to the Department's systems. *Joint Exhibit ("JT. Ex.")1-RFP.*

6. Under the RFP, the successful Offeror would be required to provide OTHS with 24-hours/day 365-days/year system operation and maintenance, application security, as well as continuity of operations, disaster recovery, and other services including Help Desk Level II and User Acceptance Testing support, site support, infrastructure support, and data and transmission security. *RFP at pp. 7-8.*
7. The services are divided into two major categories: Level I maintenance services and Level II Support Services.
8. Level I Services are defined in the RFP (§ 3.2.1.1) as "maintaining the applications and assuring that all systems continue to function, benefits are issued, and daily operations at DHR continue to occur without interruption." *RFP at pp. 44-45.* This section of the RFP also included historical data on the number of hours devoted to Level I Services over the past six years.
9. Level II support services consist of system changes, enhancements, modifications, or new developments that exceed 500 hours. Services for Level II are performed on a task order basis. *Id.; pp. 44-46.*
10. The RFP states that qualifying proposals, received from responsible Offerors that are initially

classified by the Procurement Officer as reasonably susceptible of being selected for award, would be considered. *RFP* § 5.2. Offerors were instructed to complete the financial proposal as described in Attachment L and in accordance with the pricing matrices, with "prices for all services, tasks, and obligations to be performed by the Contractor." *Id.* § 4. The entire contract price would be used for evaluation purposes and proposals would be ranked from lowest to highest. *Id.* § 5.5. The hours would be used to review the total price of each proposal in order to establish a financial ranking. *Jt. Ex. 1-RFP Clarifications, dated November 13, 2008.* The RFP also indicated that the Procurement Officer would recommend award to the Offeror whose proposal is "determined to be the most advantageous to the State," with technical factors given greater weight than price factors. *Id.* § 5.8.

11. During the RFP process, seven amendments were issued to provide further clarification of the RFP specifications.

12. Section 2.2, Revisions to the RFP, states:

Offerors shall acknowledge receipt of all amendments to this RFP issued before the response due date in the Offeror's Transmittal Letter accompanying the Technical Proposal submission. Acknowledgement of the receipt of amendments to the RFP issued after the response due date shall be in the manner specified in the amendment notice. *Joint Exhibit 1, RFP §2.2, at p.11.*

13. Section 2.3, Cancellations and Discussion, of the RFP states: "The State also reserves the right, in its

sole discretion to award a contract based upon the written Proposals received without prior discussions or negotiations." *Joint Exhibit 1, RFP §2.3, at p.11.*

14. Section 2.4 of the RFP states: "Exceptions to terms and conditions may result in having the Proposal deemed unacceptable or classified as not reasonably susceptible of being selected for award." *Joint Exhibit 1, RFP §2.4, at p.11.*

15. Section 2.8 of the RFP states: "An Offeror shall not submit an alternate Proposal in response to this RFP." *Joint Exhibit 1, RFP §2.8, at p.12.*

16. Section 2.9 of the RFP states: "An Offeror shall not submit more than one Proposal in response to this RFP." *Joint Exhibit 1, RFP §2.9, at p.12.*

17. Section 2.31 of the RFP states: "[a]ny Offeror may protest the proposed award or the award of a Contract for this procurement. Any protest shall be filed in accordance with Title 15, Subtitle 2 of State Finance and Procurement Article, Annotated Code of Maryland, and COMAR 21 (State Procurement Regulations), Subtitle 10, Administrative Civil Remedies." *Joint Exhibit 1, RFP §2.31, at p.27.*

18. Section 3.2 of the RFP states:

The scope of the work includes...

B. Perform all Level I support services to the applications listed in Section III and subsections. The State defines Level I maintenance services as any change, edit, or enhancement to any of the above applications that does not exceed 500 hours per task. The State determines and approves which tasks exceed 500 hours. *Joint Exhibit 1, RFP §3.2, at p.42.*

19. Section 3.2.1 of the RFP states:

The contract consists of two components:

1. Baseline Operations, or "keep the lights on" and Level I support services (defined below);
2. Level II support services.

The Contractor shall perform both components of the contract - baseline operations Level I, and Level II support services - to the applications listed in Section 3.2. *Joint Exhibit 1, RFP §3.2.1, at p.44.*

20. Section 3.2.1.1 of the RFP states:

Baseline operations entails simply maintaining the applications and assuring that all systems continue to function, benefits are issued, and daily operations at DHR continue to occur without interruption and according to State-defined SLAs (refer to section 3.4.12 - Service Level Agreements). Baseline operations further defined in section 3.4.16..

The Department expects Offerors to propose a minimum of 103,200 hours per contract year in Baseline Operations and Level I Support Services alone. It is up to the Offerors to determine the appropriate number of hours based on the 103,200 annual minimum, considering overall technical solutions.

The Department expects that all other services described in other sections of the RFP will be assigned hours in addition to the minimum of 103,200 hours allocated to Baseline Operations and Level I Support Services. *Joint Exhibit 1, RFP §3.2.1.1 (emphasis in original).*

21. Section 4.4 of the RFP states:

The Financial Proposal shall contain all price information for all services and products proposed as provided on Attachment L...

The financial analysis includes the price to transition -in/out and projections for ongoing costs (hardware, software, maintenance, people, and facilities) required to satisfy DHR's capacity needs as outlined in this RFP.

The Offeror shall follow these instructions in completing the pricing sheets:

1. The Offeror will provide an annual fixed price per contract year for all services described in Attachment L.
2. The Offeror must complete the pricing matrices specified for a base five-year, six-month Contract term with the options.
- ...6. In addition to completing the Pricing Sheet (Attachment L).... *Joint Exhibit 1, RFP §4.4, p.112.*

22. Section 5.6 of the RFP states:

"If more than one Best and Final Offer is requested, an Offeror's immediate previous offer shall be construed as its best and final offer unless the Offeror submits a timely notice of withdrawal or another Best and Final Offer." *Joint Exhibit 1, RFP §5.6, at pp.114-115.*

23. The RFP was evaluated by:

An Evaluation Committee of five (5) core members was established, comprised of representatives from DHR Central Office, a Local Department of Social Services, and two other State agencies.

These individuals possess expertise in Information Technology project management; technical development standards and approaches; application maintenance and hosting requirements and interdependencies; and subject matter proficiency in technical development, strategic planning, and technology's industry best practices. One committee member departed due to an emergency illness and was not replaced.

The Evaluation Committee was augmented by two (2) non-voting members that examined at a highly technical, deeply detailed level two different areas of the RFP. The first examined the specifics of the proposed network configurations, as well as the security solutions for the proposed development facilities (physical and network) and the security of the Department's data. The second provided information regarding the overall pricing methodology behind the structure of Level I and Level II Support Services. The participants possess knowledge of agency program policy, procedures, and service delivery. *Appellant's Exhibit 3, Evaluation Summary for Award, p.4*

24. During the RFP process, Offerors were provided the opportunity to submit questions to the Department.
25. Many questions were submitted over the course of the process, including numerous questions submitted by Appellant Accenture.
26. Responses to the first set of questions received from Offerors were posted on June 24, 2008.
27. DHR held a Pre-Proposal Conference on June 30, 2008.
28. On July 3, 2008, DHR issued responses to over 100 questions posted by potential offerors, with questions 8, 41, and 75 specifically related to the number of

hours DHR required offerors to list on the L-1 Pricing Sheets.

Question 8: On pages 42 and 43 of the RFP in sections 3.2.1, Baseline Operations, Level I and Level II Services Support, and 3.2.1.1, Baseline Operations and Level I Support Services:

RFP section 3.2.1, Baseline Operations, Level I and Level II Services Support, defines the contract as consisting of two components. Component 1, Baseline operations or "keep the lights on" and Level I support services, and Component 2, Level II support services. The table in RFP section 3.2.1.1, Baseline Operations and Level I Support Services, contains historic Level I hours by year.

Do the hours in this table represent total hours for Level I services only or are they inclusive of baseline operations as stated in Section 3.2.1, Baseline Operations Level I and Level II Services Support?

The hours in the table represent only those hours related to code changes (define SOW, design, test, implement, correct defects) for Level I "keep the lights on". They do not include Level II services nor do they include hours for UAT, Requirements Definition or other ancillary services such as production support, security etc.

Question 41: RFP Section 3.2.1.1 Baseline Operations and Level I Support Services - page 42: Baseline operations entails simply maintaining the applications and assuring that all systems continue to function, benefits are issued, and daily operations at DHR continue to occur without interruption

and according to State-defined SLAs (refer to section 3.4.12–Service Level Agreements). Baseline operations are further defined in section 3.4.16.

The State defines Level I support services as any change, edit, or enhancement to any of the above applications (and the applications defined in detail in Appendix D) that does not exceed 500 hours per task. Level II support services are defined as those changes that exceed 500 hours. The DHR Project Manager authorizes all work through the use of its work request system and process. Level I support services are further defined in section 3.4.16.

The following chart illustrates the historical level of effort annually for Level I services for CIS (CARES, CSES, and Services) and Datawatch. Please note that in 2006, MD CHESSIE, SAIL and WORKS were implemented, which increased maintenance and operation hours. In addition, for planning purposes, maintenance and enhancements to DHR's smaller cottage applications have not been tracked historically. In 2004, cottage applications began to be more closely managed by OTHS, and therefore the State estimates that the combined Level I efforts for cottage applications did not exceed 15,000 hours in the last two years. Offerors should consider both hours estimates when developing their proposals.

To be able to accurately size the level of effort and the level of resource skills required for the Level I work, will the DHR please provide the following information?

- A current vendor project organization chart for **Level I** work

- The number of hours worked in the last 12 months of each type of vendor resources working on each DHR application. That is,
 - How many hours have been worked in the last 12 months of each type of vendor resource working Level 1 work on the CHESSIE application?
 - How many hours have been worked in the last 12 months of each type of vendor resource working Level 1 work on the CARES application?
 - How many hours have been worked in the last 12 months of each type of vendor resource working Level 1 work on the CSE application?
 - How many hours have been worked in the last 12 months of each type of vendor resource working Level 1 work on the Cottage Applications?

Under section 3.2.1.1, hours have been provided for Level I Support Services for the last four years for both CIS/MD CHESSIE and Cottage Applications.

DHR will not provide the current contractor's staffing information. It is up to the Contractor to propose an approach that meets the requirements of THIS RFP. It should also be noted the current contract is vastly different in scope.

Question 75: RFP Section 3.2.1.1 The hours by year table for Level 1 services combine Mainframe and CHESSIE hours. Can you provide a more detailed breakout between applications (CIS, CHESSIE, CARES, other)? In addition, the data provided shows 103,200 hours in Level 1 support services for FY 07. Please provide a further break down of

hours by high level Task Description. Also, please provide a breakout of Help Desk tickets by severity level and application.

The information provided in the RFP is the more accurate information available and further breakdown is limited. For calendar year 07 Level I services for CHESSIE were approximately 36,000 hours. Please note this was the first year CHESSIE was in maintenance and operation mode. All available help desk information has been provided in Appendix I. *Joint Exhibit 1, Response to Questions Received as of July 3, 2008. (emphasis in original).*

29. Amendment No. 1 was issued on July 7, 2008. This Amendment included the following changes:

- 1) the Closing Date revised to August 11, 2008 at 4:00PM ET,
 - 2) the Anticipated Contract Award date revised to January 10, 2009,
 - 3) it revised Section 3.2.1.4, Application Maintenance - Environment
 - 4) it deleted 3.4.1.P.
 - 5) it revised 3.4.9, Transition In
 - 6) it revised 3.4.19, Removal and Replacement in GRNDS (General and Reusable Netcentric Delivery Solutions)
 - 7) it revised Section 5.3 Technical Evaluation
 - 8) it revised Section 5.4 Criteria for Technical Evaluation; and
 - 9) it revised Appendix L, Pricing Proposal.
- Joint Exhibit 1, RFP, Amendment 1; Appellant's Exhibit 3, Evaluation Summary for Award, p.2.*

30. The Closing date for receipt of questions was July 7, 2009, at which time responses to the third set of questions were posted and a revision to Question 104

was posted. *Appellant's Exhibit 3, Evaluation Summary for Award, p.2.*

31. Amendment No. 2 was issued on July 9, 2008, revising, among other things, several provisions of the Standard Services Contract. *Joint Exhibit 1, RFP, Amendment No. 2.*
32. The Department posted its responses to the questions from the Pre-Proposal Conference on July 10, 2008.
33. On August 11, 2008, the Department received proposals from three Offerors: Appellant Accenture LLP ("Accenture"), Interested party ACS State & Local Solutions, Inc. ("ACS"), and Northrop Grumman Information Technology, Inc. ("Northrop").
34. After a review of proposal contents, all three proposals were initially classified as reasonably susceptible of being selected for award.
35. The Evaluation Committee conducted reviews of the Offerors' technical proposals over the course of eight weeks, beginning August 20, 2008 and continuing through October 21, 2008.
36. Between September 15 and October 14, the Evaluation Committee sent Accenture approximately one hundred two (102) Requests for Clarification of its Technical Proposal.
37. ACS was sent forty-one (41) Requests for Clarification of its Technical Proposal by the Committee. One of the requests from the Committee required ACS to identify a replacement for one of its personnel identified in the proposal.
38. In accordance with Section 3.5.4.1 of the RFP, Offerors were permitted to substitute personnel.

