

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of Caremark PCS)
)
)
) Docket Nos. MSBCA 2544, 2548
) & 2565
Under DBM Solicitation No.)
 F10R6200071)

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OPINION BY CHAIRMAN BURNS

Appellant appeals the denial of several of its protests raising numerous issues regarding the proposed award of a contract under a competitive sealed proposal process involving a solicitation to procure Pharmacy Benefit Management services for the State of Maryland in connection with the Maryland Rx Program and the State Employee and Retiree Health and Welfare Benefits Program.

FINDINGS OF FACT
MSBCA 2544 and 2548

1. Respondent, the Maryland Department of Budget and Management (Department) is a Maryland State government agency. The major responsibilities of the Department include the budget of the State of Maryland (State) and assisting the government of the State in its functioning.
2. As part of the Department's responsibilities, the Department administers the pharmacy and prescription benefits plan (Plan) that covers State employees, State retirees, Satellite organization employees, direct pay enrollees, and their eligible dependants. RFP §1.1.2 at p.1.
3. The pharmacy and prescription benefits plan is a self-funded State group health plan administered as part of the State Employee and Retiree Health and Welfare Benefits Program. Id.
4. The State of Maryland presently has a stand-alone, self-funded prescription drug plan in effect that is currently administered by AdvancePCS Health, L.P. (AdvancePCS), a subsidiary of Appellant Caremark PCS, LLC (Caremark). RFP §3.1 at p. 13.
5. The current Plan serves approximately 99,500 enrollees. Id.
6. The total cost of the Plan, including administrative fees and claims but excluding rebates, was approximately \$293 million for calendar year 2004. Id.
7. On October 4, 2005, the Department issued a Request for Proposals (RFP) entitled **Pharmacy Benefits**

Purchasing Pool Management and Pharmacy Benefits Plan Administration Services, Solicitation No. F10R6200071.

8. This RFP sought a qualified offeror to provide the State with services in connection with the Maryland Rx Program and the State Employee and Retiree Health and Welfare Benefits Program. RFP §1.1 at p.1.
9. The scope of the contract to be performed was detailed within the RFP:

The State is soliciting proposals for one contractor to provide the pharmacy benefits purchasing pool management services for the Maryland Rx Program and to provide pharmacy benefits plan management and administrative services for the State's self-funded employee and retiree prescription plan. RFP §1.3 at p.5.
10. Pursuant to Maryland law, "the Department is establishing the Maryland Rx Program, a purchasing pool for pharmacy benefits for the State Employee and Retiree Health and Welfare Benefits Program, local governments and certain other employers for employees in Maryland." RFP §1.1.2 at p.1. This Maryland Rx Program will provide a process by which these entities "will be entitled to participate in the purchasing pool and to secure pharmacy benefits management services from the contractor on the same terms and conditions as the State through separate contracts with the Contractor." Id. at pp.1-2.
11. The current contract for prescription drug services does not contain the Maryland Rx Program.

12. The contract term was to be five years, beginning July 1, 2006, and continuing through June 30, 2011, plus a 12-month claims runout period. RFP §1.5 at p.5.
13. The contract was to be "a fixed unit price, indefinite quantity contract and reimbursement of claims as provided in COMAR 21.06.03.02A (2) and 21.06.03.06". RFP §1.4 at p.5.
14. The contract has an estimated value of approximately \$1.4 billion.
15. The RFP utilized the Competitive Sealed Proposal procurement selection method (COMAR 21.05.03). RFP §5.5.1 at p.35.
16. The RFP provided that "[t]he competitive sealed proposals method is based on discussions and revision of proposals during these discussions." Id.
17. The State sought a pricing model that provided for: pass-through pricing at retail pharmacies, on mail order and specialty pharmacies, and on other items; pricing guarantees regarding various items; and, full transparency reporting for the retail, mail and specialty components. RFP §1.1.1 at p.1.
18. AdvancePCS is a subsidiary of Caremark and is the predecessor contractor. The predecessor contract did not include the transparency requirements and many of the reporting requirements listed within the RFP. As previously noted, the predecessor contract also did not include the Maryland Rx Program within its scope of work.
19. Offerors were required to demonstrate certain minimum qualifications in order to be considered for the contract. These qualifications were: 1) "at least two years experience in administration of a retail

pharmacy network"; and, 2) "at least one million covered lives across the Offeror's pharmacy benefit management book of business as of proposal submission date." RFP §2 at p.12.

20. Both Caremark and Interested Party Catalyst Rx, Inc. (Catalyst) fulfilled these minimum qualification requirements for contract award (as did the seven other offerors).
21. Offerors were to submit proposals in two separate volumes: Volume I for the Technical Proposal and Volume II for the Financial Proposal. RFP §4.1 at p.28. The two proposals were to be sealed separately but submitted simultaneously to the Procurement Officer. RFP §4.2 at p.28.
22. The RFP provided that the evaluation of proposals would be performed by a committee organized for that purpose. RFP §5.1 at p. 34.
23. The RFP, as amended during the procurement process, advised that the evaluation of proposals would be based on enumerated criteria. Id.
24. Section 5.2 of the RFP, provided that:

The criteria to be applied to each technical proposal are as follows, listed in descending order of importance

1. Administrative Capabilities, including, but not limited to:

- Experience and Past Performance
- Claims Payment
- Transparency Reporting and Disclosure
- Purchasing Pool Management (including minimum plan size requirements, purchasing pool participant services, etc)

2. Pharmacy Network (retail, mail and specialty pharmacies networks), including, but not limited to:

- Size of Network
- Network Management and Administration

3. Clinical Capabilities, including, but not limited to:

- DUR
- Pre-Authorization
- Managed Drug Limitation (MDL)
- Formulary Management

4. Implementation Plan and Account Management, including but not limited to:

- Account Management Team

5. Cost Management Strategies

6. Maryland Economic Impact

RFP §5.2 at p. 34.

25. The six technical evaluation criteria – Administrative Capabilities, Pharmacy Network, Clinical Capabilities, Implementation Plan and Account Management, Cost Management Strategies, and Maryland Economic Impact – were listed in descending order of importance. Id.
26. The sub factors under each of the criterion were, however, not placed in a similar order of descending importance. These sub factors were of equal importance and were treated in such a manner by the evaluation committee and the Procurement Officer in evaluating and ranking the proposals for the overall evaluation criteria to which the various sub factor(s) relate. This was a reasonable method of handling the sub factors.

27. Offerors were advised that for the Financial Criteria: "All qualified Offerors will be ranked from the lowest to the highest costs based on the amounts shown for each Offeror in Line 6 of **Exhibit K-2B Sum** of the RFP." RFP § 5.3 at p.34.
28. The RFP, at §5.3 and Attachment K, provided that financial offers would be ranked using an evaluation model that projected utilization, assumed average wholesale prices, and applied the quoted pricing guarantees, fees and other requested financial information to the projected utilization and assumed average wholesale prices (AWP). The evaluation model did not deduct co-payments made by members in accordance with the plan design (RFP, Attachment N-1) from the drug ingredient costs or total contract price calculated using the model. RFP, Attachment K. The lowest evaluated price for a five-year projection was determined to be the highest ranked Financial Proposal and the remaining financial proposals were ranked based on lowest to highest evaluated total costs thereafter.
29. "Attachment K-2B Sum: Weighted Aggregate Costs - Prescription Drug Plan" of the RFP provided that:
- The financial proposal will be a weighted average of the four Purchasing Pool group proposals. The total cost for response K-2A1 and K-2B1 will be weighted at 60% (less than 150,000 members); the total cost for response K-2A2 and K-2B2 will be weighted at 20% (150,000 to 299,999 members); the total cost for response K-2A3 and K-2B3 will be weighted at 10% (300,000 to 499,999 members); and the total cost for response K-2A4 and K-2B4 will be

weighted at 10% (more than 500,000 members).

30. The total evaluated dollar amount for each offeror's Financial Proposal was derived from application of the above formula disclosed in the RFP that created a sum page for each offeror's Financial Proposal. The formula provided for evaluation of weighted aggregate costs of the State's Prescription Drug Plan under various assumptions. The lowest cost received the highest rank for purposes of the evaluation of the Financial Proposals.
31. Technical Proposals were evaluated separately from Financial Proposals.
32. Pursuant to the RFP, the Procurement Officer was to recommend award of the contract to the responsible Offeror whose proposal was found to be the most advantageous to the State considering technical evaluation factors and price factors as set forth in the RFP. RFP §5.5.3 at p.36.
33. In making the most advantageous Offeror determination, technical factors were to be given greater weight than price factors. Id.
34. From the date of the issuance of the RFP through the closing date for the submission of proposals, no protests were received by the Department challenging any of the terms of the RFP.
35. The Procurement Officer named on the RFP was Mr. Edward Bannat, an employee of the State of Maryland. Mr. Bannat actually evaluated the proposals and made the recommendation for contract award to the Department.

36. After issuing the RFP, the Department held a pre-proposal conference on October 17, 2005. At this conference, the Procurement Officer and other staff reviewed the evaluation factors, summarized the scope of work and specifications, and answered questions concerning the RFP.

37. At the Pre-Proposal Conference, the Procurement Officer specifically advised offerors:

[I]nclude in your proposal what you would be willing to do. . . .

One of the philosophies of the state in this RFP process was not to be a compliance checklist. To not say, these are the exact things you're going to have to do. . . .

The expectation of the state is that we are looking for the most competitive proposals, so we're asking for all the bidders to say, this is what we're willing to do to win the business of the state, and how you think you could best develop and offer your program to the state.

Joint Exhibit 5, Pre-Proposal Conference Transcript, at pp.91-92.

38. There were three addenda to the RFP. Addendum I was issued on October 28, 2005 and dealt with Minority Business Enterprise (MBE) Goals and Sub goals under the RFP. Addendum 2 was issued on November 3, 2005, revised the closing date for the submission of proposals and revised various sections of the RFP, including sections dealing with the Maryland Rx Program and the Technical Evaluation criteria for the RFP. Addendum 3 was issued on November 17, 2005, and also revised various sections of the RFP, including sections dealing with the reporting obligations of the

contractor, adding a requirement that the contractor "[p]rovide to the State full disclosure of revenue sources of the Contractor."

39. Questions from offerors were invited by the Department both before and after the Pre-Proposal Conference. RFP § 1.9 at p.7. Five sets of Questions & Answers were issued by the Procurement Officer to the offerors during the period from November 3 through 23, 2005. Joint Exhibit 7, Attachments A-E.
40. Offerors were on notice that "oral presentations and discussions may be held" with qualified offerors. RFP §5.5.2 2) at p.35.
41. The RFP proposal due date, as revised by Addendum 2, was November 29, 2005.
42. Nine offerors submitted timely proposals to the Department in response to the RFP: Catalyst Rx, Caremark PCS Health, Pharmacare, Walgreens, Aetna, RESTAT, Express-Scripts, Wellpoint, and Prime Therapeutics. All nine proposals were found to be technically qualified and were evaluated and ranked by the evaluation committee and the Procurement Officer.
43. The Procurement Officer and the evaluation team did not use numerical scoring in evaluating the offerors' technical proposals. Rather, offerors' technical proposals were graded on a scale of "plus", "minus" or "mid". A "minus" or "mid" grade reflected that a proposal was acceptable. A "mid" grade was ranked higher than a "minus" grade. Where necessary, technical proposals also could be evaluated as a "high-mid" or a "low-mid". This was a reasonable method of handling the grading of the technical proposals.