39. ACS did not meet the deadline imposed by the Department, and the failure was deemed a deficiency by the Evaluation Committee.
40. Northrop received fifty-two (52) Requests for Clarification.
41. Amendment No. 3 to the RFP was issued on September 30, 2008. This Amendment revised Section 3.7.2, Security - Contractor-owned Computer Equipment.
42. On October 10, 2008 Appellant gave an oral presentation of its proposal.
43. On October 21, 2008, following an eight week review period that included oral presentations by each of the Offerors, the Evaluation Committee determined that each technical proposal submitted by offerors was reasonably susceptible of being selected for award of the contract.
44. The technical proposals were then ranked by the Evaluation Committee per the five (5) RFP evaluation criteria (technical response to Section III; offeror qualifications; key personnel; references; and financial responsibility and stability (RFP Section 5.4)) in descending order of importance.
45. The result of the technical proposal evaluations were as follows:

Application Maintenance/Operations
and Enhancement Services - OTHS/OTHS-08-005-S
Technical Ranking

| Offerors | Technical Response | Qualifications | Key Personnel | References | Financial Responsibility and Stability | Totals |
|---------------------|--------------------|----------------|---------------|------------|--|--------|
| ACS | 1 | 1 | 1 | 1 | 3 | 1 |
| Accenture | 3 | 3 | 2 | 1 | 2 | 3 |
| Northrop Grumman | 2 | 2 | 3 | 1 | 1 | 2 |

Joint Exhibit 2, Evaluation Summary, p.19.

46. Technically, ACS was ranked first, Northrop was ranked second, and Appellant Accenture was ranked third.
47. Financial proposals from the three Offerors were opened on October 21, 2008.
48. The technical ranking and evaluation of the Offerors were not changed or modified after the opening of the financial proposals.
49. In the original L1 Pricing Sheet included with the RFP, Offerors were only required to include the price for each of the line item requirements for each contract and option year. As per the instructions included with the pricing sheets, Offerors were advised to provide a "firm fixed price for each applicable service". The pricing sheets also provided that offerors shall "complete the pricing matrices specified."
50. In light of numerous questions and clarifications submitted by the Offerors, the Department decided to request Best and Final Offers ("BAFOs") from the Offerors to ensure that any technical changes that may have resulted in changes to the Offerors' costs could be appropriately reflected.
51. In addition, the Evaluation Committee could not determine the number of hours each of the Offerors proposed for the Baseline Level I Support Services. *RFP § 3.4.16.* The Department intended that the Offerors would use the data and combined figure of 103,200 hours for Level I Services shown in the chart in § 3.2.1.1 as a minimum number when preparing their proposals. See, *RFP pp. 44-45.*
52. The Procurement Officer explained in her testimony that the Department was interested in knowing the

- number of hours proposed for the Level I Services to assure that the Offerors understood the work involved in Level I Services and the important cost difference between Level I and Level II Services.
53. On October 22, 2008, a request for BAFOs was sent to the three Offerors.
 54. Each of the Offerors was asked to: (1) revise its proposal in light of the changes made to the technical proposal during the evaluation process; (2) describe its build up costs for Section 2.4.9 Software Licensing; (3) consider § 3.2.1.1 Baseline Operations and Level I Support, and (4) provide the number of hours proposed for § 3.2.1.1.
 55. Accenture's initial pricing proposal was accompanied by a separate document entitled 3.0 Basis of Estimate ("BOE"). Ms. Cindy Hielscher, the lead writer of Accenture's proposals, described the BOE in testimony as a compilation of Accenture's assumptions that were made during the pricing of the proposal.
 56. The Evaluation Committee did not address the assumptions in the BOE as the Committee expected Accenture's price to increase drastically in light of the numerous Requests for Clarification and the new questions from the Department.
 57. Northrop also submitted assumptions, but included them with the Transmittal Letter as directed by § 4.1 of the RFP. The Evaluation Committee, therefore, responded to these assumptions on September 29, 2008, prior to opening the financial proposal.
 58. The BAFOs were due from Offerors on October 27, 2008.
 59. On October 22, 2008 Appellant received from the Department the request for the first BAFO which noted

that it had been determined by the Department that certain clarifications pertaining to Accenture's financial proposal were required to complete the evaluation process.

60. The clarifications requested included:

... 4. Please provide the number of hours proposed for the requirements outline in Section 3.2.1.1, Baseline Operations and Level I Support Services.

5. Please clarify in detail how you determined your overall pricing. ...

6. In developing your Best and Final Offer (BAFO), please utilize the attached pricing sheet. . .

61. On October 23, 2008, the Department sent Amendment No. 4, Revised Pricing Proposal, to all Offerors.

62. Paragraph 12 of the instructions to Amendment No. 4 stated, "[t]he hours listed on the rate sheet are for evaluation purposes."

63. Amendment No. 5 was issued on October 24, 2008, modifying Appendix L, sheet L-1.

64. On October 24, 2008, Appellant received and acknowledged the receipt of Amendment No. 5, including the accompanying instructions which stated in paragraph 12, "[t]he hours listed on the rate sheet are for evaluation purposes."

65. On October 27, 2008, Amendment No. 6 was issued. Amendment No. 6 instructions, like the instructions to Amendments 4 and 5, stated in paragraph 12, "[t]he hours listed on the rate sheet are for evaluation purposes."

66. Amendment No. 6 revised Appendix L, deleting sheet L-3.

67. Offerors were instructed to propose a firm fixed price for each applicable service and to complete the pricing matrixes specified. *Jt. Ex. 1, Amendment No. 6, Revised Pricing Sheets with Instructions.*
68. On October 27, 2008, BAFOs were received from all three (3) Offerors.
69. In the BAFO submitted by Accenture, Accenture did not include a firm fixed price for approximately eighty (80) of the pricing matrices specified on the L1 pricing sheet.
70. Accenture explained in its BAFO that it had adjusted its pricing to reflect the clarifications to the technical proposal, which resulted in a total contract amount of \$73,905,400, an overall decrease of approximately \$2.6 million from the initial submission. Accenture explained its cost build up for Software Licensing and further explained its pricing methodology. Accenture also advised that it had proposed 807,326 hours for Level I "keep the lights on" and Level I "ancillary" services. Accenture did not define "ancillary services."
71. Both ACS and Northrop proposed a firm fixed price for each applicable service on the pricing sheet and completed the pricing matrices as requested.
72. The Evaluation Committee reviewed the BAFOs on October 28, 2008.
73. The Evaluation Committee determined that the Offerors lacked a fundamental understanding of the pricing; found that none of the Offerors proposed the minimum 103,200 hours for Baseline Operations and Level I Support, \$ 3.4.16 for each contract and option year; and, concluded that final ranking could not be

completed until additional discussions were held with the Offerors to clarify their understanding of the pricing.

74. On November 3, 2008, the Department set up conference calls with each Offeror to clarify its expectation that a combined figure of 103,200 hours for Level I services must be used by the Offerors when preparing financial proposals.
75. The conference calls took place on November 3, 2008.
76. The conference call with Appellant lasted almost two hours. The Procurement Officer along with the Evaluation Committee was present for the Department. Ms. Hielscher and Ms. Anne Wolfe were present on the call for Accenture.
77. During this conference call Accenture was informed that, pursuant to § 3.2.1.1 of the RFP a minimum of 103,200 hours must be proposed for line item 3.4.16 Baseline and Level I Support Services on the Pricing Sheet for each contract year. In addition to the minimum 103,200 hours, Accenture was instructed to propose additional hours for the other services described in the 'Phase/Description' column on the L1 Pricing Sheet, which did not include such ancillary services as help desk, training, and security. Accenture was also told not to assume that the 103,200 hour minimum included hours for any other services. Accenture was informed that Level I Services did not include: help desk; training; security; business continuity or disaster recovery; project management; nor the other line items on the pricing sheet.
78. Accenture acknowledged its understanding that the 103,200 hours were a minimum for § 3.4.16 only and

that Accenture could propose more hours depending on its technical proposal and any efficiencies it intended to accomplish over the term of the contract.

79. During this conference call the Department also discussed Accenture's BOE which had been submitted with the original pricing proposal.

80. Specifically, the Department advised Accenture that, based upon the previous discussions regarding the minimum hours required for § 3.4.16 Baseline and Level I Services, Accenture should reconsider Operations - Level I services assumption, which states:

Base Level I Service Hours are 103,200 plus Production Support, Security, Requirements Definition, Long Range Planning, Training, Level II Support, Services and Removal of GRNDS. We assume all other functions requested within the RFP are included in the base hours. It is assumed that these support hours include all necessary Subject Matter Expert requirements and Project Management.

81. During the November 3, 2008 conference call between the Department and the Appellant, the Department made it clear that it expected the Appellant to propose at least 103,200 hours in line item 3.4.16 Baseline and Level I Support Services on the Pricing Sheet for every year of the contract.

82. The Department left it up to the Appellant to decide how to place technical efficiencies in its pricing sheet and the Appellant noted during a telephone conversation with the Department that it agreed and that it understood it was not to assume that all other services were included in the 103,200 hours:

DHR: I think the purpose of the call is to make sure that you completely understand what's being requested in the pricing?

Ms. Hielscher: Yes, I agree.

DHR: Okay. Moving on, the second question that we have is -

Ms. Hielscher: I'm sorry. This is Cindy. So let me just ask you the question maybe another way. Are we required to have 103,000 hours for every year for baseline? I mean, is that a requirement of DHR? Or, if we are able to factor in efficiencies based on prior - past experiences in other places, is it okay to go below those hours?

DHR: Based on our - we provided the best information that we could in the RFP, and on page 43 of the RFP we have a table that shows the most recent hours for baseline operations. And that's just keeping the lights on. Those are just work requests under 500 hours. That's just keeping the lights on. And we expected at least 103,200 hours. That's a minimum. You could bid more. You could propose more based on the scope of what you saw in the RFP. It's really up to you guys. But that line item alone on your pricing sheet, the Department expects at least 103,200 hours in that item.

Ms. Hielscher: And would that be for all five years of the contract?

DHR: For each year. Does that make sense? 103,000 hours per year, because that's --

Ms. Hielscher: 103,000--yes, I - so I understand that - so what I hear is

that we shouldn't assume efficiencies in that 103,000 hours past the first year.

DHR: I think that is up to you in your solution.

Ms. Hielscher: Okay.

DHR: However, what you can't assume is that the 103,200 hours contains all other services.

Ms. Hielscher: I agree. And that we do understand.

83. After the conference calls with all of the Offerors were concluded, it was decided that a second BAFO from the Offerors was advisable.
84. The Department consequently requested a Second BAFO from the Offerors.
85. The Department also issued Amendment No. 7 on November 5, 2008.
86. Amendment No. 7 provides that:

This amendment is being issued to amend and clarify certain information in the above named RFP and RFP Appendix L (Pricing Proposal). All information contained herein is binding on all Offerors who respond to this RFP. Specific parts of the RFP have been amended...

1. Revised Pricing Proposal

1. The Offeror shall propose a firm fixed price for each applicable service on an annual basis.

The Offeror shall include a breakdown of hours for each item on the pricing sheet, for each contract year.

2. **All costs associated with the Transition In should be defined in**

the column entitled "Transition (6 Months)" in the cell corresponding to Section 3.4.9 - Transition In. No costs should be amortized across the base period of the contract or otherwise absorbed in other areas of the pricing proposal. Joint Exhibit 1, RFP, Amendment No.7. (emphasis in original)

87. Amendment No. 7, among other matters, revised the L1 and L2 Pricing Sheets:

Revised Pricing Proposal

1. The Offeror shall include a breakdown of hours for each line item on the pricing sheet, for each contract year.
 2. The Offeror shall provide a Rate Sheet (Attachment L2-Rate Sheet) that lists the rate for each labor category proposed by the Offeror for each base year and option year of the contract. Level II Support Services is fixed-price on a task-order basis. The Contractor's statement of work will not be evaluated based on labor category and individual labor rate. The average hourly rate will be used to price the task order work.
7. 3.2.1.1 - Baseline Operations and Level I Support Services

| Hours by Year | | | | |
|--------------------------------|----------------------|----------------------|----------------------|-----------------------|
| Level I | Sept 01 - Aug 02 | Sept 02 - Aug 03 | Sept 03 - Aug 04 | July 06 - Jun 07 |
| Mainframe and MD CHESSIE | 78,476 | 97,622 | 84,372 | 88,200 |
| Cottage Applications | No data available | No data available | 15,000 | 15,000 |
| <u>Totals</u> | <u>78,476</u> | <u>97,622</u> | <u>99,372</u> | <u>103,200</u> |

The Department anticipates the Offerors to propose a *minimum of 103,200 hours per contract year in Baseline Operations and Level I Support Services alone*. It is up to the Offerors to determine the appropriate number of hours needed in *access (sic) of the 103,200 annual minimum hours*, considering the Offeror's overall technical proposal.

All other services described in other sections of the RFP will be assigned hours *in addition to* the minimum of 103,200 hours allocated to Baseline Operations and Level I Support Services.