44. A "plus" rating was the highest possible rating. All "plus" ratings were equally weighted for purposes of the evaluation.
45. In determining the technical rankings of the offerors, the evaluation team relied on the evaluation criteria in Section 5 of the RFP and discussed the strengths and weaknesses of the offerors in relation to the evaluation criteria of the RFP.
46. The evaluation team each individually reviewed the technical proposals of all nine offerors, participated in vendor discussions with the offerors, and participated in various meetings with the Procurement Officer in order to evaluate the offers received in response to the RFP.
47. Catalyst was rated "plus" under each of the RFP's evaluation criteria and the sub factors there under.
48. Caremark received a "plus" rating on all criteria and sub factors except for three: 1) Under "Transparency Reporting and Disclosure", Caremark was graded a "minus"; 2) Under "Purchasing Pool Management", Caremark was graded a "minus"; and 3) Under "Maryland Economic Impact", Caremark was graded "mid". Both "Transparency Reporting and Disclosure" and "Purchasing Pool Management" were sub factors under the highest weighted technical evaluation criterion: "Administrative Capabilities". RFP §5.2 at p. 34; Addendum 2.
49. Under the "Transparency Reporting and Disclosure" sub factor, offerors' proposals were evaluated for both pass-through pricing and disclosure. On or about December 22, 2005, the Procurement Officer advised

Caremark of the need for details concerning pass-through pricing, pricing guarantees and transparency:

18. **Pass-Through Pricing, Pricing Guarantees and Transparency**—The State would like to secure a contract with Pass-Through Pricing, Pricing Guarantees and Transparency as set forth in RFP Section 1.1.1, items (a) through (e). Please detail your willingness to comply with each of these provisions. Please be specific about any deviations you have to these required provisions.

Joint Exhibit 13.

50. Caremark responded to the Procurement Officer's December 22, 2005 inquiry regarding Pass-Through Pricing, Pricing Guarantees and Transparency on or about December 30, 2005. Joint Exhibit 14. Caremark's response was as follows:

(a) Pass-Through Pricing at Retail Pharmacies—for the retail component, the Contractor selected shall pass-through the actual price the Contractor has negotiated with the dispensing retail pharmacy; spread pricing with participating retail pharmacies shall not be permitted.

Caremark confirms.

(b) Pass-Through Pricing on Mail Order and Specialty Pharmacies—for mail and specialty pharmacy components, passing through actual acquisition pricing from wholesalers or manufacturers is not required; however, the drug ingredient cost charged to the State must be consistent with the pricing guarantees for claims processed at mail and specialty pharmacies.

Caremark confirms.

(c) Pass-Through Pricing on Other Items—For the retail, mail and specialty components, the Contractor selected shall not retain any revenue (attributable to the State's business) from pharmaceutical manufacturers or wholesalers, including, but not limited to data fees, access fees, market share fees, rebates, formulary access fees, administrative fees or marketing grants.

Caremark agrees to the retail, mail, specialty, market share and rebate components. The following further explains Caremark's positioning [sic] on passing through service fees and data fees:

Service fees that Caremark may receive from pharmaceutical manufacturers include fees that Caremark may receive in connection with programs offered by Caremark, such as physician or participant education programs; compliance and persistency programs; and communications to healthcare professionals. These fees that are paid to Caremark are not paid to or allocated by Caremark on a client-specific basis. Rather, these fees are paid to reimburse Caremark for its service program offerings. For these reasons, Caremark does not disclose to its clients detailed information regarding the service fees received and does not share those fees with its clients.

Caremark may sell aggregate blinded data to a number of nationally recognized data integration firms in order to support appropriate administration of Caremark's drug management programs. This benchmarking

data enables us to compare against other drug spending population sets and gauge the effectiveness of Caremark's clinical programs on a national and regional basis. Drug-specific information at the prescription level is typically sold for these purposes. It is not our practice to provide information to any third-party organization if the disclosure is in violation of any applicable privacy laws. The fees that are paid to Caremark are not paid to Caremark on a client-specific basis.

(d) Pricing Guarantees—For the retail, mail and specialty components, the Contractor selected shall also guarantee a maximum amount for dispensing and administration fees, minimum percentage discounts off AWP by drug-type (brand and generic) and place of service (retail, mail and specialty pharmacies) and minimum guarantees per claim for rebates, including all revenue described in Section 1.1.1(c).

Caremark confirms.

(e) Transparency—For the retail, mail and specialty components, the Contractor selected shall provide full transparency reporting as further described in 3.4.1.7 Reporting section of the RFP.

Caremark confirms.

Joint Exhibit 14.

51. For four out of the five items concerning pass-through pricing, pricing guarantees and transparency for which the Procurement Officer asked for clarification Caremark responded with "Caremark confirms". For the fifth item, subparagraph (c), Caremark provided a

lengthy answer (outlined in Finding of Fact Number 50). Id.

52. The Procurement Officer did not understand Caremark's response to subparagraph (c). Rather, he found the response to be "purposely confusing" and drafted so as "to give Caremark an out on [the] issue." The Procurement Officer interpreted Caremark's response to mean that Caremark was "holding back money that [he] wanted to have the state get." Caremark's response in subparagraph (c) made the Procurement Officer "less confident in Caremark's ability to fulfill the requirements of the [subparagraph (c)] question".
53. Caremark had additional opportunities in vendor discussions and in its Best and Final offer (BAFO) submission to clarify its response to subparagraph (c) to the evaluation team and the Procurement Officer. Caremark, however, did not do so. As a result, at the time of the final overall ranking of offerors, the "minus" Caremark received under the "Transparency Reporting and Disclosure" sub factor under the "Administrative Capabilities" criterion did not change.
54. Caremark was not the only offeror that was marked down for its response to subparagraph (c). Catalyst was not, however, marked down for this sub factor.
55. On or about December 22, 2005, the Procurement Officer asked Catalyst the same question regarding "Pass-Through Pricing, Pricing Guarantees and Transparency" that he had asked Caremark. Joint Exhibit 22.
56. Catalyst responded to the Procurement Officer's inquiry regarding "Pass-Through Pricing, Pricing

Guarantees and Transparency" on December 30, 2006, writing:

Catalyst confirms our willingness to comply with each of the provisions set forth in RFP Section 1.1.1, items (a) through (e). Catalyst does not propose any deviations to the required provisions.

Joint Exhibit 23.

57. Catalyst reiterated its commitment to comply with the Transparency Reporting and Disclosure requirements of the RFP during its vendor discussions as well.
58. Caremark also received a "minus" grade for its technical proposal regarding the sub factor "Purchasing Pool Management" under the "Administrative Capabilities" criterion. The "minus" grade, according to the Procurement Officer, was given:

Because they [Caremark] were acceptable, but barely acceptable. They didn't take the—they didn't take—they did nothing more than say they would comply. They didn't develop the subject. They didn't show us how they would comply. . . . They said we were in these various coalitions, but they didn't tell us any of the pluses, any of the minuses, any of the lessons learned they had in these coalitions. It was just, give them something, and let's see what happens.

According to the Procurement Officer, Caremark would have been evaluated more favorably under this sub factor:

If they [Caremark] would have come out and said, you know what we're going to do, were going to take all of these [Maryland] counties and we're going to put them on your system, you're going

to jump up immeasurably, they [Caremark] didn't say that. They said, we have the counties. . . .

Now, are they going to—their approach wasn't proactive enough that I felt comfortable in what they were going to give us. Yes, I have a bunch of counties, that's very good. You're the biggest PBM in the country. Is it going to benefit me or is it going to be a problem I have to overcome because you have all these and you don't want to give the nicer deals that you got from them for the more onerous [deal] I hope I got you to agree to by going through the procurement process with the state.

59. The RFP, § 3.4.2 at p.22-24, outlined the requirements for an offeror's technical proposal response regarding the offeror's approach to the Maryland Rx Purchasing Pool. In its response (which was organized by following the RFP's sections and subsections as contained in RFP 3.4.2), Caremark simply wrote "Caremark confirms" under each section and subsection of its Technical Proposal addressing the Maryland Rx Purchasing Pool. Joint Exhibit 10, Tab 2. The remaining text in the Caremark Technical Proposal regarding the Maryland Rx Purchasing Pool mirrors language contained in the RFP.
60. As part of its Technical Proposal response addressing this particular requirement of the RFP, Catalyst provided the State with a four-page Preliminary Marketing Plan specific to the Maryland Rx Purchasing Pool. Joint Exhibit 19. Catalyst also confirmed its willingness to comply with all other requirements of the RFP regarding the Maryland Rx Purchasing Pool.

61. Caremark received a "mid" grade under the evaluation criterion "Maryland Economic Impact". Caremark's proposal for Maryland Economic Benefits consisted of one page with brief analysis. Joint Exhibit 10, Tab 5, at Attachment J-4.
62. Catalyst, which was graded "plus" under this criterion, provided a report analyzing the economic impact of Catalyst in the State. The 11-page economic analysis was drafted by Darius Irani, Ph.D., a faculty member in the Department of Economics at Towson University and Director of Applied Economics Group at Regional Economics Studies Institute. Joint Exhibit 19, Attachment J-4 (Dr. Irani's curriculum vitae and his final report were attached to Attachment J-4 on Catalyst's Technical Proposal).
63. Dr. Irani's report (entitled "Economic Impact Event Study, Award of the Maryland contract to Catalyst Rx") supplied numerous specifics as to jobs to be created and amounts to be realized within the State of Maryland should Catalyst be selected for award of the contract. For example, Dr. Irani claimed that "[t]he selection of Catalyst Rx as the successful vendor for the Maryland PBM contract will generate a total of \$5,341,964 in new value added[.]" and that "[o]ver the six year period from 2006 to 2011 Catalyst Rx, based on an annual 25 percent growth rate, will have generated \$500,818,711 in cumulative total economic impact within Maryland."
64. The Procurement Officer explained the "mid" grading of the Caremark and the "plus" grading of Catalyst as follows at the Hearing on Appellant's Appeals:

Caremark gave me one sheet of paper and said, this is what you're going to get. Catalyst gave me a study by an economist from Towson University that spelled out, if we get this contract, this is what is going to happen. I went through the assumptions. It looked and sounded plausible. . . . It made sense. It just was a better submission for the Maryland economic impact.

Caremark had a good submission. There was nothing to substantiate it. There wasn't much thought into it. On top of that, Catalyst comes and says, I will put two scholarships at the University of Maryland Pharmacy School at \$10,000 a year for the life of the contract.

Additionally, . . . Catalyst says, I will hire ten interns for each year of the life of the contract. I included those, and I added them in, and Catalyst had a better Maryland economic impact submission.

65. On January 23, 2006, the evaluation team and the Procurement Officer met to discuss the technical evaluation of the offerors and to rank the offerors based on the evaluation of the offerors' technical proposals. This meeting occurred after the evaluation team had reviewed the proposals, obtained clarifications from vendors, held vendor discussions, and had information from the reference checks for each of the offerors.
66. Prior to the meeting held on January 23, 2006, the evaluation team had met numerous times during the RFP process.

67. At the January 23, 2006 meeting, each member of the evaluation team ranked Catalyst as having submitted the best technical proposal.
68. At the January 23, 2006 meeting, the evaluation team members ranked Caremark as having submitted the third best technical proposal. Two members ranked Caremark's proposal second, two members ranked Caremark's proposal third and one member ranked Caremark's proposal fourth.
69. Overall, Caremark's technical proposal was ranked third best by the evaluation committee.
70. After the technical evaluation and proposal rankings were completed, the evaluation committee opened and reviewed the financial proposal submissions. The financial rankings were based on the dollar figures contained in the offerors' financial proposals.
71. After review of the initial financial proposals, it was determined that Best and Final Offers (BAFOs) would be necessary because several offerors had included exceptions in their financial proposals and the financial proposals did not reflect pricing for revisions offerors had made to their technical proposals.
72. At a meeting on January 31, 2006, the evaluation team members and the Procurement Officer met and discussed and developed specific technical strengths and weaknesses for each offeror's technical proposal. This meeting lasted between two to three hours. A list summarizing the strengths and weaknesses of each of the offerors, including Catalyst and Caremark, was circulated among the evaluation team on or about February 1, 2006. Respondent's Exhibit 4.

73. According to the evaluation team and the Procurement Officer, as of February 1, 2006, Caremark was viewed as having various strengths including its status as the incumbent. Specifically, the evaluation team and the Procurement Officer credited Caremark with strengths for "Experience and Past Performance" based on Caremark's "14 years successful experience with the State" and Caremark's "[k]nowledge of State operations". Respondent's Ex. 4. In addition, the evaluation team and the Procurement Officer credited Caremark with strengths that resulted from Caremark's status as the incumbent under "Size of Network" (sub factor under criteria 2, "Pharmacy Network"), "Formulary Management" (sub factor under criteria 3, "Clinical Capabilities"), "Clinical Capabilities" (criteria 3), and "Implementation" (criteria 4). Specifically, the evaluation team and the Procurement Officer noted: "[n]o disruption" as a strength for Caremark under Size of Network; "[n]o formulary disruption" as a strength for Caremark under Formulary Management; and, "[n]o transition issues" and "[v]ery little implementation necessary" as strengths for Caremark under both "Clinical Capabilities" and "Implementation". Respondent's Exhibit 4.
74. As of February 1, 2006 the evaluation team and the Procurement Officer also identified weaknesses with Caremark's technical proposal:
1. Weaknesses
 - i. Transparency
 1. Commitment seemed vague—team not comfortable that they will be able to audit

2. Have not exhibited that they can offer transparency

ii. Network Management and Administration

1. Used limited network to price 46-90 days supply (note: this could change in BAFO)

2. State required to use CuraScript (specialty pharmacy) for specialty drugs (note: this could change in BAFO)

iii. Purchasing Pool Management

1. Not pro-active in pushing participation

iv. Account Management

1. Difficulty in getting reports

Respondent's Exhibit 4.

75. As of February 1, 2006, the evaluation team and the Procurement Officer noted one weakness of Catalyst's technical proposal:

1. Weaknesses

i. Size of Network

1. Did not offer limited network

Respondent's Exhibit 4.

76. Offerors (including Catalyst and Caremark) submitted their Best and Final Offers on or about February 2, 2006.

77. The evaluation team and the Procurement Officer met on or about February 13, 2006 to review the BAFOs and to determine the final overall rankings of the offerors.

78. The Procurement Officer and the evaluation team considered the BAFOs submitted by the offerors, including Catalyst and by Caremark, before determining the final overall ranking of offerors.

79. Nothing submitted in the BAFOs changed the evaluated technical rankings of Catalyst or Caremark.
80. The BAFOs did result in changing the Financial Proposal rankings of Catalyst and Caremark. Caremark's financial ranking moved from 2 to 1 and Catalyst's financial ranking moved from 6 to 2 respectively, after evaluation of the BAFOs. See Appellant's Exhibit 34.
81. After considering the BAFOs, the technical proposals, and other relevant information, the evaluation committee unanimously recommended Catalyst for award of the contract.
82. The Procurement Officer concurred with the recommendation of the evaluation committee and recommended Catalyst to the Department Secretary for award of the contract.
83. At the hearing on Caremark's Appeals MSBCA 2544 and 2548, the Procurement Officer explained his rationale for his decision to award the contract to Catalyst instead of Caremark:

I looked at what I considered the strengths and weaknesses. I found there were three areas in what - and I found Catalyst and Caremark very comparable except for three areas. In those three areas, and we've gone over them, but I'll go again, transparency, purchasing pool, and economic impact, I found Catalyst better.

I looked at what Catalyst gave us that Caremark didn't in those three areas. I felt that it was worth more than 1 percent, and it was worth more than 13.3 million dollars over five years. That \$2.5 million a year. And yes, that's a lot of money. I mean, a

million dollars is a lot of money, but we're talking about a big contract here. This is - 1 percent is 1 percent, no matter what number you put through - you multiply it by.

The Procurement Officer further explained:

[T]here was 13 - less than 13.3 million dollars' difference over five years. I evaluated that. And of that \$13 million, Catalyst is \$6.7 million cheaper as admin fees. It's \$1.8 more expensive for dispensing fees. It's \$7 million more expensive for ingredient costs. It's \$11 million more—excuse me, Catalyst is more expensive by \$11 million. The total comes out to 13.3 million dollars. What I am saying is my admin fee, I got to pay, and Catalyst is cheaper.

Then I come to dispensing fees, ingredient cost rebates, those are fees that are very subject to transparency, full disclosure and pass-through pricing. You [Caremark] are cheaper on that by 20 million dollars. Twenty million dollars cheaper on those that affect seven more—or 7 million dollars more expensive on admin fees which are a fact of life, you're [the State is] going to pay them. That's where I say . . . yes, it's 13 million dollars, it's over a 1.4 billion dollar contract.

The 13 million dollars sounds good by itself, but against the [1.4 billion] dollar contract where I have 7 million dollars cheaper for an admin fee and 20 million dollars on costs that, I don't know what I am going to get because I got a lot of verbiage and no, yes, you're going to get this. That's why I came down on this.

84. The Procurement Officer, by way of a communication dated February 17, 2006, notified the Department Secretary, Cecilia Janauszkiewicz, that the evaluation committee recommended Catalyst for award of the contract and that he concurred with that recommendation. Appellant's Exhibit 34; Respondent's Exhibit 6.

85. In recommending Catalyst for award to the Department Secretary, the Procurement Officer explained:

The evaluation came down to two offerors, Catalyst Rx and Caremark. Catalyst Rx was ranked #1 technical/#2 financial, but \$13M more expensive than Caremark, or \$2.5M/year over the five-year contract. Caremark was ranked #3 technical/#1 financial. Catalyst Rx was the recommended awardee. All five evaluators were in agreement with the final ranking. I concur with their recommendation.

Appellant's Exhibit 34; Respondent's Exhibit 6.

86. In the February 17, 2006, notice of recommendation for award, the Procurement Officer supported the recommendation of Catalyst for award to the Department Secretary with specific rationales and reasons which highlighted many of the strengths and weaknesses identified by the evaluation team and the Procurement Officer in their meetings during the RFP process. See Appellant's Exhibit 34; Respondent's Exhibit 6.

87. In the February 17, 2006, notice of recommendation for award, the Procurement Officer specifically advised the Department Secretary of the following strengths and weaknesses for Caremark:

Caremark

1. Strengths
 - i. Experience and Past Performance
 1. 14 years successful experience with the State
 2. Knowledge of State operations
 3. Have their own mail-order and specialty pharmacies—creates efficiencies per Caremark
 4. Large PBM
 - ii. Administrative Capabilities
 1. No issue with issuing ID cards
 - iii. Claims Payment
 1. Can administer Medicare Part D—wrap, COB, submission to CMS
 - iv. Size of Network
 1. Strong MD and national network
 2. No disruption
 - v. Network Management and Administration
 1. Established network
 - vi. Formulary Management
 1. No formulary disruption
 - vii. Clinical Capabilities
 1. Can handle DUR, Pre-Authorization, Academic Detailing
 2. No transition issues
 - viii. Implementation
 1. Very little implementation necessary
 - ix. Account Management
 1. Exclusive clinical director in addition to Sabah
 2. Clinical/operations very responsive
2. Weaknesses
 - i. Transparency

1. Commitment seemed vague—team not comfortable that they will be able to audit
2. Have not exhibited that they can offer transparency
 - ii. Network Management and Administration
 1. Caremark proposed a \$1.60 pharmacy dispensing fee for retail brand drugs in every tier of their proposal. A dispensing fee under \$1.70 was a concern for Aon (too low).
 2. Low dispensing fee and high discounts. Concern is that the pharmacies could be squeezed.
 - iii. Purchasing Pool Management
 1. Not pro-active in pushing participation
 - iv. Exceptions
 1. Some exceptions in financials. Compound drugs, specialty drugs limited by manufacturer and some new (first six months) generics were excluded. Reserved right to modify financials in certain instances, e.g., industry wide changes, client changing plan design, co-payments, deductibles, etc.
 2. Some exceptions in technical
 3. HIPAA exceptions

See Appellant's Exhibit 34; Respondent's Exhibit 6.

88. In the February 17, 2006, notice of recommendation for award, the Procurement Officer specifically advised the Department Secretary of the following strengths and weaknesses for Catalyst:

Catalyst Rx

- Strengths
 - o Past Performance

- Excellent based on references
 - Do not have their own mail-order and specialty pharmacies. This creates flexibility—per Catalyst Rx.
- Claims Payment
 - Good performance guarantees across the board
- Network Management and Administration
 - Guarantee that 99% of the pharmacy network will be contracted throughout the term of the contract.
 - Will pay a performance penalty of \$100,000 to the State for each full percentage point below the target level. This guarantee will be measured and paid on a monthly basis.
- Transparency and pass-through pricing
 - No exceptions
 - Said they will act as a fiduciary of the State
- Purchasing Pool
 - Very pro-active vs. other vendors in recruiting PPP's [Purchasing Pool Participants]
- DUR [Drug Utilization Review]
 - Impressive programs
 - Adjudication system has smart edits
 - Physician focus—hands-on approach
- Account Management Team
 - 2 dedicated pharmacists

- Gave a lot of confidence that they will be able to produce ID cards on time
 - Very pro-active in servicing clients—references backed this up
 - Maryland Economic Impact
 - Company is Maryland-based
 - Provide scholarships and internships
 - Maryland consumer pharmacy card for under-insured or uninsured on prescription drugs
 - Vendor had no exceptions
 - \$1,000,000 performance bond to guarantee timely and complete implementation of PBM program in the State
- Weaknesses
 - Financials were for Health Extras (Catalyst Rx's parent), not Catalyst Rx. However, references and performance of work [were] all Catalyst Rx's. We need either Catalyst Rx's financials or a guarantee from Health Extras.
 - Small PBM compared to the Big Three (Caremark, Express-Scripts and Medco who have about 70% of the PBM market)

See, Appellant's Exhibit 34; Respondent's Exhibit 6.

89. The evaluation committee and the Procurement Officer did not act arbitrarily, capriciously, unreasonably or in violation of law during the RFP evaluation process.
90. The Department determined that Catalyst should be awarded the contract under the RFP.

91. Offerors were advised of the Department's decision to recommend award to Catalyst on March 20, 2006. That notification included a written summary of the technical and financial rankings of the nine (9) proposals. The recommendation for award was scheduled to be made to the Board of Public Works (BPW) at its April 5, 2006 meeting.
92. On March 23, 2006, Edward Bannat, Joel Leberknight, and a member of the evaluation committee met with Caremark officials and its counsel for a debriefing that had been requested by Caremark. The debriefing lasted two hours.
93. On March 27, 2006, Caremark filed its first protest of the recommended award. Caremark supplemented that protest by way of correspondence dated May 5, 2006. The Procurement Officer denied the protest, including the supplemental argument, on May 15, 2006.
94. Caremark filed its First Notice of Appeal with the Maryland State Board of Contract Appeals (Board) on May 25, 2006. This is Appeal MSBCA 2544.
95. On May 22, 2006, Caremark filed a second protest of the recommended award. The Procurement Officer denied the second protest on June 14, 2006.
96. Caremark filed its Second Notice of Appeal with the Board on June 23, 2006. This is Appeal MSBCA 2548.
97. Appeals MSBCA 2544 and 2548 were heard by the Board on September 18, 19, 20, 21, 22, 27, and 28, 2006.
98. Catalyst has never revoked or withdrawn its proposal, its offer or its agreement to the contract at issue herein.
99. Catalyst's proposal, offer and its agreement to the contract at issue has never lapsed.