88. One of the reasons for and purposes of the second BAFO and for Amendment No. 7 was to insure that all of the Offerors knew and understood that the 103,200 hours minimum was now a requirement of the RFP.
89. On November 5, 2008, the Department also asked Accenture for additional information and clarifications, including requesting that Accenture address the issues noted in the BOE and asking Accenture to explain why it did not have prices for many of the deliverables identified as §§ 3.4.1.G, 3.4.1.1, and 3.4.1.J of the pricing sheet.
90. On November 5, 2008, Accenture notified the Procurement Officer, Ms. Sandra Johnson, that it had concerns about its competitive advantage based upon the new requirement to include labor rates for each contract year for Level II Services as per Amendment No. 7, item 2, rather than providing the maximum hourly rate. As Ms. Johnson explained it, the Department was interested in the amount that the contractor would charge the Department for Level II

Services throughout the term of the contract to compare against the task orders later.

91. This change concerned Accenture and, in an e-mail communication to the Procurement Officer on November 6, 2008, Accenture requested an opportunity for further discussions about the instructions in Amendment No. 7 emphasizing that they believed "the instructions have taken away a key competitive advantage for Accenture in a fixed price contract and will not result in the best value for the State."
92. Accenture also requested further clarification of the instructions to Amendment No. 7, which if followed, would result in significant changes to its financial proposal.
93. Notwithstanding these statements, Accenture acknowledged the Department's desire to have a minimum of 103,200 hours for baseline services.
94. On November 7, 2008, in response to Accenture's questions, the Procurement Officer issued Clarifications to all Offerors reiterating its requirement of the 103,200 minimum hours needed for Baseline Maintenance and Level I Support Services and, further stating that, "in addition to the minimum hours, additional annual hours for the specific requirements should be priced separately."
95. The Department noted that, notwithstanding what is noted in these Findings of Fact, there might be some overlap in the baseline services and the other pricing requirements.
96. The Department stated in the Clarifications issued on November 7, 2008:

2. How are we to show year over year efficiencies for evaluation purposes? An example of efficiency would be that we reduce defect rates by XX% over time to reduce the time spent working on defects and potentially allow more times towards other Level I work.

Year over year gains in productivity or overall efficiencies should be described in detail in your Technical Proposal. Any discussion regarding the percentage of work expected to decrease over time or expected volume of defects anticipated to diminish as a result of the improved productivity should also be outlined in your Technical Proposal. The gains in productivity or overall efficiencies will be reflected in the hours needed over and above the 103,200 hour minimum.

3. We understand DHR's desire to have a minimum of 103,200 hours dedicated to baseline operations and Level I support services. We are, however, unclear as to how these hours would be shown on the amended application maintenance pricing sheet... Does DHR expect to see the hours associated with testing activities for Level I Baseline Maintenance fixes in category 3.4.16 Baseline Maintenance and Level I Support Services or in 3.4.18 Software Testing in the Pricing Sheet? In other words, does DHR expect to see 103,200 hours in the 3.4.16 Baseline Maintenance and Level I Support Services line of the Pricing Sheet or is it anticipating some of those hours to be in Phase/Description categories with overlapping categories?

The Offeror shall propose a minimum of 103,200 hours in 3.4.16 - Baseline Maintenance and Level I Support

Services for each contract year and each option period.

There is some small amount of overlap between Sections 3.4.15, 3.4.16, and 3.4.18. The differences were clarified in the questions posted on July 3, 2008 (specifically, 8, 11, 25, 41, 47, and 75) and the questions posted and further clarified on July 7, 2008 (110, and as clarified, 104). Thus, in addition to the minimum hours, additional annual hours for the specific requirements should be priced separately. *Joint Exhibit 1, November 7, 2008 Clarifications.*

97. After receipt of the Clarifications, there was no other request from Accenture for clarification of Amendment No. 7.
98. During her testimony, Ms. Hielscher testified that she read and understood Amendment No. 7 to require a breakdown of hours for each item.
99. During her testimony, Ms. Hielscher testified that after the issuance of Amendment No. 7, the Department's request for 103,200 hours for Section 3.4.16 Baseline Operations and Level 1 Support did not change.
100. Appellant did not submit any protest regarding this procurement process prior to the submission of its second BAFO or before the opening of that second BAFO.
101. The second BAFOs were due, and were received by the Department, on November 14, 2008.
102. The Department received the Appellant's second BAFO, Pricing Clarifications, and another Basis of Estimate. In the Appellant's BOE "Financial Assumptions", it

took exception to Amendment No. 7 by stating that its Proposal was based upon the assumption that:

“Base Level I Service hours are 103,200 plus production Support, Security, Requirements Definitions, Long Range Planning, Training, Level II Support Services and Removal of GRNDS. We assume all other functions requested with the RFP are included in the base hours. It is assumed that these support hours include all necessary Subject Matter Expert requirements and Project Management.”

103. The Appellant priced the minimum 103,200 hours for §3.4.16 Baseline and Level I Services for contract years one and two, and provided pricing and hours for ten other services for contract years one and two.
104. For the remaining years the Appellant failed to include the additional hours over and above the 103,200 minimum as required by Amendment No. 7.
105. The Appellant lumped together all other required Level I Service hours into §3.4.16 Baseline Services.
106. In its second BAFO, Appellant failed to complete the Pricing Sheets in compliance with the specifications of the RFP and Amendment No. 7.
107. In its second BAFO, for contract years three (3) through (9) nine, the Appellant did not follow the requirements of the RFP and Amendment No. 7. Rather than placing the additional hours in the phase/description service areas, Appellant left those areas blank.
108. In its second BAFO, despite the Department's instructions to Accenture to modify the assumption relating to the baseline services and despite the new pricing instructions in Amendment No. 7, Accenture

submitted the very same assumption, without any changes or modifications and priced its proposal the same as it had done previously.

109. In accordance with this assumption, Accenture included the minimum 103,200 hours for § 3.4.16 Baseline and Level I Services for contract years one and two. However, also included in the § 3.4.16 Baseline and Level I Services were prices and hours for ten other services, unilaterally selected by Accenture, for contract years one and two. For the remaining years, Accenture failed to include the additional hours over and above the 103,200 minimum as required by Amendment No. 7. Instead, Accenture decided to lump together all of the other required Level I Service hours into the § 3.4.16 Baseline Services.
110. Ms. Hielscher testified that the new pricing proposal took away Accenture's competitive advantage and testified that Accenture proposed a price and took the risk associated therewith. *Hearing Transcript IV, pp.48-49.*
111. Accenture apparently decided that it could be more efficient than the 103,200 hours required over the life of the contract for baseline services, and, therefore, decided not to comply with the minimum requirements as requested by the Department.
112. Accenture showed its perceived efficiencies by combining other services into the § 3.4.16 Baseline Operations and Level I Support, after being told explicitly not to do so. This was the only way, according to Accenture, to show the efficiencies Accenture intended to obtain.

113. ACS, on the other hand, asserted that it too would obtain certain efficiencies in the baseline services over the life of the contract. In order to show this, ACS proposed, at least, the minimum hours required for § 3.4.16 (plus more) and incrementally reduced the hours necessary for these services; but at no time, did ACS fall below the minimum requirements. ACS then explained in its assumptions how the efficiencies would be obtained using the minimum State requirements.
114. The Evaluation Committee reviewed all of the Offerors' BAFOs.
115. ACS's and Northrop's proposals were deemed reasonably susceptible for being selected for award and were subsequently evaluated and ranked.
116. Accenture's second BAFO was found to be not reasonably susceptible for being selected for award and Accenture was, therefore, eliminated from further review.
117. Approximately two-thirds of the cells in Accenture's L1 pricing proposal contained 'dashes' instead of prices and hours.
118. Accenture subsequently explained in testimony that the 'dashes' did not signify that the blocks were ignored, but, rather, no pricing or hours was provided.
119. The Procurement Officer testified that the Department asked Offerors to complete each and every cell block in order to ensure that Offerors understood the work involved; could distinguish between the Level I and Level II service hours; and, to determine what the Offerors were charging for each service and how the Offerors arrived at a given price.

120. The Committee attempted to evaluate the proposal, including the hours and the prices provided by Accenture, but was unable to do so because of the limited information provided, and the fact that so many of the services were combined into the baseline operations in direct violation of the RFP requirements. As a result, the Department was unable to determine how the prices were calculated.
121. Accenture did not fill out the pricing sheet as instructed by the Department in numerous communications.
122. Accenture's response to the second BAFO request was \$74,905,400.
123. ACS's price in its second BAFO was \$139,950,000.
124. Northrop Grumman's price in its second BAFO was \$165,483,905.
125. On November 14, 2008, the ranking of the financial proposals of the remaining two Offerors was completed. The Evaluation Committee determined ACS and Northrop Grumman were susceptible to award and able to be evaluated and thereafter recommended unanimously that ACS be awarded the Contract,
126. The Evaluation Committee cited in its Evaluation Summary and Recommendation for Award ACS's strengths and identified only one deficiency of ACS regarding the failure to identify a replacement within the proposal deadline.
127. The Procurement Officer agreed with and accepted the Evaluation Committee's Recommendation for Award of the Contract to ACS.
128. The Procurement Officer presented her recommendation for award and the elimination of Accenture from

- further consideration to the Secretary of the Department on December 5, 2008.
129. The Evaluation Summary and Recommendation for Award was approved by the Secretary of the Department on December 5, 2008.
 130. On December 8, Accenture was notified that, pursuant to § 2.4 of the RFP, its proposal was deemed not reasonably susceptible of being selected for award.
 131. On December 8, 2008, ACS was informed that its proposal was recommended for award of the contract herein.
 132. At no time did the Evaluation Committee change its recommendation or the rankings after they had completed their evaluations of the technical proposal or financial proposals.
 133. The Evaluation Committee based its decision on the proposals it received in response to the RFP and related documents and discussions.
 134. There is no evidence of bias by the Evaluation Committee, the Procurement Officer, or any other person associated with the award of this contract during this Procurement Process.
 135. Specifically, there is no evidence of bias by the Evaluation Committee, the Procurement Officer, or any other person associated with the award of this contract during this Procurement Process for or against Accenture, ACS, or Northrop Grumman.
 136. Ms. Isabel FitzGerald, the Department's Chief Information Officer of the Office of Technology and Human Services ("OTHS"), was not a member of the Evaluation Committee.

137. Ms. FitzGerald provided technical assistance on the RFP and assisted in responding to questions.
138. There is no evidence that Ms. FitzGerald directly or indirectly, or improperly, influenced the evaluation process, the Evaluation Committee, or the Procurement Officer in any manner before the final evaluations herein and the Recommendation of Award of the contract to ACS.
139. Accenture requested a debriefing be held and a debriefing was held on December 11, 2008.
140. On December 15, 2008, Accenture filed a Protest.
141. In its December 15, 2008 Protest, Accenture alleged that the Department: did not tell Accenture that some of its assumptions filed with Accenture's initial BAFO were objectionable; should not have deemed Accenture's Proposal not reasonably susceptible for being selected for award because Accenture failed to comply with the requirements of Amendment No. 7; did not follow its own Financial Evaluation Criteria; and was biased against Accenture in the evaluation of Accenture's Proposal.
142. In its December 15, 2008 Protest, Accenture requested that it be permitted to cure its Proposal for evaluation purposes and that the Department refrain from recommending award to any contractor other than Accenture pending the resolution of the Protest.
143. The Department sustained the Appellant's first basis of protest on January 8, 2009 and denied bases two, three, and four. The Department declined to re-evaluate Appellant's proposal and declined to recommend that the contract be awarded to the Appellant.

144. The Appellant then filed a Notice of Appeal of Bid Protest ("First Appeal") with the Maryland State Board of Contract Appeals ("Board") on January 22, 2009, asserting as grounds for its Appeal:

1. Accenture's alleged failure to properly insert unevaluated hours in certain cells in the BAFO #2 Financial Spreadsheet is not grounds for rejection;
2. The Department misapplied the Financial Criteria set forth in the RFP §5.5; and
3. The Department's statements to Accenture at the December 11, 2008 meeting raise additional concerns regarding the Department's evaluation of Accenture's technical proposal. Specifically, the mention of a 'weakness' in Accenture's technical proposal relating to a lack of understanding of current DHR processes and systems made during its December 11, 2008 meeting with Accenture shows bias toward the Department's incumbent vendor(s) and is an unfair comparative ranking of the technical proposals among the offerors.

145. Appellant filed a Second Protest on April 30, 2009.

146. The Second Protest was based on eight (8) grounds:

1. There were latent ambiguities in the RFP pricing requirements;
2. Email communications provided further evidence of bias;
3. Respondent improperly rejected Accenture's proposal for a reason *other than* the reason that was provided to Accenture;
4. Respondent wrongfully rationalized its improper decision to deem Accenture's offer as not

- reasonably susceptible of being selected for award;
5. Respondent improperly modified technical scores of offerors after financial scores were opened;
 6. Respondent arbitrarily ranked ACS as technically higher than Accenture in the "key personnel" category even though ACS submitted its proposal with missing key personnel;
 7. There were improper communications between ACS and Respondent; and,
 8. There was a conflict of interest with regard to Respondent's CIO.

147. On June 22, 2009, Respondent denied Appellant's Second Protest in its entirety.

148. On July 1, 2009, Appellant filed its second notice of Appeal with the Board.

149. Accenture repeated seven (7) of the eight (8) grounds from its Protest as the basis for its second Appeal, withdrawing the ground regarding improper communications between ACS and Respondent (Ground Seven (7) from the second Protest).

150. On June 2, 2009, Respondent requested to consolidate Accenture's Second Protest under this first appeal.

151. By way of an order dated June 4, 2009, the Board granted Respondent's request to so consolidate these actions.

152. A hearing regarding Appellant's Appeals was held on September 16, 17, 18, 22, and 23, 2009.

DECISION-INTRODUCTORY SUMMARY

Appellant raises a host of issues by way of two appeals regarding the Procurement Process involved with

this contract. After extensive discovery, the filing of various Motions, five days of hearing testimony, extensive briefing by the parties, and an extensive review of the record by this Board, it is clear that both of Appellant's Appeals must be denied.

Appellant's arguments, for the most part, come down to two contentions: 1) the Department was wrong to find Appellant's second BAFO Financial Proposal not reasonably susceptible of award and, 2) the Department was biased against Appellant. Neither argument holds water and, in point of fact, the appeal process has revealed copious evidence that the Department was amply justified in rejecting Appellant's second BAFO (indeed, arguably not rejecting Appellant's second BAFO may well have lead to a successful appeal of such a decision by the current Interested Party and contract awardee ACS) and there is no substantive evidence of any kind indicating bias against Appellant or in favor of another offeror by the Department and its representatives during this procurement.

For various reasons, Appellant chose to ignore clear, repeated instructions on how to fill out the second BAFO requested by the State. Appellant's second BAFO response was found by the Department to be seriously lacking in requested specifics making it impossible for the Department to judge whether Appellant's bottom line price was grounded in reality. The Department therefore found Appellant's second BAFO to be not reasonably susceptible of award and ended consideration of Appellant's offer.

That determination by the Department was neither arbitrary, capricious, irrational, illogical or illegal. On the contrary, a different determination by the Department and award of the contract to Appellant might well have

resulted in a successful appeal of such actions and decisions by another offeror (such as ACS).

In this procurement, Appellant took certain risks in order to craft a proposal that Appellant felt would be successful, a proposal substantially lower in price than other offerors' second BAFOs. Unfortunately for Appellant, Appellant chose to submit a BAFO on its terms, not on the Department's. The fact that Appellant came up with a lower price is irrelevant because Appellant's price was not given in response to the Department's BAFO request. Rather, Appellant's second BAFO is based on a repeatedly expressed desire to retain and exhibit a "competitive advantage". In so doing, Appellant submitted what was found, quite reasonably by the Department, to be a fatally flawed and unresponsive second BAFO. The decision to reject Appellant's second BAFO was not based on bias or a misreading of the RFP and related documents; it was based on Appellant's submission of a fatally non-responsive BAFO.

DECISION-MOTIONS

In order to render a decision in these appeals, the Board must first deal with several Motions.

Interested Party ACS has filed two Motions to Dismiss. These Motions involve four appeal grounds. These include appeal grounds one (1) and two (2) from Appellant Accenture's first Appeal, namely: 1. Accenture's alleged failure to properly insert unevaluated hours in certain cells in the BAFO #2 Financial Spreadsheet is not grounds for rejection ("First Appeal Ground One") and, 2. The Department misapplied the Financial Criteria set forth in the RFP §5.5 ("First Appeal Ground Two"). They also include

appeal grounds one (1) and four (4) from Appellant's second appeal (namely 1. There were latent ambiguities in the RFP pricing requirements ("Second Appeal Ground One") and, 4. Respondent wrongfully rationalized its improper decision to deem Accenture's offer as not reasonably susceptible of being selected for award ("Second Appeal Ground Four").

ACS argues that these four appeal grounds were not timely protested and must be dismissed. ACS notes that under COMAR:

A protest based on alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation. COMAR 21.10.02.03(A).

ACS's Motion will be denied with respect to First Appeal Grounds One and Two and Second Appeal Ground Four (although ground Four is a close call). ACS's Motion will be granted regarding Second Appeal Ground One.

In order to explain the reasoning for these decisions, a review of relevant facts is in order. This review will serve to not only illuminate the decision rational as to the Motions under consideration, but is also relevant to deciding the remaining appeal grounds on the merits as well.

This procurement process involved months of activity by the Evaluation Committee and by the Procurement Officer

(known herein as the "Procurement Officials") and by offerors. The Procurement Officials repeatedly sought to explain and clarify what was expected of offerors. The process included not one but two BAFOs, seven RFP amendments, an oral presentation, and numerous questions. All offerors were given many opportunities to ask questions, make clarifications, make presentations and refine their offers.

During this procurement process, after reviewing the first BAFO responses regarding Financial Proposals, there came a point when the Evaluation Committee determined that Offerors lacked an understanding of the pricing (i.e. determined that none of the Offerors proposed the requested minimum 103,200 hours for Baseline Operations and Level I Support - § 3.4.16 for each contract and option year); and, therefore, determined that final ranking could not be completed until additional discussions were held with the Offerors to clarify their understanding of the pricing.

On November 3, 2008, the Department set up conference calls with each Offeror to clarify its expectation that a combined figure of 103,200 hours for Level I services must be used by the Offerors when preparing financial proposals. Those conference calls took place on November 3, 2008.

The conference call with Appellant Accenture lasted almost two hours. The Procurement Officer along with the Evaluation Committee were present for the Department. Ms. Cindy Hielscher (designated according to Accenture "to take the lead in preparing Accenture's technical and financial proposals because she is an industry expert") and Ms. Anne Wolfe were present on the call for Accenture. During this conference call Accenture was informed that, pursuant to § 3.2.1.1 of the RFP a minimum of 103,200 hours must be

proposed for line item 3.4.16 Baseline and Level I Support Services on the Pricing Sheet for each contract year. In addition to the minimum 103,200 hours, Accenture was instructed to propose additional hours for the other services described in the 'Phase/Description' column on the L1 Pricing Sheet, which did not include such ancillary services as help desk, training, and security. Accenture was also told not to assume that the 103,200 hour minimum included hours for any other services. Accenture was informed that Level I Services were: not help desk; not training; not security; not business continuity or disaster recovery; not project management; nor any of the other line items on the pricing sheet.

Accenture acknowledged its understanding that the 103,200 hours were a minimum for § 3.4.16 only and that Accenture could propose more hours depending on its technical proposal and any efficiencies it intended to accomplish over the term of the contract.

During this conference call the Department also discussed Accenture's Basis of Estimate (BOE) which had been submitted with the original pricing proposal. Specifically, the Department advised Accenture that, based upon the previous discussions regarding the minimum hours required for § 3.4.16 Baseline and Level I Services, Accenture should reconsider Operations - Level I services assumption, which states:

Base Level I Service Hours are 103,200 plus Production Support, Security, Requirements Definition, Long Range Planning, Training, Level II Support, Services and Removal of GRNDS. We assume all other functions requested within the RFP are included in the base hours. It is assumed that these

support hours include all necessary Subject Matter Expert requirements and Project Management.

The Department made it clear during this call that it expected the Appellant to propose at least 103,200 hours in line item 3.4.16 Baseline and Level I Support Services on the Pricing Sheet for every year of the contract. Although the Department left it up to the Appellant to decide how to place technical efficiencies in its pricing sheet, the Appellant agreed that it understood it was not to assume that all other services were included in the 103,200 hours:

DHR: I think the purpose of the call is to make sure that you completely understand what's being requested in the pricing?

Ms. Hielscher: Yes, I agree.

DHR: Okay. Moving on, the second question that we have is -

Ms. Hielscher: I'm sorry. This is Cindy. So let me just ask you the question maybe another way. Are we required to have 103,000 hours for every year for baseline? I mean, is that a requirement of DHR? Or, if we are able to factor in efficiencies based on prior - past experiences in other places, is it okay to go below those hours?

DHR: Based on our - we provided the best information that we could in the RFP, and on page 43 of the RFP we have a table that shows the most recent hours for baseline operations. And that's just keeping the lights on. Those are just work requests under 500 hours. That's just keeping the lights on. And we expected at least 103,200 hours. That's a minimum. You could

bid more. You could propose more based on the scope of what you saw in the RFP. It's really up to you guys. But that line item alone on your pricing sheet, the Department expects at least 103,200 hours in that item.

Ms. Hielscher: And would that be for all five years of the contract?

DHR: For each year. Does that make sense? 103,000 hours per year, because that's --

Ms. Hielscher: 103,000--yes, I - so I understand that - so what I hear is that we shouldn't assume efficiencies in that 103,000 hours past the first year.

DHR: I think that is up to you in your solution.

Ms. Hielscher: Okay.

DHR: However, what you can't assume is that the 103,200 hours contains all other services.

Ms. Hielscher: I agree. And that we do understand.

After the conference calls with all of the Offerors were concluded, it was decided that a second BAFO from the Offerors was advisable and a Second BAFO was requested from the Offerors by the Department.

The Department also issued Amendment No. 7 on November 5, 2008. Amendment No. 7 provides that:

This amendment is being issued to amend and clarify certain information in the above named RFP and RFP Appendix L (Pricing Proposal). All information contained herein is binding on all Offerors who respond to this RFP.

Specific parts of the RFP have been amended...

1. Revised Pricing Proposal

1. The Offeror shall propose a firm fixed price for each applicable service on an annual basis.

The Offeror shall include a breakdown of hours for each item on the pricing sheet, for each contract year.

2. All costs associated with the Transition In should be defined in the column entitled "Transition (6 Months)" in the cell corresponding to Section 3.4.9 - Transition In. No costs should be amortized across the base period of the contract or otherwise absorbed in other areas of the pricing proposal. Joint Exhibit 1, RFP, Amendment No.7. (Emphasis in original)

Amendment No. 7, among other matters, revised the L1 and L2 Pricing Sheets to provide that:

Revised Pricing Proposal

1. The Offeror shall include a breakdown of hours for each line item on the pricing sheet, for each contract year.

2. The Offeror shall provide a Rate Sheet (Attachment L2-Rate Sheet) that lists the rate for each labor category proposed by the Offeror for each base year and option year of the contract. Level II Support Services is fixed-price on a task-order basis. The Contractor's statement of work will not be evaluated based on labor category and individual labor rate. The average hourly rate will be used to price the task order work.

7. 3.2.1.1 - Baseline Operations and Level I Support Services

| Hours by Year | | | | |
|--------------------------------|----------------------|----------------------|----------------------|-----------------------|
| Level I | Sept 01 - Aug 02 | Sept 02 - Aug 03 | Sept 03 - Aug 04 | July 06 - Jun 07 |
| Mainframe and MD CHESSIE | 78,476 | 97,622 | 84,372 | 88,200 |
| Cottage Applications | No data available | No data available | 15,000 | 15,000 |
| <u>Totals</u> | <u>78,476</u> | <u>97,622</u> | <u>99,372</u> | <u>103,200</u> |

The Department anticipates the Offerors to propose a *minimum of 103,200 hours per contract year in Baseline Operations and Level I Support Services alone.* It is up to the Offerors to determine the appropriate number of hours needed in *access (sic) of the 103,200 annual minimum hours,* considering the Offeror's overall technical proposal.

All other services described in other sections of the RFP will be assigned hours *in addition to* the minimum of 103,200 hours allocated to Baseline Operations and Level I Support Services.

One of the important and clear reasons for the second BAFO and for Amendment No. 7 was to insure that all of the Offerors knew and understood that the 103,200 hours minimum was now a requirement of the RFP.

On November 5, 2008, the Department asked Accenture for additional information and clarifications, including requesting that Accenture address the issues noted in the BOE and asking Accenture to explain why it did not have prices for many of the deliverables identified as §§ 3.4.1.G, 3.4.1.1, and 3.4.1.J of the pricing sheet.

On November 5, 2008, Accenture notified the Procurement Officer, Ms. Sandra Johnson, that it had concerns about its competitive advantage based upon the new requirement to include labor rates for each contract year for Level II Services as per Amendment No. 7, item 2, rather than providing the maximum hourly rate. As Ms. Johnson explained it, the Department was interested in the amount that the contractor would charge the Department for Level II Services throughout the term of the contract to compare against the task orders later.

This change concerned Accenture and, in an e-mail communication to the Procurement Officer on November 6, 2008, Accenture requested an opportunity for further discussions about the instructions in Amendment No. 7 emphasizing that they believed "the instructions have taken away a key competitive advantage for Accenture in a fixed price contract and will not result in the best value for the State." Accenture also requested further clarification of the instructions to Amendment No. 7, which if followed, would result in significant changes to its financial proposal.

Notwithstanding these concerns, Accenture acknowledged the Department's desire to have a minimum of 103,200 hours for baseline services.

On November 7, 2008, in response to Accenture's questions, the Procurement Officer issued Clarifications to all Offerors addressing Accenture's concerns. The Department reiterated its requirement of the 103,200 minimum hours needed for Baseline Maintenance and Level I Support Services and, further stated that, "in addition to the minimum hours, additional annual hours for the specific requirements should be priced separately."

The Department stated in the Clarifications issued on November 7, 2008 that:

2. How are we to show year over year efficiencies for evaluation purposes? An example of efficiency would be that we reduce defect rates by XX% over time to reduce the time spent working on defects and potentially allow more times towards other Level I work.