100. Catalyst is ready, willing and able to perform the contract on the terms stated in its proposal.
101. Catalyst is legally bound to perform the contract on the terms stated in its proposals should Caremark's appeals be denied.
102. The 120-day period of irrevocability established by the RFP ended during the course of Caremark's protests and appeals.
103. Caremark filed its first and second protest with the Procurement Officer regarding this contract, and filed its first Appeal with the Board, during this 120-day period of irrevocability.
104. Catalyst's involvement in these appeals (MSBCA 2544, 2548, and 2565) extends the period of irrevocability.
105. Catalyst has not refused any request of the Procurement Officer regarding the award of the contract to Catalyst.
106. Catalyst has not refused to extend the period of irrevocability of its proposal.
107. Catalyst has taken affirmative steps indicating that its acceptance of the contract remains in effect. These steps include: 1) the prompt submission of a signed contract to the Department at the request of the Procurement Officer; 2) the prompt submission of a signed contract affidavit to the State upon the request of the Procurement Officer; 3) the obtaining and submission to the Procurement Officer of a \$1 million performance bond; and, 4) active and ongoing participation in the protest and appeal process.
108. There is no evidence that Catalyst has ever indicated any desire to revoke its proposal, its offer and/or

its acceptance of the contract at issue in these appeals.

FINDINGS OF FACT
MSBCA 2565

109. For purposes of the Appeal designated MSBCA 2565 Findings of Fact 1-108 For MSBCA Appeals MSBCA 2544 and 2548 are hereby incorporated and adopted by reference.
110. Appellant Caremark filed a protest alleging that the Procurement Officer engaged in discussions with Catalyst after submission of BAFOs. The protest was received by the Procurement Officer on September 14, 2006. Caremark's Opposition to Catalyst's Motion to Dismiss Exhibit 22.
111. Caremark's third appeal initially asserted four appeal grounds. After a hearing on the Department's Motion to Dismiss or, in the alternative, for Summary Disposition, on November 30, 2006, the Board ordered that three of the appeal arguments be consolidated with MSBCA 2544 and 2548 because the Board had already heard evidence concerning those appeals at the Hearing regarding MSBCA 2544 and 2548.
112. The remaining appeal ground involves April 2006 communications between the Procurement Officer and representatives of Catalyst regarding information related to customizing the formulary to be administered by Catalyst as part of its contract performance. These discussions are alleged by Caremark to have been improper and violative of Maryland Law and regulations.

113. The September 14, 2006 protest alleged that on or about April 4, 2006, the Procurement Officer and the Department had engaged in post-BAFO discussions on the topic of the formulary to be implemented by Catalyst.
114. The evidence proffered by Caremark in support of its protest consisted of two emails, dated April 3, 2006 and April 4, 2006, from the Procurement Officer to representatives of Catalyst.
115. The April 3, 2006, (at 5:40 PM) email from the Procurement Officer to Mike Donovan of Catalyst, with a copy to Troy Loney of Catalyst, read as follows:

Mr. Mike Donovan:

As we just discussed, we are trying to minimize disruption to State employees under the new contract. So I have two main questions for Catalyst Rx and some detail questions under each main question.

I. Can your formulary mimic the current State formulary? I think you can because you noted in your proposal that you offered "complete formulary customization".

a) If so, is there any cost for this?

b) If there is, how much would this cost be?

II. Can your formulary mimic the current State formulary for the top 20 drugs for which members would pay a higher copay under the Catalyst Rx formulary than under the formulary in the current contract? (The list of the top 20 drugs is attached in an Excel spreadsheet.)

a) Is there any cost for this?

b) If there is, how much would this cost be?

Let me know,

Ed Bannat
Procurement Officer

Appellant's Exhibit 101.

116. The April 3, 2006, email included an attachment that was a one-page Excel spreadsheet, identified as: "State of Maryland, Formulary Analysis, Top 20 Disrupted Brand Drugs, Analysis Based on Caremark Paid Claims Data for July 1, 2005 - January 31, 2006." Appellant's Exhibit 101.
117. The April 4, 2006, (at 11:11 AM) email, from the Procurement Officer to Troy Loney of Catalyst, with a copy to Mike Donovan of Catalyst and Diane Bell of the Department, read as follows:

Mr. Troy Loney,

As we just discussed, disregard my question in my first email below on mimicking the whole current State formulary. Also, restate my 2nd below question on the top 20 drugs to:

"How much would it cost (on a per month basis) if we delayed implementation of the Catalyst list for the top 20 drugs?"

Also, as we discussed, the evaluation ranking sheet is attached.

Also, I found out that the data on the top 20 drug list is, as stated, for the July 1, 2005 - January 31, 2006 period.

Ed Bannat
Procurement Officer

Appellant's Exhibit 102.

118. The "evaluation ranking sheet" that was attached to the April 4, 2006, email was a one-page chart listing the nine offerors for this

- procurement, with their technical ranking, proposed total cost, financial ranking and overall ranking, entitled: "Pharmacy RFP # F10R6200071 Evaluation Ranking." Appellant's Exhibit 102.
119. In addition, the April 4, 2006 email included, as text and not an attachment, the April 3, 2006 email text detailed in Appellant's Exhibit 101. Appellant's Exhibit 102.
120. The April 3, 2006 and April 4, 2006, emails, on their face, illustrate that the Procurement Officer and representatives of Catalyst had also discussed, in other conversations, the topics identified in the emails shortly before the April 3, 2006 and April 4, 2006 emails were sent by the Procurement Officer. Appellant's Exhibits 101 and 102.
121. Caremark's counsel admitted, during testimony on the Hearing held concerning this appeal, that he understood that the April 3, 2006 and April 4, 2006 emails referred to recent, post-BAFO communications between Catalyst and DBM.
122. Caremark's counsel viewed the April 4, 2006 email as evidence that the Procurement Officer "engaged in discussions with Catalyst, in violation of COMAR 21.05.03.03D(1)."
123. Caremark's counsel received the April 3, 2006 and April 4, 2006 emails on August 23, 2006 as part of discovery production in MSBCA 2544 and 2548.
124. By way of a four-page letter dated August 28, 2006, Caremark raised numerous issues with the Department concerning what Caremark considered to be incomplete

- production of documents by the Department. Caremark's Opposition to Catalyst's Motion to Dismiss Exhibit 16.
125. Caremark's August 28, 2006 letter did not mention the April 3, 2006 and/or April 4, 2006 emails, or request any responses which may have existed to those emails.
 126. Between August 23, 2006 and September 4, 2006, Caremark did not ask the Department whether there had been any response from Catalyst to the April 3, 2006 and/or April 4, 2006 emails from the Procurement Officer.
 127. The Department and the Procurement Officer did not do anything to mislead Caremark regarding the contents of the April 3, 2006 and/or April 4, 2006 emails or the facts regarding the exchanges between Catalyst and the Procurement Officer evidenced by the April 3, 2006 and/or April 4, 2006 emails.
 128. Caremark knew, or should have known, on August 23, 2006 the facts on which it based its September 14, 2006 protest alleging improper post- BAFO discussions between the Department and Catalyst.
 129. Caremark knew, or should have known, on August 23, 2006 the facts on which it based its September 14, 2006 protest alleging improper disclosure of Caremark proprietary data.
 130. Caremark filed the protest that is at issue in MSBCA 2565 on September 14, 2006. Caremark's Opposition to Catalyst's Motion to Dismiss Exhibit 22.
 131. Caremark knew, or should have known, the grounds for the protest (MSBCA 2565) on August 23, 2006 and was required to have filed its protest on or before August 30, 2006.

132. Caremark's protest (MSBCA 2565) was untimely under COMAR 21.10.02.03.B because it was filed more than seven days after the basis for the protest was known, or should have been known.
133. The Department properly dismissed the protest as untimely.
134. All nine offerors, including Catalyst and Caremark, submitted BAFO's to the State on February 2, 2006.
135. After receipt and evaluation of the nine BAFO's, the evaluation committee and the Procurement Officer determined that the proposal of Catalyst offered the best value to the State and that Catalyst should be recommended for award.
136. On February 17, 2006, the Procurement Officer advised the Department Secretary that the evaluation team recommended Catalyst as the awardee for the subject procurement and that he concurred with the recommendation.
137. The Secretary of the Department accepted and adopted that recommendation.
138. Subsequent to the Secretary's approval of the Procurement Officer's recommendation for award to Catalyst, the Department requested that Catalyst execute the Pharmacy Benefits Purchasing Pool Management And Pharmacy Benefits Administration Services Contract ("PBM Contract").
139. By way of a facsimile dated March 17, 2006, Catalyst transmitted to the Department the PBM Contract bearing the signature of Catalyst's Chief Financial Officer, Michael P. Donovan, and the date March 16, 2006.
140. In the PBM Contract, Catalyst committed to perform in accordance with its technical and financial proposals.

141. On March 17, 2006, Catalyst also forwarded to the Department a copy and original of a Performance Bond, in the amount of \$1 million, executed on March 17, 2006 guaranteeing various aspects of its performance.
142. The Department has not, as of today's date, executed the Contract.
143. The Department sought Board of Public Works approval of the recommendation to award the contract to Catalyst but withdrew the request for approval as a result of Caremark's first protest filed March 27, 2006.
144. The Contract documents to be approved by the BPW and that will be resubmitted to the BPW are those documents signed by Catalyst in March, 2006.
145. The Contract incorporates the Catalyst technical proposal and the Catalyst financial proposal.
146. The Catalyst technical proposal incorporated into the Contract does not include any correspondence, communications or documents dated after February 27, 2006.
147. The Catalyst financial proposal incorporated into the Contract does not include any correspondence, communications or documents submitted after February 2, 2006.
148. The Procurement Officer was asked, based on a request from the Department Secretary, to find out the cost of a delay in implementing Catalyst's formulary.
149. The Secretary indicated that delayed implementation of the Catalyst formulary likely would not occur if it would result in an increase in price.

150. Catalyst offered formulary customization as part of its technical proposal describing the services it offered to provide during the Contract term.
151. Neither the April 3, 2006 nor the April 4, 2006 email asked Catalyst to change the Catalyst formulary.
152. Neither the April 3, 2006 nor the April 4, 2006 email directed Catalyst to change the Catalyst formulary.
153. By email dated April 10, 2006, Catalyst answered the question asked by the Department in the April 4, 2006 email.
154. After Catalyst submitted its April 10, 2006 email responding to the April 4, 2006 email the information provided by Catalyst was provided to the Department Secretary. No further steps were taken by the Procurement Officer regarding the requested and received information.
155. The Procurement Officer did not have any communications with Catalyst on the topic of the April 3, 2006 and April 4, 2006 emails after April 11, 2006.
156. No change orders, modifications, or amendments were prepared as a result of the communication between the Procurement Officer and Catalyst in April, 2006 to alter the Contract as signed by Catalyst.
157. After the submission of its BAFO, Catalyst did not change its technical or financial proposals.
158. Catalyst did not use any of the information from the April 3, 2006 or the April 4, 2006 emails in submitting its technical proposal, financial proposal, or BAFO.
159. The Procurement Officer's decision to recommend award to Catalyst was not changed or influenced by the

- exchanges between the Procurement Officer and Catalyst that occurred in April, 2006.
160. The proposed contract between Catalyst and the State of Maryland was not changed or altered by the exchanges between the Procurement Officer and Catalyst that occurred in April, 2006.
 161. The Contract signed by Catalyst in March, 2006 is the contract to be presented to the BPW for approval should the Department prevail in appeals MSBCA 2544, 2548, and 2565.
 162. The Procurement Officer and evaluation committee found that Caremark's proposal represented "no formulary disruption" to the State.
 163. The RFP did not require any specific formulary or the placement of any specific drugs on the formulary proposed by offerors. See Joint Exhibit 8 (from appeals MSBCA 2544 and 2548).
 164. The evaluation criteria in the RFP did not call for evaluating the cost of formulary disruption as a separate technical or financial criterion. Id.
 165. At no time before it submitted its BAFO did Caremark ever protest the evaluation criteria in the RFP or the formula in the RFP for evaluating financial or technical proposals.
 166. In evaluating the financial proposals of Caremark and Catalyst, the Department followed the evaluation criteria contained within the RFP.
 167. On or about April 13, 2006, the Department and Caremark entered into a Fourth Modification to Pharmacy Benefits Management Services Contract (Fourth Modification).