Year over year gains in productivity or overall efficiencies should be described in detail in your Technical Proposal. Any discussion regarding the percentage of work expected to decrease over time or expected volume of defects anticipated to diminish as a result of the improved productivity should also be outlined in your Technical Proposal. The gains in productivity or overall efficiencies will be reflected in the hours needed over and above the 103,200 hour minimum.

4. We understand DHR's desire to have a minimum of 103,200 hours dedicated to baseline operations and Level I support services. We are, however, unclear as to how these hours would be shown on the amended application maintenance pricing sheet... Does DHR expect to see the hours associated with testing activities for Level I Baseline Maintenance fixes in category 3.4.16 Baseline Maintenance and Level I Support Services or in 3.4.18 Software Testing in the Pricing Sheet? In other words, does DHR expect to see 103,200 hours in the 3.4.16 Baseline Maintenance and Level I Support Services line of the Pricing Sheet or is it anticipating some of those hours to be in Phase/Description categories with overlapping categories?

The Offeror shall propose a minimum of 103,200 hours in 3.4.16 - Baseline Maintenance and Level I Support Services for each contract year and each option period.

There is some small amount of overlap between Sections 3.4.15, 3.4.16, and 3.4.18. The differences were clarified in the questions posted on July 3, 2008 (specifically, 8, 11, 25, 41, 47, and 75) and the questions posted and further clarified on July 7, 2008 (110, and as clarified, 104). Thus, in addition to the minimum hours, additional annual hours for the specific requirements should be priced separately. *Joint Exhibit 1, November 7, 2008 Clarifications.*

Significantly for purposes of these Motions, and for this decision in general, there was no other request from Accenture for clarification or further explanation of Amendment No. 7 after Accenture's receipt of these noted clarifications.

During her testimony, Ms. Hielscher - who by Accenture's own admission is an "industry expert" who "has worked with government clients for twenty-four years" and "has delivered applications maintenance, development enhancement projects in human resources" - testified that she read and understood Amendment No. 7 to require a breakdown of hours for each item.

Ms. Hielscher also testified that after the issuance of Amendment No. 7, the Department's request for 103,200 hours for Section 3.4.16 Baseline Operations and Level 1 Support did not change.

Importantly, Appellant did not submit any protest regarding anything involved within this procurement process

prior to the submission of its second BAFO or before the opening of that second BAFO.

The Department timely received the Appellant's second BAFO, Pricing Clarifications, and another Basis of Estimate on November 14, 2008.

In the Appellant's BOE "Financial Assumptions", it took exception to Amendment No. 7 by stating that its Proposal was based upon the assumption that:

"Base Level I Service hours are 103,200 plus production Support, Security, Requirements Definitions, Long Range Planning, Training, Level II Support Services and Removal of GRNDS. We assume all other functions requested with the RFP are included in the base hours. It is assumed that these support hours include all necessary Subject Matter Expert requirements and Project Management."

The Appellant priced the minimum 103,200 hours for §3.4.16 Baseline and Level I Services for contract years one and two, and provided pricing and hours for ten other services for contract years one and two. For the remaining years the Appellant failed to include the additional hours over and above the 103,200 minimum as required by Amendment No. 7. The Appellant lumped together all other required Level I Service hours into §3.4.16 Baseline Services.

There is no doubt that Appellant failed to complete the Pricing Sheets in compliance with the specifications of the RFP and Amendment No. 7 in its second BAFO. It is clear that in the second BAFO for contract years three through nine, the Appellant did not follow the requirements of the RFP and Amendment No. 7. Rather than placing the additional hours in the phase/description service areas, Appellant left those areas blank.

In its second BAFO, despite the Department's instructions to Accenture to modify the assumption relating to the baseline services and despite the new pricing instructions in Amendment No. 7, Accenture submitted in this second BAFO the very same assumption, without any changes or modifications and priced its proposal the same as it had done previously. In accordance with this assumption, Accenture included the minimum 103,200 hours for § 3.4.16 Baseline and Level I Services for contract years one and two. However, also included in the § 3.4.16 Baseline and Level I Services were prices and hours for ten other services, arbitrarily selected by Accenture, for contract years one and two. For the remaining years, Accenture failed to include the additional hours over and above the 103,200 minimum as required by Amendment No. 7. Instead, Accenture decided to lump together all of the other required Level I Service hours into the § 3.4.16 Baseline Services.

Why would Accenture take these actions? According to evidence, including the testimony of Ms. Hielscher, the new pricing proposal requested by the Department took away Accenture's perceived competitive advantage. Accenture decided to propose a fixed price based on responding to the second BAFO request not as the Department instructed, but as Accenture believed would present Accenture's proposal in the best possible light - and Accenture took the risk associated therewith. For Accenture, this decision, to submit the second BAFO not as the Department requested but as they chose to complete it, was a catastrophic mistake.

Accenture apparently decided that it could be more efficient than the 103,200 hours required over the life of the contract for baseline services, and, for that reason,

decided not to comply with the minimum requirements as requested. Accenture showed its efficiencies by combining other services into the § 3.4.16 Baseline Operations and Level I Support, after being told explicitly not to do so. This was the only way, according to Accenture, to show the efficiencies Accenture intended to obtain.

ACS, on the other hand, asserted that it too would obtain certain efficiencies in the baseline services over the life of the contract. In order to show this, ACS proposed the minimum hours required for § 3.4.16 (plus more) and incrementally reduced the hours necessary for these services. Unlike Accenture, however, ACS did not fall below the minimum requirements. ACS, rather, explained in its assumptions how the efficiencies would be obtained using the minimum State requirements.

After receipt of the second BAFOs, the Evaluation Committee reviewed all of the BAFOs submitted. ACS's and Northrop's proposals were deemed reasonably susceptible for being selected for award and were subsequently evaluated and ranked. Accenture's second BAFO was found to be not reasonably susceptible for being selected for award and Accenture was, therefore, eliminated from further review.

The Committee attempted to evaluate the proposal, the hours, and the prices provided by Accenture, but was unable to do so because of the limited information provided, and the fact that so many of the services were combined into the baseline operations in direct violation of the RFP requirements. As a result, the Department was unable to determine how the prices were calculated.

For example, in the second BAFO of Accenture approximately two-thirds of Accenture's L1 pricing proposal contained 'dashes' instead of prices and hours. Accenture

subsequently explained in testimony that the 'dashes' did not signify that the blocks were ignored, but, rather, no pricing or hours was provided.

The Procurement Officer testified that the Department asked Offerors to complete each and every cell block in order to ensure that Offerors understood the work involved; could distinguish between the Level I and Level II service hours; and, to determine what the Offerors were charging for each service and how the Offerors arrived at a given price.

Clearly, Accenture submitted a second BAFO that the Procurement Officer and Evaluation Committee members simply could not reasonably evaluate. There was no way for the evaluators to evaluate Accenture's financial proposal because Accenture chose not to complete the financial proposal as requested and required.

On November 14, 2008, the ranking of the financial proposals of the remaining two Offerors was completed. The Evaluation Committee determined ACS and Northrop Grumman were susceptible of award and able to be evaluated and thereafter recommended unanimously that ACS be awarded the Contract.

The Evaluation Committee cited in its Evaluation Summary and Recommendation for Award ACS's strengths and identified the one deficiency of ACS regarding the failure to identify a replacement within the proposal deadline. The Procurement Officer agreed with and accepted the Evaluation Committee's Recommendation for Award of the Contract to ACS. The Procurement Officer presented her recommendation for award and the elimination of Accenture from further consideration to the Secretary of the Department on December 5, 2008. The Evaluation Summary and Recommendation

for Award was approved by the Secretary of the Department on December 5, 2008.

On December 8, Accenture was notified that, pursuant to § 2.4 of the RFP, its proposal was deemed not reasonably susceptible of being selected for award.

Accenture requested a debriefing be held and a debriefing was held on December 11, 2008. On December 15, 2008, Accenture filed its first Protest.

In this December 15, 2008 Protest, Accenture alleged that the Department: did not tell Accenture that some of its assumptions filed with Accenture's initial BAFO were objectionable; should not have deemed Accenture's Proposal not reasonably susceptible for being selected for award because Accenture failed to comply with the requirements of Amendment No. 7; did not follow its own Financial Evaluation Criteria; and was biased against Accenture in the evaluation of Accenture's Proposal. Accenture requested that it be permitted to cure its Proposal for evaluation purposes and that the Department refrain from recommending award to any contractor other than Accenture pending the resolution of the Protest.

The Department sustained the Appellant's first basis of protest on January 8, 2009 and denied bases two, three, and four. The Department declined to re-evaluate Appellant's proposal and declined to recommend that the contract be awarded to the Appellant.

The Appellant then filed a Notice of Appeal of Bid Protest with the Board on January 22, 2009, alleging:

1. Accenture's alleged failure to properly insert unevaluated hours in certain cells in the BAFO #2 Financial Spreadsheet is not grounds for rejection;

2. The Department misapplied the Financial Criteria set forth in the RFP §5.5; and
3. The Department's statements to Accenture at the December 11, 2008 meeting raise additional concerns regarding the Department's evaluation of Accenture's technical proposal. Specifically, the mention of a 'weakness' in Accenture's technical proposal relating to a lack of understanding of current DHR processes and systems made during its December 11, 2008 meeting with Accenture shows bias toward the Department's incumbent vendor(s) and is an unfair comparative ranking of the technical proposals among the offerors.

After certain documents were provided to Appellant pursuant to a request Appellant filed a Second Protest on April 30, 2009. The Second Protest was based on eight (8) grounds:

- 1) There were latent ambiguities in the RFP pricing requirements;
- 2) Email communications provided further evidence of bias;
- 3) respondent improperly rejected Accenture's proposal for a reason *other than* the reason that was provided to Accenture;
- 4) Respondent wrongfully rationalized its improper decision to deem Accenture's offer as not reasonably susceptible of being selected for award;
- 5) Respondent improperly modified technical scores of offerors after financial scores were opened;
- 6) Respondent arbitrarily ranked ACS as technically higher than Accenture in the "key personnel" category even

- though ACS submitted its proposal with missing key personnel;
- 7) There were improper communications between ACS and Respondent; and,
 - 8) There was a conflict of interest with regard to Respondent's CIO.

On June 22, 2009, Respondent denied Appellant's Second Protest in its entirety. On July 1, 2009, Appellant filed its second notice of Appeal with the Board. Accenture repeated seven of the eight grounds from its Protest as the basis for its second Appeal, withdrawing the ground regarding improper communications between ACS and Respondent (Ground 7 from the second Protest).

ACS argues that Grounds One and Two of Appellant's first appeal should have been filed as a protest prior to the closing date for receipt of the second BAFO. If Appellant wanted to protest the alleged improprieties associated with the evaluation criteria requirements of the RFP including the use of hours in the evaluation, it should have done so prior to the closing date for receipt of the Second BAFO. Appellant was repeatedly advised that hours would be considered in the evaluation process and were requested to provide hours prior to the submissions of the Second BAFO. If Appellant believed consideration of hours and requests for hours did not comport with RFP §5.5, it should have protested then. Appellant failed to file such a protest prior to the November 14, 2008, the closing date of the Second BAFO. Grounds 1 and 2 of Appellant's Appeal must therefore be dismissed, ACS concludes, because the Board lacks jurisdiction to hear such grounds.

ACS raises valid points concerning the nature of these two appeal grounds. The facts are clear that Accenture was repeatedly told that hours would be considered in providing

an evaluation of proposals and that Accenture was repeatedly asked to provide certain hours prior to the submission of Accenture's second BAFO. The Department could not have been more clear to Accenture or gone to greater lengths to insure that Accenture understood the requirements of the second BAFO and what was sought by the Department in that second BAFO in order to enable the Department to evaluate the offerors financial proposals fairly and equally.

The Board, however, recognizes that Accenture did not know that its second BAFO had been classified as not reasonably susceptible of being selected for award until informed by the Department on December 8, 2008. Specifically, Accenture was notified on that date that:

In light of Accenture LLP's failure to comply with the requirements of Section 2.4 (Acceptance of Terms and Conditions) of the RFP, your financial proposal and 3.0 Basis of Estimate, has been deemed to be not reasonably susceptible of being selected for award...

Accenture asked to be notified of the reasons for this finding and on December 9, 2008, the Department informed Accenture that its proposal was determined to be not susceptible for award because it "proposed several exceptions/assumptions in the Basis of Estimate that were not acceptable to DHR" and it, "failed to provide hours for each category as required in Amendment No. 7."

Accenture promptly requested a debriefing, which was held on December 11, 2008. Accenture's first Protest followed on December 15, 2008.

In the interests of fairness, it is not reasonable to hold Accenture responsible for knowing the reasons for the rejection of its second BAFO and the finding that its financial proposal had been found to be not reasonably susceptible of being selected for award until it was informed of those findings by the Department. The Department so informed Accenture of those findings on December 8, 2008 and elaborated on those findings on December 9, 2008 as well as at the debriefing on December 11, 2008.

Accenture filed its first Protest on December 15, 2008. By whichever date taken as controlling - December 8 or 9 or 11 - Accenture still filed its Protest in a timely fashion. Grounds one and two from Accenture's first Appeal were, therefore, timely filed with the Department and are not dismissed by the Board as having been untimely filed.

The same cannot be said for Ground 1 of Appellant's second Protest (and Appeal).

Ground 1 of Appellant's Second Appeal relies on the assertion that there were "latent ambiguities in the solicitation pricing requirements". The record does not support a latent ambiguity but was instead a calculated business risk by Appellant that failed.

A latent ambiguity is an ambiguity that is not apparent from a review. See, Richard F. Kline, Inc., MSBCA 2092, 5 MSBCA ¶479 (2000). Where an ambiguity is determined to have been latent, the Appellant is entitled to relief as long as its interpretation of the latent ambiguity was reasonable. See, Cherry Hill Construction, Inc., MSBCA 2025; 2048, 5 MSBCA ¶468 (1999). If there is evidence that a reasonable and prudent contractor party would have interpreted the latent ambiguity differently than the

appellant , the appellant is not entitled to relief. See, Richard F. Kline, Inc., supra. For the Appellant to succeed in showing a latent ambiguity, it must to show that its particular interpretation was, reasonable and susceptible to the understanding it reached. See, Substation Testing Co., MSBCA 1464, 3 MSBCA ¶ 225 (1989).

Even without the Motion to Dismiss this appeal ground, it is clear that the Appellant has not met its burden in establishing a latent ambiguity in the solicitation pricing requirements herein.

As to the Motion to Dismiss, the record is clear and the facts are overwhelming that by November 14, 2008 - the closing date for the Second BAFO - the Department had made it clear to all offerors that it expected, and required, that hours would be utilized in connection with the evaluation process. Accenture was informed of this fact repeatedly during the lead-up to the submission of the second BAFO.

Accenture, and all other offerors for that matter, were on notice of that fact. For example, RFP §5.5 stated:

The separate price volume of each qualifying proposal will be distributed to the Evaluation Committee for all proposals deemed susceptible for award following the completion of the technical evaluation. The Evaluation Committee will review the total price of each proposal in order to establish a financial ranking of the proposals, from lowest to highest price. The entire contract price including options years and transition costs will be used for purposes of the evaluation. The total contract price can be found in Appendix L, Pricing Sheets, and is identified as the Total Proposed Price (five (5) years and six (6) months).

Also, RFP §4.4 required:

The Financial Proposal shall contain all price information for all services and products proposed as provided on Attachment L...

The financial analysis includes the price to transition -in/out and projections for ongoing costs (hardware, software, maintenance, people, and facilities) required to satisfy DHR's capacity needs as outlined in this RFP.

The Offeror shall follow these instructions in completing the pricing sheets:

1. The Offeror will provide an annual fixed price per contract year for all services described in Attachment L.

2. The Offeror must complete the pricing matrices specified for a base five-year, six-month Contract term with the options.

...6. In addition to completing the Pricing Sheet.. (Attachment L)....

Amendment No. 7 also was relevant, stating:

This amendment is being issued to amend and clarify certain information in the above named RFP and RFP Appendix L (Pricing Proposal). All information contained herein is binding on all Offerors who respond to this RFP. Specific parts of the RFP have been amended...

1. Revised Pricing Proposal

1. The Offeror shall propose a firm fixed price for each applicable service on an annual basis.

The Offeror shall include a breakdown of hours for each item

- on the pricing sheet, for each contract year.
2. All costs associated with the Transition In should be defined in the column entitled "Transition (6 Months)" in the cell corresponding to Section 3.4.9 - Transition In. No costs should be amortized across the base period of the contract or otherwise absorbed in other areas of the pricing proposal. Joint Exhibit 1, RFP, Amendment No.7. (Emphasis in original)

The Instructions to Amendment No. 7 of RFP stated:

- 1...[t]he Offeror shall include a breakdown of hours for each line item on the pricing sheet, for each contract year.
2. The Offeror should complete the pricing matrices specified for a base five-year, six-month contract term with two, two-year option terms...
- 13...The hours listed on the rate sheet are for evaluation purposes...

Instructions to Amendment No. 6 of the RFP stated:

2. The Offeror should complete the pricing matrices specified for a base five-year, six-month contract term with two, two-year option terms...
- 12...[t]he hours listed on the rate sheet are for evaluation purposes.

Instructions to Amendment No. 5 of the RFP stated:

2. The Offeror should complete the pricing matrices specified for a base five-year, six-month contract term with two, two-year option terms...
- 12...[t]he hours listed on the rate sheet are for evaluation purposes.

Instructions to Amendment No. 4 repeated that requirement:

2. The Offeror should complete the pricing matrices specified for a base five-year, six-month contract term with two, two-year option terms...
12...[t]he hours listed on the rate sheet are for evaluation purposes.

The Appellant's own employee, Ms. Hielscher, clearly indicated that Accenture was familiar with these documents and provisions:

Q: Is it fair to say that you read all of the questions that may have come from the procurement officer to Accenture related to your submissions?

A: I have read all of the questions.

Q: Is it fair to say that you would have read all of the requests for BAFOs, either first or second, as it relates to this RFP?

A: Yes.

Q: Is it fair to say that you believe that you understood what was being requested by the RFP amendment questions and answers or BAFOs?

A: Yes.

Q: And you indicated in your testimony that you never saw anything that required you to fill out every cell, isn't that correct?

A: That is true.

Q: But you've indicated that you read all of the provisions of the RFP, the amendment questions and answers and BAFOs, correct?

A: Yes. *Hearing Transcript V, pp. 55-56.*

...

Q: ...Did you ever request the procurement officer to modify the L-1 Pricing Sheet with Amendment Number 7

because you just didn't want to fill in cells to fill in cells.

...

A: No.

Q: Did you request it?

A: No. *Hearing Transcript V, pp. 56-57.*

...

Q: You had indicated previously to my questions that you had read all of the amendments and any accompanying instructions issued with the RFP.

A: That's correct. *Hearing Transcript V, p. 78.*

Also contradicting Appellant's assertions is other testimony elicited from Ms. Hielscher. Ms. Hielscher testified that hours were important and required:

[Board Member Collins]

Q: Did you speculate in your mind what the reason might be?

A: Well, I speculated in my mind that they probably needed [hours] for some kind of comparison or they're looking to see what your staffing level might be. I didn't really know for sure, and it's a lot of data on hours so it was confusing at this point.

Q: Did you think it might be important though?

A: I would assume if they asked for it, it was important, yeah. *Hearing Transcript IV, pp. 29-30.*

Ms. Hielscher further testified that the Department, "very specifically said 103,200 hours goes into 3.4.16," when it answered Appellant's questions to Amendment No. 7. *Hearing Transcript IV, p. 50.* Yet, despite this specificity, she admitted "I technically didn't put an hour in every box, but I know they were looking for breakouts of hours." *Id.* She further testified that she fully understood

the need to obey instructions, conceding in her testimony "You have to fill out the spreadsheet the way - yeah, you should fill it out based on how you're directed to fill it out." *Hearing Transcript IV, p. 142.* She also understood that the Department was looking for visibility when it sought information:

Q: And did you hear from the Department that they wanted visibility into the services provided?

A: We heard through the governance, so the project management, the reporting and the tracking, that DHR wants to understand what is going on with the provided services, so they want up-to-date status, want to see what is -- what services are being provided and how they're being provided.

Q: So would it be fair to say for them to know what services are being provided and to have visibility they should have some kind of understanding of the hours and pricing associated with the services that are being provided based on what you just said?

A: Yeah. I think that's fine. *Hearing Transcript V, p. 72.*

There is ample evidence that the two other offerors, ACS and Northrop Grumman, interpreted the instructions and specifications very differently from Appellant. Unlike Appellant, they completed the pricing matrices as the Department instructed, intended, and repeatedly requested.

Accenture should have known months before April 30, 2009 of the existence of this appeal ground. The RFP documents involved, the notification to Accenture of the Department finding that its second BAFO was not reasonably susceptible of award, and the debriefing were concluded by December 11, 2008. There is no basis for permitting the

filing of this protest ground four months later. Even if a latent ambiguity existed, and we emphasize again no such finding under this record, it should have been discovered by Appellant months before it was protested.

The Board finds that the Appellant was given multiple notices, instructions and clarifications that hours were to be used for evaluation purposes and there is overwhelming evidence that Appellant understood that fact and deliberately chose to disregard that requirement in preparing its second BAFO.

There were no latent ambiguities with the RFP for purposes of this protest/appeal ground and even if there were, Accenture should have discovered them months before April 30, 2009. Appeal Ground One (1) of the Second Appeal is, therefore, dismissed.

Ground Four (4) of the Second Appeal asserts that the Respondent wrongfully rationalized its improper decision to deem Accenture's offer as not reasonably susceptible of being selected for award. More specifically, Accenture claims that the Department misrepresented its reason for rejecting Accenture's financial proposal.

ACS may or may not have a point concerning the timeliness of this amorphous appeal ground, which actually, when analyzed, alleges both illegality and bias. Since this appeal ground contains such underlying allegations, allegations which were timely appealed by Appellant within its first Appeal, the Board will consider this ground on the merits and will not dismiss Second Appeal Ground Four as having been untimely filed.

ACS's Motion to Dismiss Appeal Ground Four of the Second Appeal is, therefore, denied.

The Department has also moved to dismiss Accenture's Appeals as untimely. Although the Department notes in its Post-Hearing Brief that it "adopts and incorporates by Reference the Motion to Dismiss filed by the Interested Party, ACS," the Brief of the Department seems to be a general Motion to Dismiss both Appeals based on untimely filing by Appellant.

The Board has already ruled on a Motion to Dismiss Appeal Grounds 1 and 2 from Appellant's First Appeal and Appeal Grounds 1 and 4 from Appellant's Second Appeal. The Board reiterates those rulings for purposes of Respondent's Motion to Dismiss. As to any other appeal grounds that may be relevant to Respondent's Motion, the Board hereby rules that any Motion to Dismiss the other Appeal Grounds herein is denied.

Appellant's Motion(s) for Summary Judgment/Summary Disposition are found to be merit less and are denied.

DECISION-MERITS

The Board will now move on to the remaining appeal grounds. The Board first notes that both the facts and the decision as presented to this point provide ample, repeated examples of why these Appeals are without merit and must be dismissed. As we have explained at length, it was not unreasonable, arbitrary, capricious, or violative of law or regulation for the procurement officials involved herein to conclude that Accenture's second BAFO was and is not reasonably susceptible of being selected for award of this contract. Far from it. Nor is there any evidence of any bias during this Procurement - none whatsoever.

The Board will, therefore, discuss the remaining appeal grounds in light of the substantial discussion above.

As we have noted on numerous occasions, the contest of a procurement award is a serious matter and an Appellant has the burden of proving that a Procurement Officer's award of a contract was contrary to law or regulation or otherwise unreasonable, arbitrary capricious or an abuse of discretion. *E.g.*, Yellow Transportation, MSBCA 2374, 2380, 2382 and 2389, ___ MSBCA ¶___ (2004); Delmarva Community Services, Inc., MSBCA 2303, 5 MSBCA ¶523 (2002).

An Appellant's 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. *E.g.*, ACS State Healthcare, LLC, MSBCA 2474, ___ MSBCA ¶___ (2005); Delmarva Community Services, *supra*. The Board does not second guess an evaluation of a proposal, but will determine whether or not a reasonable basis exists for the conclusions reached. *E.g.*, ACS State Healthcare, LLC, *supra*; Baltimore Industrial Medical Center, MSBCA 1815, 4 MSBCA ¶368 (1994) at pp.5-6. Bias must be demonstrated to exist, when alleged, by substantive hard facts or evidence. *E.g.*, Stronghold Security, LLC, MSBCA 2499, ___ MSBCA ¶___ (2005); Kennedy Personnel Services, MSBCA 2415, ___ MSBCA ¶___ (2004) at pp. 9-10.

This Board has expressed well-founded reluctance to substitute its judgment for that of an agency, in part because it is the procuring agency that will have to "live with the results" of its decision. *E.g.*, Stronghold Security, LLC, *supra*; Klein's of Aberdeen, MSBCA 1773, 4

MSBCA ¶354 (1994) at p. 7. 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 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. *E.g.*, ACS State Healthcare, LLC, supra; United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 & 1409, 3 MSBCA ¶201 (1989) at pp.58-59. Such discretion extends to findings concerning whether or not an offeror is reasonably susceptible of being awarded a contract or is not reasonably susceptible of being awarded a contract.

The record in this case contains numerous examples of why Respondent's decision to reject Appellant's second BAFO submission as not reasonably susceptible of award was not contrary to law or regulation or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

In fact, as has been noted, there is a strong argument to be made that had Respondent accepted Appellant's second BAFO submission as reasonably susceptible of award and awarded the contract to Appellant, the Interested Party herein, ACS, might well have had grounds for a successful protest appeal itself against Accenture and the Department.

The record also has produced no evidence of bias on the part of anyone involved with the evaluation of this procurement and the selection of ACS as awardee. Hard facts and evidence suggest that, on the contrary, Respondent and its representatives treated all offerors fairly and equally, including Appellant Accenture.