168. The Fourth Modification was requested "to extend the contract term by six months to allow time to resolve" Caremark's protests against the award of the new contract for the Pharmacy Benefits Manager (PBM) services.
169. The Fourth Modification provided for payments to Caremark of approximately \$160 million for providing the same services (with certain exceptions and differences) as those that were solicited by the procurement that is the subject of Caremark's appeals.
170. The Fourth Modification called for Caremark to provide services consistent with Caremark's November 29, 2005 technical proposal, "including all attachments, addendums, clarifications, and subsequent correspondence submitted by [Caremark] through February 2, 2006" and be paid on the terms of Caremark's February 2, 2006 financial proposal, both of which were submitted in response to the RFP that is the subject of this protest.
171. The Department and Caremark, during implementation of the Fourth Modification, discussed the placement of certain drugs on the formulary offered by Caremark's technical proposal.
172. On or about December 20, 2006, the Department and Caremark entered into a Fifth Modification to Pharmacy Benefits Management Services Contract (Fifth Modification).
173. The Fifth Modification was requested "to extend the contract term by another six months to allow time to resolve" Caremark's protests against the award of the new contract for the PBM services.

174. The Fifth Modification provided for payments to Caremark of approximately \$160 million for providing the same services (with certain exceptions and differences) as those that were solicited by the procurement that is the subject of Caremark's appeals.
175. Both the Fourth and Fifth Modifications continued implementation of the State's formulary. In the Fourth and Fifth Modifications, Caremark did not reduce the price that it charged to the Department for continuing (or "mimicking") the State's current formulary.
176. Any of the approximately 70 million members of all the plans administered by Caremark can access detailed information about the formulary used for that member's plan.
177. Any of the approximately 99,500 members of the Maryland State plan administered by Caremark can access the formulary placement of any drug on the formulary used by Caremark in administering the plan.
178. Caremark filed a Notice of Appeal with the Board on October 16, 2006 regarding the September 14, 2006 protest. This is Appeal MSBCA 2565.
179. The Department filed a Motion to Dismiss or, in the alternative, for Summary Disposition on October 26, 2006.
180. Catalyst filed a Motion to Dismiss for Lack of Jurisdiction and, in the Alternative, for Summary Decision on January 2, 2007.
181. Both the Department's and Catalyst's Motion were held by the Board for final decision until the hearing on MSBCA 2565 was held.
182. MSBCA 2565 was heard by the Board on January 25 and 26, 2007.

183. MSBCA 2544 and 2548 were consolidated by the Board with MSBCA 2565 for purposes of rendering a decision on all of Caremark's appeals in one action.

DECISION
MSBCA 2544 and 2548
Motion for Summary Disposition

Appellant Caremark has filed a Motion for Summary Disposition, arguing that "Catalyst is not eligible for contract award."

Caremark points out that the RFP established a 120-day period of time during which offers were irrevocable. This 120-day period began to run on the closing date for the submission of BAFO's - February 2, 2006. According to Caremark, that 120-day period ran until June 2, 2006, during which time neither Caremark nor Catalyst could lawfully revoke their offers to the Department under the RFP.

Caremark argues that Catalyst did not extend the period of irrevocability of its offer prior to the expiration of the 120-day period and that Catalyst was free on June 3, 2006 to withdraw its offer (and remains so to the present day).

Caremark claims that Catalyst has, therefore, obtained an "unfair competitive advantage". By failing to extend its offer during the 120-day period, Catalyst can now withdraw its offer "at any time". Catalyst is, Caremark argues, illegible for award of the contract.

The Board disagrees with Caremark - finding as a matter of fact and of law that Catalyst is not ineligible for award of this contract - and denies the Motion for Summary Disposition for the reasons that follow.

Catalyst has clearly not abandoned its offer, or in any way indicated that it wishes to withdraw its offer. Catalyst has, rather, taken a number of steps that evidence its clear intent to be bound to its BAFO offer and enter into this contract with the State of Maryland.

Prior to the expiration of the 120-day period of irrevocability mandated by the RFP, Catalyst took several affirmative steps indicating that its acceptance of the contract remained in effect. These steps included: 1) the prompt submission of a signed contract to the Department at the request of the Procurement Officer; 2) the prompt submission of a signed contract affidavit to the State upon the request of the Procurement Officer; 3) the obtaining and submission to the Procurement Officer of a \$1 million performance bond; and, 4) active and ongoing participation in the protest and appeal process.

The United States Comptroller General has held that an interested party is not required to extend its offer through the pendency of a protest because the party's active participation in a bid protest tolls that period until the protest is resolved. See, e.g., Mission Van & Storage Co., Inc. and MAPAC, Inc., a Joint Venture, 53 Comp.Gen. 775 (1974), 74-1 CPD ¶195; Consultants, Ltd., 2001 CPD ¶92, B-286688.2 (May 16, 2001). Significantly, active participation in a bid protest permits the revival and acceptance of even expired offers. See, e.g., S. J. Groves & Sons Co., 82-2 CPD ¶423, B-207172 (Nov. 9, 1982); Pride Mobility Products Corporation, 2005 CPD ¶72, B-292822.5 (Dec. 6, 1999).

Catalyst's proposal has never lapsed. Catalyst has never revoked its proposal, or indicated in any fashion any

desire to revoke its proposal. Catalyst's proposal remains viable and open up to the present day.

There is no evidence that Catalyst has ever sought to obtain a competitive advantage by offering a shorter acceptance period than any of the other offerors, or by withdrawing, or threatening to withdraw, its proposal.

Catalyst fully complied with the terms of the RFP and with all requests made by the Procurement Officer indicating acceptance of, and an intent to be bound by, this contract. There is no evidence that Catalyst has ever refused a request by the Procurement Officer to extend the period of irrevocability.

The RFP-mandated period for irrevocability for all offerors, Catalyst and Caremark included, did end during Caremark's protests and appeals of the award of this contract. Like Caremark, however, Catalyst's involvement in these protests and appeals extends that period.

To find, as Caremark's suggests, that Caremark is a proper party to these proceedings as the protestor and eligible for contract award but that Catalyst is not a proper party to these proceedings, is not an interested party and is not eligible for contract award simply makes no sense whatsoever. Such a finding would be completely unfair to Catalyst. Such a finding would also do clear harm to the integrity and efficiency of the procurement system in Maryland as well.

An illustrative case is Mission Van & Storage Co., Inc. and MAPAC, Inc., a Joint Venture, *supra*. In that case, the protestor argued that the low bidder's expired offer could not be accepted where it had expired during the pendency of the protest. The Comptroller General denied the protest and held that the expired offer could be

reinstated. The Comptroller General found that the integrity of the bidding system was not compromised where the low bidder offered to hold its bid open for the minimum acceptance period required by the IFB and did not seek to gain a competitive advantage by offering a shorter acceptance period. The low bidder was also found to have shown its intent to hold open its bid by its active participation in the bid protest. The bid acceptance period was, therefore, found to be tolled during the pendency of the protest.

In a similar fashion, Catalyst's proposal also met the RFP mandated requirement for a minimum irrevocable proposal acceptance period. Catalyst's offer was, by operation of the RFP, irrevocable for 120 days after the submission of its BAFO. Catalyst has similarly actively participated in these protests and appeals. Catalyst has complied with all of the Procurement Officer's requests regarding the award of this contract, including signing the proposed contract, executing and submitting a Contract Affidavit, and obtaining and submitting a performance bond.

There is no evidence whatsoever that Catalyst does not intend to be bound to the terms of its BAFO and the contract.

Caremark's reliance on Kinsley Construction, Inc., MSBCA 2384 and 2399, 6 MSBCA ¶546 (2004), is misplaced. In that decision, the Board was clear that the mere passage of a date by which an offer may become revocable is not sufficient cause to find that an offer has been revoked or that an offeror is no longer an interested party eligible for contract award.

The Board noted that COMAR 21.05.02.19A provides that for 90 days after the opening of bids, bid prices are irrevocable. *Id.* at p.3. This section does not, however,

. . . provide that bids are deemed to be withdrawn if they are not accepted within the 90 day period. It simply says that they are "irrevocable" during the that time.

Id.

The Board also found that although COMAR 21.05.02.19B permits the Procurement Officer to request bidders to extend the time during which the State may accept their bids:

COMAR 21.05.02.19B does not provide that bids are deemed to be withdrawn if the agency fails to request an extension. It simply says that the procurement officer 'may' make such a request. Although the State potentially leaves itself at risk when it fails to do so, the risk is merely academic here since Appellant did not withdraw its bid.

Id.

Thus, the bid and offer of the Appellant in Kinsley, like the bid and offer of Catalyst here, was not withdrawn simply because the State did not request an extension.

As the Board further found, the "real problem" regarding standing in Kinsley was not presented by COMAR 21.05.02.19; it was presented by the lapse of a required bid security.

Far from bolstering Caremark's case, Kinsley actually provides support for the proposition that Catalyst's bid, BAFO and offer to perform the contract remain very much in

force since Catalyst has not revoked its offer, although the period for which the offer was irrevocable has expired.

The other cases cited by Caremark are found to be not on point and unpersuasive.

The Board will, therefore, deny Caremark's Motion for Summary Disposition.

The reasons for this holding have been clearly discussed, but the Board also points out that a ruling such as Caremark suggests might well encourage potential protestors to file protests and appeals with little or no merit hoping that a delay, of the protestor's own making, will result in the awardee being found ineligible for award. Such a result would not be in the interests of fundamental fairness, of the Maryland State procurement system, or of the people of Maryland.

DECISION
MSBCA 2544 and 2548
Respondent's Motion to Dismiss

Respondent Department has filed a Motion to Dismiss these appeals based on Caremark's alleged failure to follow, and violation of, the Board's pre-hearing order regarding production of documents and Caremark's alleged failure to produce documents responsive to the Department's request. The Department requests that these appeals be dismissed or, in the alternative, that a lesser sanction be imposed on Caremark.

As COMAR 21.10.06.31 makes clear, the Board has broad discretion in ordering sanctions for failure to obey an order of the Board. The "Board may make whatever order in regard to the failure as it considers necessary to the just and expeditious conduct of the appeal." *Id.*

For the record, the Board is troubled by what occurred in these appeals regarding discovery.

As is described in the remainder of this decision, however, Caremark's appeals are found to be without merit and will be denied.

Suffice it to say that this Board expects all counsel in all matters to obey orders issued by the Board. Should a party in the future fail or refuse to obey an order issued by the Board, this Board will not hesitate in the slightest to find against the offending party, up to and including dismissing the claims of an Appellant or granting judgment for an Appellant, depending on the particular facts of a situation and the posture of the offending party.

DECISION
MSBCA 2544 and 2548
Merits

Appellant Caremark raised numerous issues throughout the appeal process involving MSBCA 2544 and 2548. Caremark has focused in on eight grounds for appeal within it's Post-hearing Brief. The Board will resolve each of those grounds.¹

To begin, most of Caremark's appeal grounds revolve around Caremark's assertions that the evaluation committee and/or the Procurement Officer acted arbitrarily, capriciously, unreasonably or in violation of law during the evaluation of this RFP and the recommendation for award of this contract.

Before dealing with Caremark's arguments, the Board points out that this Board has repeatedly stressed in past

¹ The Boards finds no merit in any of the other grounds which Caremark may have raised during the Appeal process but has chosen not to brief in it's Post-Hearing Brief.

decisions - involving these sort of claims - that Appellants such as Caremark have 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. Delmarva Community Services, Inc., MSBCA 2302, 5 MSBCA ¶523 (2002) at p. 5. This is not a light burden for an Appellant to meet and this Board requires strong, clear and substantial evidence - not allegations, suppositions, biased opinions or conjecture - before finding such a burden has been met. See, ACS Healthcare, LLC, MSBCA 2474, ___ MSBCA ___ (2005). An Appellant's disagreement with the evaluation of its proposal or the recommendation for award is not sufficient to meet this burden. See, e.g., Delmarva Community Services, Inc., *supra*; ACS Healthcare, LLC, *supra*.