What the record shows is that Accenture chose to submit a BAFO which was not responsive to the requirements

of the Department and not responsive to clear requests from the Department for certain information. Evidence indicates that this was a conscious business decision on the part of Appellant to preserve a perceived "competitive advantage". That competitive advantage was, apparently, achieved by Appellant submitting a proposal in the second BAFO round on its terms, not the Department's. Appellant's proposal was substantially less in dollar terms than the other two offerors, which is hardly surprising considering that Appellant submitted the proposal on its terms, not on the terms requested and required by the Department of all offerors. Whatever Accenture's proposal is, it is not responsive to the Department's second BAFO request.

As we have previously discussed, the record in this case is replete with illustrations of why the decision to reject Appellant's second BAFO submission as not reasonably susceptible of award was proper and was made without bias. The Board will simply note a few further examples in support of those findings.

As previously noted, there came a point in this procurement when the Evaluation Committee determined that Offerors lacked a fundamental understanding of the pricing; determined that none of the Offerors proposed the minimum 103,200 hours for Baseline Operations and Level I Support; and, concluded that final ranking could not be completed until additional discussions were held with the Offerors to clarify their understanding of the pricing.

Those discussions were held with all of the offerors, including Appellant. All offerors were given the same information regarding how to fill out the Price Proposal Sheet. All offerors were told to complete each block in the

attachment L1 Price Proposal sheet. ACS and Northrop complied; Accenture did not.

Procurement Officer Sandra Johnson testified at length as to what the Department wanted from offerors and what the Department received from Accenture:

Q: ... Can you tell me what it is about that pricing proposal that makes it not reasonable susceptible of award?

A: Okay. Because in -- we asked that they fill out -- we needed to see hours. We wanted to know what they were going to charge us... What we wanted to ensure was that none of the offerors thought that they were going to go into using those Level 2 services to get a higher rate because they could only be done under task orders as a modification to the contract. *Hearing Transcript I, pp. 109-110.*

...

A: We had -- especially with Accenture we had a two hour, almost a two hour, conference call with them to ensure that they understood that this was not going to roll over into a task -- that they understood that what we were looking for and also what we were looking for was that in the baseline maintenance and Level 1 support services that they understood that we were looking for at a minimum 103,200 hours for each year of the contract, at a minimum. They could bid more hours if they wanted to but no less than 103,200 hours and there was an in depth conversation that took place. We told them what that 103,200 would not include... [Accenture's] 103,200 hours that [Accenture] requested for baseline services but those hours also include some other services, that we told them it should not. ... when we got their second BAFO and I looked at it I began to wonder if they even understood the scope of the services that we were

requesting or if they could perform -- if they intended to perform those services or how they intended to perform the services because the majority of the pricing proposal was blank. *Hearing Transcript I, pp. 111-112.*

...

Additionally:

A: ... we told them on the phone that that's what we expected was baseline operation hours only was 103,200 hours. I don't think that could have been any clearer. She appeared to understand it.

Q: Well, this may be the -- not the first time in the history of procurement in Maryland that there's been a miscommunication then.

A: Well, how is that a miscommunication if you're saying -- it actually says the department expected at least 103,200 hours proposed in baseline operations and Level 1 support services alone? It was also not expected necessarily that the exact number would be proposed in the baseline operations and Level 1 support services. That number represented a minimum number of hours to be considered for baseline operations and Level 1 support services, and that was last year's estimate. The department expected that all the additional requirements and services, as outlined in the RFP and described in the pricing sheets, would be priced separately from the hours and baseline operations and Level 1 support services, that minimum number again being 103,200 hours. *Hearing Transcript I, pp.199-200.*

Ms. Hielscher's testimony confirms Ms. Johnson's testimony. During the November 3, 2008, conference call Accenture was informed that, pursuant to § 3.2.1.1 of the RFP, a minimum of 103,200 hours had to be proposed for line

item 3.4.16 Baseline and Level I Support Services on the Pricing Sheet for each contract year. In addition to the minimum 103,200 hours, Accenture was instructed to propose additional hours for the other services described in the 'Phase/Description' column on the L1 Pricing Sheet, which did not include such ancillary services as help desk, training, and security. Accenture was also told not to assume that the 103,200 hour minimum included hours for any other services. Accenture was informed that Level I Services were not: help desk; training; security; business continuity or disaster recovery; project management; and, all of the other line items on the pricing sheet. Accenture acknowledged its understanding that the 103,200 hours were a minimum for § 3.4.16 only and that Accenture could propose more hours depending on its technical proposal and any efficiencies it intended to accomplish over the term of the contract.

During this conference call the Department also discussed Accenture's BOE which had been submitted with the original pricing proposal. Specifically, the Department advised Accenture that, based upon the previous discussions regarding the minimum hours required for § 3.4.16 Baseline and Level I Services, Accenture should reconsider Operations - Level I services assumption, which states:

Base Level I Service Hours are 103,200 plus Production Support, Security, Requirements Definition, Long Range Planning, Training, Level II Support, Services and Removal of GRNDS. We assume all other functions requested within the RFP are included in the base hours. It is assumed that these support hours include all necessary Subject Matter Expert requirements and Project Management.

Although the Department left it up to the Appellant to decide how to place technical efficiencies in its pricing sheet, the Appellant stated during this call that it agreed that it understood it was not to assume that all other services were included in the 103,200 hours. The transcript is worth repeating:

DHR: I think the purpose of the call is to make sure that you completely understand what's being requested in the pricing?

Ms. Hielscher: Yes, I agree.

DHR: Okay. Moving on, the second question that we have is -

Ms. Hielscher: I'm sorry. This is Cindy. So let me just ask you the question maybe another way. Are we required to have 103,000 hours for every year for baseline? I mean, is that a requirement of DHR? Or, if we are able to factor in efficiencies based on prior - past experiences in other places, is it okay to go below those hours?

DHR: Based on our - we provided the best information that we could in the RFP, and on page 43 of the RFP we have a table that shows the most recent hours for baseline operations. And that's just keeping the lights on. Those are just work requests under 500 hours. That's just keeping the lights on. And we expected at least 103,200 hours. That's a minimum. You could bid more. You could propose more based on the scope of what you saw in the RFP. It's really up to you guys. But that line item alone on your pricing sheet, the Department expects at least 103,200 hours in that item.

Ms. Hielscher: And would that be for all five years of the contract?

DHR: For each year. Does that make sense? 103,000 hours per year, because that's --

Ms. Hielscher: 103,000--yes, I - so I understand that - so what I hear is that we shouldn't assume efficiencies in that 103,000 hours past the first year.

DHR: I think that is up to you in your solution.

Ms. Hielscher: Okay.

DHR: However, what you can't assume is that the 103,200 hours contains all other services.

Ms. Hielscher: I agree. And that we do understand.

Accenture was clearly told what was expected of it but it failed to comply.

Accenture's failure to comply with the requirements of the second BAFO request left the frustrated evaluators wondering if Accenture even understood the nature of the work requested and what was required of it:

Q: ... When you say the price proposal of Accenture, and the absence of hours in connection with Item 3.4.1 to 3.4.8, did you draw an inference that Accenture could or did or did not understand the requirements?

A: That became a question, did they fully understand what was being required of them. *Hearing Transcript II, p. 248.*

Q: ...And you determine if the financial proposal indicates in a nutshell that they understand the work and they can do it for the price they're offering, correct?

A: Correct.

Q: And when you looked and the Evaluation Committee looked at Accenture's price proposal sheet, you and the Evaluation Committee apparently felt there are serious doubts whether Accenture understood the work to be completed, how much it would cost, how many hours it would take.

A: Correct

Q: And for that reason, you were unable to evaluate that proposal to the point where you had to determine it was so not reasonably susceptible -

A: Being selected for award.

Q: For award, correct?

A: Correct. *Hearing Transcript II, pp. 254-255.*

...

A: ...what we got involved into was whether or not they could perform the services for the price that they proposed, and we really couldn't tell because the pricing proposal was not complete...What do we do... We looked at the pricing proposal. It was not completed ... So how can we evaluate it... *Hearing Transcript II, pp. 264-265.*

Appellant's second BAFO was fatally flawed, improperly filled out and incompletely filled out. As a result, the evaluators had no empirical method of determining if Appellant's second BAFO price was legitimate nor of comparing it fairly to the other two BAFOs. Ms. Johnson made those points several times during her testimony, including the following:

Q: Is it your testimony it is impossible to know if this final price

of 74,905,400 has any relation to reality because there are no hours included there?

A: Not only are there no hours, there's only pricing for, what, the transition period. There are no - there is no pricing in here for project work plan all the way down through - there are no pricing for any other years. *Hearing Transcript I, p. 112-113.*

Q: ...it sounds like what you're saying is that this number, this total proposed price of \$74,905,400 that you personally had absolutely no way from evaluating this price proposal to know if that was an accurate number or not.

A: I did not...I had a lot of questions. I mean we didn't have that issue with any of the other Offerors. We didn't spend two hours on the phone on a conference call with any of the other offerors. *Hearing Transcript I, pp. 114-115.*

...
A: ...we could not evaluate their pricing proposal based on the information that we had because it wasn't completed. We didn't - we didn't know if we had enough information to evaluate it.

Q: So the financial proposal was not - if Accenture was not evaluated. ...

A: Yes. *Hearing Transcript II, pp. 390-391.*

Ms. Johnson testified as to how a proposal is, and specifically how the Appellant's Proposal was, ruled not susceptible for award:

...you don't even get to the evaluation of the ranking of that total proposed price if you don't have a compliant proposal to even consider, to even begin to evaluate or rank. And therein lies the problem. They did not submit a

compliant pricing proposal and we gave numerous instructions on how to do it and they just did not do it correctly. *Hearing Transcript I, p. 136.*

As to bias against Appellant, Ms. Johnson testified that Accenture's second BAFO was reviewed extensively in an attempt to evaluate it but, as a result of Accenture's failure to submit a complete, responsive BAFO, the evaluators "were unable to determine much of anything from looking at the price proposal." *Hearing Transcript III, p. 539.*

Furthermore, in response to direct questions regarding possible bias, Ms. Johnson testified under oath that:

Q: Did you personally treat Accenture any differently than the other proposers?

A: No, I didn't... We seemed to spend an inordinate amount of time with Accenture throughout the process.

Q: Are you biased in any way against Accenture receiving this contract?

A: No... I mean, this is my job. I have no reason to feel one way or another about a company. It's my job to put contracts in place and I know no more about Accenture than I know about any of the others... *Hearing Transcript I, p. 116.*

and:

Q: Do you know if any of the evaluators had a bias against Accenture?

A: No. If they did I am not aware.

Q: Do you know if...anybody in the state government on this procurement had any bias against Accenture that you know of?

A: No. *Hearing Transcript I, p. 118.*

There was no bias against Appellant in this procurement. Appellant ignored the requirements of the RFP, ignored what it was told during the November 3, 2008 conference call, and ignored Amendment No. 7 in preparing and submitting its second BAFO. Appellant's representative testified that she recognized that the request for hours by the Department was important. Appellant filed no protest before the submission of its second BAFO on November 14, 2008 regarding any issue.

The determination by the Evaluation Committee, the Procurement Officer and the Department Secretary that Accenture's proposal was and is not reasonably susceptible of award of this contract is clearly not arbitrary, capricious, irrational, or illegal and the determination that ACS's proposal is the most advantageous to the State of Maryland considering both price reasonableness and the evaluation factors set for in the RFP and related documents is not arbitrary, capricious, irrational, or illegal.

Appellant has not met its burden in proving that the Procurement Officer's decision was in any way arbitrary, capricious, irrational or an abuse of discretion.

Appellant argues that in order for the rejection of a proposal to be valid as "not reasonably susceptible of being selected for award," it must be made at the beginning of the procurement process. Appellant relies on COMAR 21.05.03.03(B), which states that "the procurement officer may initially classify proposals as reasonably susceptible of being selected for award; or not reasonably susceptible of being selected for award." Appellant attempts to support its argument that "not reasonably susceptible" is a ruling that can only be made early in the process, and only with respect to technical proposals.

The Board disagrees. Because COMAR 21.05.03.03(B) says the procurement offeror "may initially" classify proposals as not reasonably susceptible of being selected for award, it does not follow that they must do it at the very beginning of the process. For example, "initially" can mean prior to evaluation of proposals, or award of the contract, or prior to the ranking of offers. The Department ruled Appellant to be not susceptible of being selected after receiving and reviewing Appellant's second BAFO, prior to ranking ACS's and Northrop Grumman's financial proposals, and prior to awarding the contract to ACS.

The language in COMAR 21.05.03.03(B) does not specify which type of proposal can be found to be "not reasonably susceptible to award." Nowhere, however, does COMAR indicate that only technical proposals can be classified as not reasonably susceptible to award. COMAR 21.05.03.03(B)(2) simply states: "(2) Offers judged by the procurement officer not to be responsible or offerors whose proposals are classified as not reasonably susceptible of being selected for award shall be notified." *Id.*

This Board finds that procurement officers have the authority to find both technical and financial proposals as being "[r]easonably susceptible of being selected for award" or "[n]ot reasonably susceptible of being selected for award" as facts and circumstances may require. These judgments are based on a number of factors, including whether an offeror is responsible and capable of performing the work required by an RFP and whether an offeror's proposal - be it technical or financial - is responsive to and complies with the requirements of an RFP. A proposal that is initially deemed qualified may be eventually deemed not qualified based on further evaluation during the

procurement process. See, Penn Parking, Inc., MSBCA 2450 and 2552, ____ MSBCA ____ (2006).