Mere disagreement with the judgment of the evaluators assigned to an evaluation panel for procurement is insufficient to show that the evaluation of proposals is unreasonable. E.g., Delmarva Community Services, Inc., *supra*; AGS Genasys Corporation, MSBCA 2197, 2 MSBCA ¶158 (1987).

This Board has repeatedly and consistently ruled that, since a procurement official's findings concerning the relative technical merits of proposals are discretionary and entitled to great weight, the Board will only determine whether a Procurement Officer's determinations concerning the relative technical merits of proposals are arbitrary, capricious, unreasonable or contrary to law or regulation. *Id.*

This Board is not designed to be, nor does it function as, a "Procurement Super-Evaluation Committee" reviewing in minute detail every aspect of a Procurement Officer's

decision to award a contract. That is not this Board's legal charge and such a process would, in our view, seriously damage and undermine the State government procurement system and process within Maryland.

This Board has been and remains, therefore, extremely reluctant to substitute its judgment for that of a procuring agency. The agency must live with the results of its determination as to what is the most advantageous offer in a procurement, and the agency receives the benefit of any doubt so long as the agency's determination can be rationally justified. See, Eisner Communications, Inc., MSBCA 2438, _____ MSBCA ____ (2005). The Board will not disturb an evaluation committee's and/or a procurement officer's recommendation for award of a contract unless the burdens and decision overturning requirements clearly established by Board precedent are met. *E.g.*, ACS Healthcare, LLC, *supra*; Eisner Communications, Inc., *supra*; Delmarva Community Services, Inc., *supra*; RAID, Inc.; MSBCA 2197, 5 MSBCA ¶485 (2000); AGS Genasys Corporation ; *supra*; B. Paul Blaine Associates, Inc.; MSBCA 1123, 1 MSBCA ¶58 (1983).

Having established those clear ground rules, the Board now moves on to deal with Caremark's grounds for appeal.

Caremark first claims that the Department conducted this procurement and the evaluation of proposals in an arbitrary, capricious, and unreasonable manner that violated Maryland Law. Specifically, Caremark claims that the Department ranked Caremark lower than Catalyst with respect to two evaluation sub factors: 1) transparency, reporting and disclosure, and, 2) purchasing pool management (also referred to as the Maryland Rx Program). Caremark asserts that the Department gave excessive

importance to these two sub factors and, even if the Procurement Officer was correct in evaluating the sub factors, he failed to reasonably weigh the purported technical advantage of the Catalyst proposal against the low price of Caremark in determining the most advantageous offer to the State.

The RFP established six technical evaluation criteria to be applied to the technical proposals submitted by offerors. RFP §5.2. The Procurement Officer testified at the hearing on Caremark's appeals that in evaluating the nine technical proposals that were submitted in response to the RFP, he and the evaluation committee applied the criteria of the RFP. In applying the criteria, the committee and the Procurement Officer considered the proposals, including the BAFOs and other relevant information developed during the RFP process.

In this appeal ground, Caremark alleges that the Procurement Officer arbitrarily and unreasonably read and applied the RFP and unreasonably evaluated Caremark's and Catalyst's proposals (N.B. this common theme is present in many of Caremark's appeal allegations).

Caremark's assertions are, however, unsupported by the evidence in this case. The Procurement Officer testified at length as to the evaluation process. Following the RFP, he reasonably interpreted and followed the RFP to treat the listed evaluation criteria as required by the RFP - the evaluation criteria were each listed and were to be applied in descending order of importance based on how they were listed in the RFP. RFP §5.2. The Procurement Officer testified that the various sub factors within each evaluation criteria were viewed to be equally weighted components of each evaluation criteria. There is no

credible evidence of any kind that either the evaluation committee or the Procurement Officer gave "excessive importance" to any of the sub factors, including "transparency, reporting and disclosure" and/or "purchasing pool management".

The evaluation committee and the Procurement Officer reasonably interpreted the evaluation criteria and criteria sub factors and utilized those criteria and sub factors in evaluating the proposals of all nine offerors herein. Caremark has submitted no credible evidence to the contrary.

A reasonable basis exists for the evaluation of proposals by the evaluation committee and the Procurement Officer concerning this appeal ground as raised by Caremark. The Board, therefore, cannot and will not sustain this appeal ground.

Caremark next asserts that the Department and the Procurement Officer failed to reasonably weigh the purported technical advantage of the Catalyst proposal against the low price of Caremark in determining the most advantageous offer to the State.

The RFP states:

. . . [T]he Procurement Officer will recommend award of the contract to the responsible Offeror whose proposal is determined to be the most advantageous to the State considering technical evaluation factors and price factors as set forth in the RFP. In making the most advantageous Offeror determination, technical factors will be given greater weight than price factors.

RFP §5.5.3.

The Procurement Officer testified in great detail as to the evaluation process. That testimony included the evaluation process which occurred regarding technical and price factors.

The Procurement Officer's testimony established a reasonable and rational basis for the evaluation of the nine proposals submitted herein. According to his testimony:

I looked at what I considered the strengths and weaknesses. I found there were three areas in what - and I found Catalyst and Caremark very comparable except for three areas. In those three areas, and we've gone over them, but I'll go again, transparency, purchasing pool, and economic impact, I found Catalyst better.

I looked at what Catalyst gave us that Caremark didn't in those three areas. I felt that it was worth more than 1 percent, and it was worth more than 13.3 million dollars over five years. That \$2.5 million a year.

The difference in price between Caremark's and Catalyst's offers under the RFP was approximately \$13.3 million out of a contract valued at \$1.4 billion. That \$13.3 million figure is approximately one percent of the contract value.

Caremark claims that the Procurement Officer failed to consider this price difference in evaluating the proposals of Caremark and Catalyst. Caremark is factually incorrect in this assertion. As the above-noted testimony illustrates, the Procurement Officer clearly considered the technical advantages found in Catalyst's proposal against the lower (albeit one percent lower) price offered by

Caremark in determining which offer was more advantageous to the State.

Procurement officials may award a contract to a higher priced, technically superior proposal if it is determined that the higher priced, technically superior proposal is also the proposal most advantageous to the State. E.g., Delmarva Community Services, Inc., supra; United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989); Information Control Systems Corporation, MSBCA 1198, 1 MSBCA ¶81 (1984).

As discussed, there was clearly a reasonable, rational basis for the Procurement Officer determining Catalyst's offer to be the offer most advantageous to the State (in spite of the one percent higher price of the Catalyst offer as compared to Caremark's offer). Caremark's appeal on this ground is, therefore, denied.

Caremark's next appeal ground involves Caremark's claim that procurement officials ignored Caremark's relevant experience and "other advantages of incumbency" in the evaluation process and, therefore, the resulting evaluation and recommendation for award was arbitrary, capricious, unreasonable and violative of Maryland Law. Caremark argues that: "The Procurement Officer graded Catalyst's proposal as equal to Caremark on a number of important criteria and subfactors[sic] when, in fact, the objective evidence showed obvious advantages to Caremark's proposal."

Once again, Caremark has offered no substantive evidence to justify these claims and the evidence actually indicates otherwise. The Procurement Officer testified at the hearing that he considered the prior experience and

performance by Caremark and its subsidiary AdvancePCS on the current Maryland contract as part of his evaluation and recommendation. The Procurement Officer testified that he considered Caremark's prior contract performance.

In the February 17, 2006, notice of recommendation for award, the Procurement Officer specifically advised the Department Secretary of several strengths which flowed directly from Caremark's status as the incumbent contractor, including: "14 years successful experience with the State"; "[k]nowledge of state operations"; "[n]o disruption"; "[n]o formulary disruption"; "[n]o transition issues"; and, "[v]ery little implementation necessary".

Caremark argues that the Procurement Officer used "variable grading methods" in evaluating proposals. Caremark's argument is without factual support. The Procurement Officer testified at length regarding the method he used for evaluation of proposals. He explained that that he first graded each offeror's proposal and then he "compare[d] them to their competition." He used that method for each criteria and sub factor included in the RFP for each offeror. According to the Procurement Officer, he uses that process "on all of [his] evaluations."

According to the Procurement Officer, the grades potentially available to the offerors were "plus", "mid" and "minus". (those grades roughly were the equivalent of the grades "A", "B" or "C"). The Procurement Officer elaborated on this grading system, explaining that:

I was high school grading here. You know, a "C" is a pass, a "D" is a failing. A "B" is a "B". A "C" is 70 to 80. A "B" is 80 to 90. And an "A" is 90 to 100.

Under the "Administrative Capabilities" criteria sub factor "Experience and Past Performance" Caremark received a "plus" grade, the highest grade available. Catalyst also received a "plus" grade for that sub factor as well. Caremark received the highest grade possible for "Experience and Past Performance", so it is clear that Caremark's assertion that the Procurement Officials ignored Caremark's "relevant experience and other advantages of incumbency in the evaluation" is completely without merit. The Procurement Officer did not ignore Caremark's past performance.

Caremark also complains that Catalyst received a "plus" for the "Experience and Past Performance" sub factor, stating that "Caremark should have been rated superior to Catalyst" and that "failure to do so was improper and illegal."

The Board completely disagrees with Caremark. The record contains copious justification for the Procurement Officer and other evaluating officials to rank Caremark with a "plus" and "Catalyst" with a "plus" under the "Experience and Past Performance" sub factor. We will not add to an already lengthy opinion to recite these facts in detail but, rather, simply note for the record that the justifications for the decision are clear and convincing.

Caremark's argument is, in reality, merely Caremark's opinion. It consists of suppositions, conjecture, assertions, and conclusions. It lacks facts or evidence.

To find for Caremark on this ground would require the Board to completely ignore Board precedent and the long-established standard for reviewing the decisions of procuring officials in evaluating proposals and awarding

contracts. We decline this opportunity and deny Caremark's appeal on this ground.

Caremark next claims that the "Procurement Officer ignored formulary disruption to the [p]rejudice of Caremark, the State, and its Members". Caremark claims that the Procurement Officer found an arbitrary method to evaluate Caremark's proposal regarding the evaluation criteria "Clinical Capabilities", particularly the sub factor "Formulary Management".

Once again, Caremark offers opinion, conjecture, assertions, and conclusions in support of this appeal ground. What it does not offer are facts or evidence which even remotely justify sustaining this appeal ground. Caremark received a "plus" grade for the formulary management sub factor; Catalyst received a "plus" grade for that sub factor as well. Caremark argues that Catalyst should not have received as high a grade as Caremark regarding this sub factor. Caremark also argues that "formulary disruption" should have been considered within the evaluation criteria.

First, we must point out that Caremark received a "plus" grade, the highest grade possible, for the "formulary management" sub factor. Caremark's issue, therefore, is with Catalyst receiving a similar "plus" grade as well.

Once again, the Board notes that the record contains more than sufficient rationale for the finding by evaluators that Catalyst deserved a "plus" grade. The Board has no reason to overrule that finding.

As to the issue of "formulary disruption", Caremark argues that Catalyst and, frankly, no other offeror could receive a grade as high as Caremark because, as the current

contractor, Caremark's selection under the new contract would result in less "formulary disruption" than the selection of any new contractor.

The Procurement Officer testified that he did not want to set up evaluation criteria in which one offeror, by nature of its position as the incumbent, would have an unfair advantage over other offerors. He also testified that he did not want to set up the Department for a contract where the incumbent always wins. He did not, therefore, use or consider "formulary disruption" as a "plus" for Caremark and a negative for all the other offerors.

Such decisions and actions were not arbitrary, capricious, irrational, or illegal. They are consistent with state procurement goals, including treating persons who deal with the Maryland State Procurement system fairly and equitably. *See, generally, State Finance and Procurement Article § 11-201.*

As previously shown, Caremark received a number of positive grades for advantages flowing from its nature as the incumbent contractor. These advantages included being noted for "[n]o formulary disruption" by both the evaluation committee and the Procurement Officer in their evaluation of Caremark's proposal and being recognized for "no formulary disruption" under "formulary management" in the recommendation for award letter dated February 17, 2006, from the Procurement Officer to the Department Secretary. Caremark received recognition and positive credit for no formulary disruption, received a "plus" for the criteria "Clinical Capabilities" and was, therefore, in no way prejudiced by the evaluation process regarding Caremark and "formulary disruption".

The Procurement Officer's decision on how to treat Caremark's incumbency, including the issue of "formulary disruption", was in no way arbitrary, capricious, irrational or illegal. It is not, therefore, actionable and is not subject to second-guessing by this Board.

Even accepting Caremark's argument, to the extent that Catalyst could arguably have been graded lower on this one component of one sub factor of the third most important criterion there is no testimony or evidence that that grade would in any way have resulted in a different result regarding the final grading of Catalyst regarding this criteria ("Clinical Capabilities"), let alone the final technical evaluation of Catalyst or the recommendation for award to Catalyst. Once again, the Board is asked to speculate and substitute its judgment for the procuring officials herein. Once again, the Board, following clear, decades-old Board precedent, declines. This appeal ground is without merit and is denied.

Caremark next claims that the evaluation of the "transparency reporting and disclosure" sub factor "was fraught with errors reflecting arbitrary, capricious, and unreasonable actions that violated Maryland Procurement Law."

Caremark offers seven supporting bases for this contention.

Caremark first claims that the RFP did not identify enthusiasm or demeanor at the oral presentation as a factor in contract award. Caremark claims that "the RFP did not identify the quality of the oral presentations, enthusiasm, or a 'wow' factor as criteria, factors, or subfactors for selection."

Caremark's second claim is that the "critique of Caremark's Executive Summary was unfair, contrary to the RFP and violative of Maryland Law".

Caremark's third claim is that the "Procurement Officer wrongly applied a different grading system for evaluating 'transparency reporting and disclosure' than for certain other criteria."

Caremark's fourth claim is that "Caremark should have received a high grade for 'transparency reporting and disclosure' because it promised to provide the disclosure the RFP sought".

Caremark's fifth claim is that the Department "inappropriately upgraded Catalyst with respect to transparency for mail order and specialty pharmacy services".

Caremark's sixth claim is that there was unfair and disparate treatment of references.

Caremark's seventh claim to support the allegation of an arbitrary, capricious, unreasonable and/or illegal evaluation of the "transparency reporting and disclosure" sub factor is that the Procurement Officer allegedly misunderstood the term "attributable" to the Maryland Program.

As will be discussed in detail, these claims are without merit.

During this procurement, each offeror was presented with numerous opportunities to provide information to the Procurement Officer and evaluation committee, including: 1) the written technical proposal; 2) written responses to clarification questions provided to the offeror prior to its discussion and oral presentation; 3) the oral presentation and discussion; 4) written follow-up responses

submitted after the presentations and discussions; and, 5) the BAFO. Appellant's Exhibit 32.

Where the evaluators had questions or concerns about Caremark's proposal, such issues were brought to Caremark's attention. These were opportunities for Caremark to clarify and improve its proposal and Caremark responded by providing additional information.

When the evaluation of proposals was completed, Caremark received a grade of "minus" on the "Transparency Reporting and Disclosure" sub factor under the "Administrative Capabilities" technical evaluation criterion.

Caremark first claims that this grade was incorrectly based upon an improper and impermissible perception that Caremark's proposal and oral presentation lacked enthusiasm, or a "wow" factor.

Oral presentations and discussions are a valid part of the evaluation process and may provide information to be used by the evaluation committee and the Procurement Officer in evaluating and ranking proposals. As we have noted, it is reasonable to expect that evaluation scores may be improved or downgraded based on oral interviews and discussions. See AGS Genesys Corp., MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 13.

During the two-month period of the evaluation phase, the Department solicited information from all offerors, including Caremark, during each phase and considered the information and responses submitted by Caremark and the other offerors.

Caremark, along with all offerors, was given extensive and numerous opportunities to present the evaluators with information and to convince the evaluators that Caremark

offered the State of Maryland the "most advantageous" proposal in response to this RFP.

The Procurement Officer explained in detail the basis for Caremark's "minus" grade regarding "transparency":

Caremark, from the beginning, didn't go after this issue, in my opinion. As I said at the debriefing, the executive summary, which is where you tell the customer in a short clip of words how you're going to wow them, how you're going to impress them, how you should buy from me, Mr. State, because I'm the greatest thing since sliced bread.

And you - not you, but Caremark came along and didn't address two of the four top things in our criteria. I mean, especially transparency, but that got the most verbiage in our RFP . . .

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The Procurement Officer continued by noting:

[T]hey didn't go after transparency. They put an exception in the - they didn't address it in the executive summary, but they put an exception in the executive summary.

So then we came back in clarification questions. And we gave them - said, listen, 1.1.1., that is what we want you to answer. That is the guts of our RFP. And there were five subsections, five little subfactors there. Tell us what you're going to do on transparency, and tell us where you're going to deviate from it.

. . . Caremark came back and said, we'll do A, we'll do B, we'll do D, we'll do E. They didn't say that for C. C was a bunch of - well, not a bunch - several paragraphs, very confusing, as to what they were going

to give me, but if they would have wanted to do it, they would have said, we'll do it. They didn't.

So we went back and that led into the vendor discussions. They took exception - they took exception - they didn't answer that number C.

Mr. Pyzik [an evaluator] asked these questions, and Caremark answered them, and Mr. Pyzik kept - and he [Caremark's vice president] didn't give them the complete agreement that he would do it is when Mr. Pyzik said, he [Caremark's vice president] started hemming and hawing and fidgeting. And some of the other evaluators heard the same - or noticed the same uneasiness.

Before the evaluation was over, the state said, okay, Caremark, tell us, give us this comfort statement that the only income you will get from the retail side is through the admin fee, you will not get any other income on that. Caremark didn't answer that. They said at the time they would confirm that or tell us how they would comply. They never came back with a statement saying, we will do it.

The Procurement Officer stated that there were a number of factors and issues which created doubts in his mind that Caremark was committed to providing the transparency required by the RFP. Such doubts may be right or wrong, but they have not been proven to have been in any fashion arbitrary, capricious, unreasonable, and/or illegal.

The record (including the above-detailed testimony by the Procurement Officer) contains ample justification for the Procurement Officer's view that Caremark was not

providing the transparency required by this RFP and, therefore, provides ample justification for the awarding of a "minus" to Caremark for the transparency reporting and disclosure sub factor.

The RFP sought disclosure from the contractor of all contractor revenue sources, whether or not those sources were attributable to the State Plan or the Maryland Rx Program. See Joint Exhibit 4; Joint Exhibit 8. By arguably limiting its agreement to report revenues "attributable to the Plan", Caremark was arguably responding in variance to the requirements of the RFP. See Joint Exhibit 10, Tab 2.

Testimony from Caremark's own witness seems to indicate that "service fees" that Caremark receives "for providing a service to manufacturers" are "not specific to any client, so those are not attributable to the state".

There is, therefore, ample justification for the Procurement Officer's view that Caremark did not offer full transparency. Caremark's claims regarding enthusiasm at the oral presentation and the executive summary are contradicted by testimony and evidence that, under Board precedent, leave Caremark far short of establishing arbitrary, capricious, unreasonable, or illegal actions or decisions.

Similarly, the allegation regarding a different grading system being utilized for evaluating "transparency reporting and disclosure" than for other criteria is clearly contradicted by the record in this case.

Caremark's assertion that it should have received a higher grade for "transparency and disclosure" because it "promised to provide the disclosure the RFP sought" is simply that: an assertion. There are ample grounds for the Procurement Officer to disagree with that assertion. The

Board, therefore, will not disturb the Procurement Officer's judgment.

Catalyst received a "plus" grade regarding the "transparency reporting and disclosure" sub factor. Caremark argues that this grade was inappropriate. Particularly, Caremark points to the evaluation of Catalyst regarding mail order and specialty pharmacy services.

According to the Procurement Officer, Catalyst's rating of "plus" was not based on Catalyst's offer to provide the State with a copy of its subcontract with its mail order and specialty vendor. As noted by the Procurement Officer, that offer was an "over and above" the minimum requirements of the RFP. It was not something that was required by the RFP, and it was viewed by the Procurement Officer as an item which provided evidence of Catalyst's willingness to give the state full disclosure. According to the Procurement Officer: "This was a plus, not a determining factor in their proposal. It was a nice thing they gave us."

Moreover, contrary to Caremark's view, Catalyst's offer to disclose its subcontract with its mail order and specialty pharmacy vendor also offered real value to the State according to the Procurement Officer.

According to the Procurement Officer, Catalyst's "plus" grade for the "transparency reporting and disclosure" sub factor was based on a complete evaluation of Catalyst's proposal regarding this area. Caremark's minus grade was the result of a similar complete evaluation.

As to the allegation that there was disparate treatment of references, the record reflects otherwise. There is, quite simply, no credible evidence that the

Procurement Officer or the evaluation committee treated the references of different offerors differently or unfairly. The record clearly does not support Caremark's assertion. This assertion is unsupported by facts and this appeal ground must be denied.

Caremark's next claim, that the Procurement Officer misunderstood the term "attributable" to the Maryland Program, is also without support or evidentiary merit.

The record reflects that the evaluators specifically sought confirmation from Caremark that Caremark was willing to comply with the subparagraph (a) through (e) requirements of § 1.1.1 of the RFP. Caremark unequivocally confirmed its agreement to comply with subparagraphs (a), (b), (d) and (e), by stating simply: "Caremark confirms." For subparagraph (c), however, Caremark did not state "Caremark confirms." Instead, Caremark provided a three paragraph response.

The Procurement Officer found that this three paragraph response to be confusing and viewed it as purposely confusing (being worded so that he "couldn't figure it out"). This was not an arbitrary, capricious, unreasonable and/or illegal view by the Procurement Officer.

During the Hearing, the Board itself questioned the Procurement Officer regarding this issue:

Chairman Burns: Could you explain to me what your understanding of the answer to C is?

[Procurement Officer]: Mr. Chairman, that's been my difficulty in this procurement is nailing C down. I have - again, we're after - when we put the term in "not limited to," if they

would have come back and said, you got it all with the exception of this, this one we can't - I would understand that better.

But they take the approach, they're going to explain each one, but that doesn't even tell me that there's nothing else out there. That is the concern I had.

Chairman Burns: Well, am I right in reading this that . . . [t]he way it's drafted is to give Caremark an out on this issue.

[Procurement Officer]: That's how I interpreted it. . . .

In addition: the questioning went as follows:

[Procurement Officer]: . . . I'm not trying to say that Caremark didn't give us enough to be in the mix, but the way they pushed back on this issue just gave me the impression, my opinion was that they were holding back money that I wanted to have the state to get.

Chairman Burns: Were any other offerors marked down for their answer to what is here listed on page 10 as 18C?

[Procurement Officer]: Yeah. Any offeror that didn't meet specifications that we required was marked down. . .

Chairman Burns: . . . Caremark was not the only offeror that was marked lower -

[Procurement Officer]: That's correct.

Chairman Burns: -- because of their answer to this.

[Procurement Officer]: That's correct.

The transcript testimony makes it clear why the Procurement Officer had doubts and questions regarding Caremark's intentions and meaning regarding this answer. Just as obviously, such doubts were quite understandable and were not arbitrary, capricious, unreasonable, and/or illegal and this appeal ground is denied.

To the extent that any "misunderstanding" resulted regarding the term "attributable" to the State's business - and the Board finds no evidence of any such actionable or appealable "misunderstanding" being the case here - such misunderstanding was caused by Caremark's own words. There is no merit to this claim and this claim regarding confusion arising from transactions "attributable" to the "Maryland Program" is denied.

In summary, Caremark has not provided evidence that the evaluation of the "transparency reporting and disclosure" sub factor was in any way conducted in an arbitrary, capricious, unreasonable, and/or illegal manner and its appeal on this ground is denied.