Appellant argues that the rejection of Appellant's Proposal as not reasonably susceptible of award was arbitrary, capricious, and unreasonable. Appellant further claims that the decision was wrongfully and improperly rationalized.

The Board rejects those contentions completely. The record, and this decision, provides ample evidence why Appellant's second BAFO proposal was rejected. The Procurement Officer's decision was clearly not unreasonable, irrational, arbitrary, capricious or illegal. It was also not rationalized. There was no need for ex post facto rationalization here and it did not occur in this procurement. As noted extensively herein, Appellant failed to complete its second BAFO in the manner requested and required, leaving the Evaluation Committee and the Procurement Officer without a rational basis for evaluating Appellant's second BAFO. Rejection was entirely appropriate in this case.

What Appellant provided was, by its own admission, a document designed to maintain a "competitive advantage". The second BAFO submitted by Accenture was a deliberately planned proposal, not a mistake. The RFP required a breakdown of hours with costs for each requirement on the pricing sheet. A minimum of 103,200 hours was required for § 3.4.16 for each contract and option year. All other items were to be priced separately, with hours included. These were requirements, not suggestions, made expressly by the Department. They were included in the RFP by way of an Amendment to the RFP. They were explained repeatedly to all offerors. There is no dispute that these requirements were

mandatory. Section 2.4 of the RFP explains to all Offerors that exceptions taken to any of the requirements in the RFP may result in the proposal being deemed not reasonably susceptible of being selected for award.

By its actions, Accenture took exception to the mandatory requirements for hours for Level I Services and knowingly refused to provide separately itemized pricing for approximately two-thirds of its Proposal. Rather than doing as directed, Accenture chose to lump the services together under the 103,200 hours for years three through nine of the contract in an effort to undercut its competitors who priced their proposals as instructed. In doing so, Accenture improperly attempted to shift the playing field in order to gain a "competitive advantage", a field which was made level by the Department providing a set number of hours for each Offeror. What Accenture attempted was found to be improper and incomplete, and the Department rationally, and the Board finds correctly, rejected Accenture's efforts to manipulate its offer in this manner.

The Department could not disregard material terms of the RFP herein for only one Offeror, as Accenture here desires, because this would result in not giving all Offerors a fair and equal opportunity to compete on the same basis. The record reflects that Accenture did not request or need further clarification or discussions, but, rather, desired to use a pricing approach that was more advantageous to it rather than the pricing approach required by the RFP. It is no surprise that Accenture's resulting non-responsive bid was so much lower than the other two offerors.

Had the Department accepted Accenture's second BAFO as submitted and awarded the contract to Accenture, ACS might well have successfully challenged the award of the contract to Accenture. Clearly, the Department would have had some serious explaining to do to justify allowing one offeror to ignore the submission requirements plainly mandated by the second BAFO process. The Procurement Officer and the Department quite properly avoided that result by finding, quite properly, that Accenture's second BAFO proposal was not reasonably susceptible of award.

Accenture also contends that the Evaluation Committee should have focused only on the total fixed price and ignored the specific pricing instructions provided in Amendment No. 7, § 4.4 of the RFP, the Clarifications, as well as the oral discussions held with Accenture. Apparently it is Accenture's position that only the bottom line price counts and that the Department is not permitted to view how the price was determined in light of its own request for such information and, indeed, must in this case ignore terms, conditions, and requirements demanded of all proposers.

The Board totally rejects Accenture's position and argument. The Board could elaborate at great length on this finding, explaining in detail why procuring agencies have the right, and indeed the duty, to include terms and conditions in requests for financial proposals that enable the agency to maintain a level playing field for all offerors and to have confidence that the bottom line price offered by offerors is rational and legitimate.

Frankly, this case as discussed is all the explanation needed for the Board's finding. State agencies provide important services to citizens - services that often make a

critical difference in their lives. State agencies must have confidence that the award of a contract, any contract, is based on proposals and cost estimates that are realistic and reliable. To have such confidence, State agencies must often do what was done herein, establish terms and conditions which are uniform to all offerors and which are mandatory. Such requirements allow evaluators to see how an offeror has arrived at an offer number and know that the offeror understands what is requested and required and can fulfill a contract's term and conditions. Proposals that fail to conform to proposal requirements result in bottom line numbers which simply cannot be rationally judged and evaluated and are effectively meaningless. An offeror's inability and/or unwillingness to complete requested forms and documents as requested leaves the evaluators no rational basis for evaluating a proposal and determining whether an offeror's bottom line offer number is legitimate.

The Department complied with the evaluation criteria and requirements of the RFP. Accenture did not. Accenture failed to include substantial pricing information required by the Department and the Department rejected Accenture's financial proposal for that reason.

As to the assertion of bias, Accenture's claims of bias are unsubstantiated and must fail. In fact, there is overwhelming evidence in this record that all offerors were treated in a similar fashion. The record makes clear that this appeal ground, for reasons repeatedly noted throughout this decision, must be rejected.

In addition to bias and the issue of the rejection of its financial proposal, Accenture raises several other appeal grounds. All are without merit and are rejected.

Appellant claims that the technical proposals herein were re-evaluated after the financial proposals were opened. The record of this case, however, shows no evidence that the technical proposals were re-evaluated after the financial proposals were opened.

Testimony from Ms. Johnson provides evidence that that the Evaluation Committee did not go back and revise their technical rankings:

Q: Now once the rankings were completed, did there ever come a time when those rankings were [sic] changed?

A: No.

Q: Did the Committee ever go back to the technical proposals to revise or change their recommendation?

A: No.

...

Q: ... After the technical evaluations were complete, I think your testimony is that you immediately opened the financial proposals. Is that correct?

A: Correct.

Q: ...what day did you open the financial proposals?

A: On October 21st. *Hearing Transcript II, pp. 429-430.*

The Appellant points out certain discussions the Evaluators conducted upon receiving Appellant's Second BAFO. These discussions, however, show no evidence of any modifications in the technical evaluations after the financial proposals were opened. The technical rankings found by the evaluators were:

Application Maintenance/Operations and Enhancement
Services - OTHS/OTHS-08-005-S
Technical Ranking

| Offerors | Technical Response | Qualifications | Key Personnel | References | Financial Responsibility and Stability | Totals |
|---------------------|--------------------|----------------|---------------|------------|--|--------|
| ACS | 1 | 1 | 1 | 1 | 3 | 1 |
| Accenture | 3 | 3 | 2 | 1 | 2 | 3 |
| Northrop Grumman | 2 | 2 | 3 | 1 | 1 | 2 |

Joint Exhibit 2, Evaluation Summary, p.19.

The Department complied with RFP §4.2 and COMAR 21.05.03.03(A)(2) when it independently evaluated the technical and financial proposals. There is no evidence that the Department re-evaluated technical proposals after the opening of financial proposals. This appeal ground is, therefore, denied.

Appellant next claims that it was arbitrary and capricious to rank ACS higher than Accenture under the evaluation criteria of key personnel. As shown above, ACS was ranked first in the Key Personnel category of the technical rankings and the Appellant was ranked second.

The RFP identified in Section 5.4 that Key Personnel would be a criteria during the Technical evaluation and states, "The evaluation criteria order reflects a reasonable downward progression of relative weights of the criteria. In making the most advantageous Offeror determination technical factors will be given greater weight than price factors." *Joint Exhibit 1, RFP §5.4.* Key Personnel, without an instruction as to which personnel are key, is listed third in importance on a list of five factors. *Id.* The testimony of the Procurement Officer reveals ACS had Key Personnel available to perform the contract and that meaningful discussions occurred in how this criteria was to be weighted:

Q: Okay. What, if anything, did you instruct the Committee to do with respect to this issue?

A: I told the Committee that they had to look at that as a deficiency because ACS did not comply by the deadline, and that would be considered a deficiency and that they should consider that during the ranking of the technical proposal.

Q: Okay. And are you satisfied that in fact the Committee followed your instructions?

A: Yes, because we talked in detail about it.

Q: Okay.

A: And the Committee said that they were satisfied.

Q: Okay. Now at any point did ACS identify a replacement?

A: Yes, they did.

Q: When did that happen?

A: On the 21st in the evening after the ranking of the technical proposals.

Q: Okay. And if I could just draw your attention to the RFP Section 3.5.4.1, key personnel, Page 104.

A: Okay.

Q: Okay. Now isn't it true that Section 3.5.4.2 permits a contractor to submit key personnel?

A: Yes.

Q: And isn't that in fact what ACS did in this case?

A: Yes. *Hearing Transcript II, pp. 428-429.*

The Procurement Officer also testified at the hearing that the Department "did not tell [ACS or other Offerors] who their key personnel had to be." *Hearing Transcript II, p. 313.* No further evidence is found to be relevant regarding this matter.

This issue, which in any case would be a dubious ground for the sustaining of this appeal even if proven, has not

been proven by Appellant and this appeal ground is denied by the Board. The record supports the ranking of technical proposals as regards key personnel as proper and rational.

Finally, Appellant asserts that there was a conflict of interest with regard to Respondent's Chief Information Officer (CIO), Ms. Isabel FitzGerald, and that her participation in the evaluation process helped lead to the finding that Accenture was not reasonably susceptible for award.

According to Appellant, Ms. FitzGerald is married to a Mr. Paul FitzGerald who Accenture claims "is a Principal at the firm Deloitte, LLP, and ACS identified Deloitte as a subcontractor for ACS on this procurement."

Beyond this, there is no evidence whatsoever to sustain Appellant's claim regarding Ms. FitzGerald and it is rejected.

The Procurement Officer's testimony revealed no indication of bias involving Ms. FitzGerald:

[Chairman Burns]

Q: All right. She's [Ms. Fitzgerald] not part of the Evaluation Committee.

A: No, she's not.

Q: Okay. Did Ms. Fitzgerald sit in on any Evaluation Committee meetings?

A: No.

Q: At any point?

A: No.

Q Did she have -- trying to ask -- do you recall the first date that Isabel Fitzgerald contacted you about this procurement?

A: She contacted me about this procurement to find out if it was completed. That was on, I believe, the -- it was sometime in November.

Q: All right.

A: But not any specifics. Just is the procurement completed.

Q: Didn't try to influence anything or -

A: No, not with me, no. *Hearing Transcript II, p. 330.*

[Board Member Collins]

Q: What did she want to know that for?

A: Because she's the CIO, and they had -- they wanted to have the contract in place by January the 10th for transitioning purposes. And we're now into November, knowing that we have to have Board approval prior to the contract. Their -- the programs are always time. They're looking at timeliness.

...

Q: Part of her job as the information officer is to -- the flow of stuff that goes from the Agency to the Board of Public Works and so forth?

A: Well, her job is -- want this contract in place so that they can continue performing the services required of the State for the IT. Because her job, she oversees IT. *Hearing Transcript II, pp. 330-331.*

[Board Member Dembrow]

Q: She didn't exercise any influence prior to the time that a recommendation was made for ACS?

A: No. *Hearing Transcript II, p. 331.*

[Chairman Burns]

Q: Had she [Ms. Fitzgerald] said anything to you either verbally or in writing that would indicate a bias for or against any of these offerors in this matter?

A: ...no, she has not stated any bias or said anything to me to make me think that she was biased. *Hearing Transcript II, p. 341.*

Accenture relies on communications involving Ms. FitzGerald, after recommendations were made, wherein she discusses her concerns about a potential bid protest from Accenture and contends that Ms. FitzGerald influenced the recommendation for award. These communications, however, provide no such proof, nor do they evidence any bias or any other improper behavior on the part of Ms. FitzGerald.

There is, therefore, no evidence Ms. FitzGerald did anything improper in this procurement; merely her job. Ms. FitzGerald did not participate on the Evaluation Committee and there is no evidence that Ms. FitzGerald directly or indirectly influenced the selection of ACS or influenced the finding of Accenture as reasonably not susceptible of award. There is no evidence whatsoever of improper involvement in this procurement process by Ms. FitzGerald, no conflict of interest exists, and this appeal ground is denied.

In summary, each and every one of Appellant's appeal grounds is unproven and contradicted by the record and all must, therefore, be dismissed. Appellant has failed to meet its burden on any ground appealed herein. Indeed, as extensively detailed, the complete record provides substantial support of the Department on all appeal grounds.

Interested Party ACS's Motion to Dismiss Appeal Ground 1 from the Appellant's Second Appeal is granted. Respondent's Motion to Dismiss (except for Appeal Ground 1 from the Appellant's Second Appeal) is denied. Appellant's Motion for Summary Judgment is denied. Any other Motions regarding Dismissing appeal grounds or Motions for Summary Judgment or Motions for Summary Disposition which may have been made are also denied.

Any and all remaining appeal grounds raised by Appellant Accenture are rejected and denied, and all relief requested by Appellant Accenture is also denied.

Wherefore, it is Ordered this day of March, 2010 that the appeals of Accenture, LLP are denied.

Dated:

Michael W. Burns
Chairman

I Concur:

Michael J. Collins
Board Member

Dana Lee Dembrow
Board Member

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 cases.

Annotated Code of 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 10 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 2640 & 2669, appeals of Accenture, LLP under DHR RFP OTHS/OTHS-08-005-S.

Dated:

Michael L. Carnahan
Deputy Clerk