Caremark next claims that the procurement officer evaluated the Maryland Rx sub factor in a manner that was arbitrary, capricious, unreasonable, and in violation of Maryland Law. Specifically, Caremark claims that: 1) Caremark's Maryland Rx technical proposal complied with the requirements of the RFP and was wrongly downgraded for lack of a "wow" factor; and, 2) "Catalyst's manipulative pricing undermined the Maryland Rx program.

Once again, these appeal grounds are without merit and will be denied.

There was, quite simply, ample evidence for the Procurement Officer and the Department to grade Caremark's Purchasing Pool Management (also referred to repeatedly during this appeal as the "Maryland Rx Program" and used interchangeably herein with that term) sub factor as a "minus" and Catalyst's sub factor as a "plus".

Caremark argues that it was downgraded as a result of the Procurement Officer's use of undisclosed criteria for evaluation - the lack of a "wow" factor and sufficient "enthusiasm".

Once again Caremark's assertion remains, after all is said and done, merely that - an assertion. Caremark has produced no credible evidence to support this claim. Evidence shows that Caremark received a "minus" grade from the Procurement Officer and other evaluators under the sub factor Purchasing Pool Management for several reasons.

The RFP instructed offerors to "describe how the Offeror's proposed services" would meet various outlined requirements, including "Maryland Rx Program Management". RFP §4.4.2.3 at p.29-30.

In response, Caremark in its technical proposal simply stated that it would comply with the RFP's requirements. These responses consisted of "Caremark confirms" under the sections and sub sections of its technical proposal dealing with the Maryland Rx Purchasing Pool. Joint Exhibit 10, Tab 2. The remaining responses of Caremark under this sub factor consisted of text which seems to have been taken, for the most part, from the RFP itself and regurgitated under the Maryland Rx Purchasing Pool sub factor.

In the oral presentations and in follow-up responses Caremark provided little additional information regarding this sub factor.

Clearly, the Procurement Officer's view that Caremark's mere reiteration of the RFP requirements to administer and manage the Maryland Rx Program and failure to provide other useful information negatively affected the rating of Caremark's proposal was justified. As a result, Caremark received a "minus" grade for its technical proposal regarding the sub factor "Purchasing Pool Management." There was, therefore, sufficient evidence for the Procurement Officer to have concluded that Caremark's response to the Maryland Rx Purchasing Pool sub factor warranted a "minus" grade.

In its brief and at the hearing, Caremark argued at length that no Maryland small business employer and no national business employer with employees in Maryland would reasonably opt to participate in the Maryland Rx Program. Caremark takes the position that it was unreasonable of the Department to evaluate an offeror's proposal favorably for efforts proposed in connection with the "Other Employer" group (as defined by the RFP) for this reason.

The RFP, however, clearly stated that "Other Employers" were part of the eligible members for the Program. Offerors were to include their approach for growing the Program for the "Other Employers" in their proposal response addressing the statement of work regarding the Program.

The Maryland Rx Program is new - administration of this Program is not a part of the predecessor contract. According to the evidence, the State looked to offerors to describe what efforts they would undertake to make the Program a success. According to the Procurement Officer, Caremark failed to provide details regarding Caremark's proposed approach. A review of Caremark's proposal and

other evidence indicates that this determination was reasonable.

At its vendor discussion, Caremark told the State that Caremark had a number of governmental entities as existing clients. According to the Procurement Officer, however, Caremark proposed nothing in terms of its approach and gave no assurances that Caremark would work actively to bring those clients to the Program. Based on such lack of detail, the Procurement Officer reasonably concluded that he did not know what Caremark was offering under this sub factor.

In summary, Caremark offered what the Procurement Officer reasonably found to be mere reiteration of the RFP requirements to administer and manage the Maryland Rx Program and failed to provide needed information regarding this sub factor. These failures affected the rating of Caremark's proposal. As a result, Caremark received a "minus" grade for its technical proposal regarding the sub factor "Purchasing Pool Management".

As the Procurement Officer noted during the hearing on these appeals, the "minus" grade was given:

Because they [Caremark] were acceptable, but barely acceptable. They didn't take the—they didn't take—they did nothing more than say they would comply. They didn't develop the subject. They didn't show us how they would comply. . . . They said we were in these various coalitions, but they didn't tell us any of the pluses, any of the minuses, any of the lessons learned they had in these coalitions. It was just, give them something, and let's see what happens.

For the reasons noted, the Procurement Officer's grade of "minus" for Caremark under the Maryland Rx Program sub factor was clearly not arbitrary, capricious, unreasonable and/or violative of law and Caremark's appeal on this ground is denied.

Caremark also argues that Catalyst should not have received a "plus" grade for the Maryland Rx Program sub factor, specifically because Catalyst's "manipulative pricing undermined the Maryland Rx Program". Caremark's allegations are completely without merit and this appeal ground must also be denied.

In contrast to Caremark's proposal regarding Maryland Rx Program Management, evidence indicates that Catalyst was much more detailed in its response to the Maryland Rx Program Management sub factor than was Caremark. Catalyst provided a Preliminary Marketing Plan that specifically targeted eligible members (as defined within the RFP) for the Program.

Caremark argues that Catalyst should not have received a "plus" rating because of the contents of Catalyst's Financial Proposal. Caremark takes issue with the administrative fee Catalyst proposed for Tier 4 under the Financial Proposal. That is the tier that would apply if membership in the Program exceeded 500,000 (the tier was weighted as having a 10 percent likelihood of occurring under the financial model used to evaluate proposals). Caremark claims that the price proposed by Catalyst at this level would be unprofitable for Catalyst. Caremark bases its argument on the costs attendant for Catalyst to administer the State Plan with a membership of approximately 100,000.

Caremark's position is without merit. It is likely that as Program numbers grow Catalyst will experience certain efficiencies of scale that will lower its costs of administering the State Plan. Also, it is foreseeable that as the number of members served increase, Catalyst's fixed costs will be spread across a larger base and the resulting cost per member will decrease.

It is also possible that Catalyst's compensation at Tier 4 will not be derived exclusively from the administrative fees paid by the State. Instead, each of the Maryland Rx Program Purchasing Pool Members also will be paying Catalyst administrative fees that are separately negotiated. Thus, Caremark's claims that Catalyst will experience a loss at Tier 4 is unsubstantiated opinion, not fact. It is an opinion not shared by the Procurement Officer and his view is not unreasonable.

Caremark asserts that the pricing scheme laid out by Catalyst undermines its incentive to promote the Maryland Rx program. As a party to this contract, Catalyst would have the obligation to act in good faith and meet its contractual obligations. The Department had and has no reasonable basis to believe that Catalyst would act in bad faith in fulfilling this contract. Any attempt by Catalyst to "make sure there are fewer—not more—participants in the Purchasing Pool" as Caremark argues would subject Catalyst to action by the State and would certainly severely damage Catalyst's business and reputation. As previously noted, the fact that as the purchasing pool grows, fixed costs can be spread among a greater number of members undermines Caremark's contention that Catalyst would lose money as the membership grows.

Finally, the RFP clearly stated that Technical Proposals would be evaluated separately from Financial Proposals. It would have clearly been improper for the State to use the contents of Catalyst's Financial Proposal as a basis to downgrade Catalyst's technical rating under the Purchasing Pool Management sub factor. This is another reason why Caremark's appeal on this basis must be denied. There is no evidence that Catalyst's pricing was in any way manipulative or undermined the Maryland Rx Program in any fashion.

The Procurement Officer and the evaluation team assigned Caremark a "minus" under the "Purchasing Pool Management" sub factor. They assigned Catalyst a "plus" under that sub factor. The evaluation of the "Purchasing Pool Management" sub factor complied with the RFP. There was nothing arbitrary, capricious, unreasonable or illegal about the evaluation of the Purchasing Pool Management sub factor. Caremark's appeals concerning Purchasing Pool Management/the Maryland Rx Program are denied.

Caremark next claims that the Procurement Officer acted arbitrarily and capriciously in the evaluation of the Maryland Economic Impact criterion. Caremark states that the Procurement Officer acted arbitrarily in evaluating Maryland Economic Benefit, arguing that the Procurement Officer should have graded Caremark's economic benefits as equal to Catalyst's. Caremark argues that "the economic impact will be approximately equal whether the contract is awarded to one vendor or the other."

There is no basis for Caremark's claim. Contrary to Caremark's argument, it was not arbitrary, capricious, unreasonable or illegal for the Procurement Officer to

assign Caremark a "mid" score for Maryland Economic Benefit and Catalyst a "plus" score for Maryland Economic Benefit.

Maryland Economic Benefit factors were a part of the technical criteria in the RFP and required a detailed description. RFP § 4.4.2.8 (Joint Exhibit 8). The RFP required offerors to take into consideration four specific items and to "explain any other economic benefit to the State of Maryland that would result from the Offeror's proposal." *Id.*

In response, Catalyst submitted, as part of its proposal, an 11-page economic analysis performed by Dr. Darius Irani from Towson University. The analysis showed the substantial economic benefit that the State would enjoy from acceptance of Catalyst's proposal. Joint Exhibit 19, Tab "Attachment J-4". Catalyst specifically offered two scholarships at the University of Maryland Pharmacy School for the life of the contract and the hiring ten local interns regarding economic impact. The Procurement Officer and the evaluation team also found strength for Catalyst under this factor because it was Maryland-based.

In contrast, Caremark included its Maryland Benefits in a short paragraph on Attachment J-4 of its proposal. Joint Exhibit 10, Tab 5, Attachment J-4. Caremark did not offer any Maryland scholarships. Caremark did not include an economic analysis. Caremark did not offer any internships. *Id.*

Based on the proposals submitted by Catalyst and Caremark, it was not, therefore, unreasonable, capricious, arbitrary or illegal for the Procurement Officer to rate Catalyst a "plus" and Caremark a "mid" under Maryland Economic Benefit. In evaluating the submissions from Catalyst and Caremark for this evaluation criterion, the

Procurement Officer found Caremark's proposal to be less beneficial than Catalyst's proposal. The Board will not disturb that determination. *E.g., Eisner Communications, Inc., supra; Information Control Systems Corp., supra.* The appeal on this basis is denied.

Caremark next claims that the Procurement Officer arbitrarily failed to weigh the alleged technical superiority of Catalyst against the extra cost associated with the Catalyst financial proposal. Caremark's arguments are speculative and without proof. The record shows that the financial analysis conducted by the Procurement Officer and by the evaluation committee complied with the RFP and principles of Maryland Procurement Law.

This decision has already dealt with this appeal ground in detail and found it to be without merit. This appeal ground is, therefore, denied.

Caremark's final argument in these appeals is that the Procurement Officer acted arbitrarily, capriciously and unreasonably in recommending to the Department Secretary that Catalyst was the most advantageous offer to the State.

The RFP, §5.5.3, set forth that technical merit was more important than pricing factors in determining the most advantageous offer. The Procurement Officer's recommendation to the Secretary of the Department on February 17, 2006, lists numerous written factors (broken down into strengths and weaknesses) found after evaluating the proposals of Catalyst and Caremark in regard to the RFP evaluation criteria. The Procurement Officer also summarized the financial differential between the two proposals that were most likely to be considered advantageous - Catalyst and Caremark.

The final technical rankings, for both the Procurement Officer and for each evaluation committee member, resulted in Catalyst being the most highly ranked offeror. Significantly, Caremark was ranked lower than Catalyst technically by each member of the committee and by the Procurement Officer, primarily as a result of weaknesses in its proposal related to sub factors of the technical evaluation criterion. (which have been addressed in detail in this opinion).

Using the financial evaluation model contained within the RFP Caremark was ranked first and Catalyst second. The difference between the two was less than 1%.

The Procurement Officer testified that he considered not only that the difference in the financial model was 1%, but that because the contract value was approximately \$1.4 billion, that the difference between the offerors was \$13 million. He testified that he considered the technical benefits provided by Catalyst to outweigh Caremark's proposal by more than that amount. None of the arguments or information put forward by Caremark establishes with evidence that the Procurement Officer abused his discretion, acted arbitrarily and capriciously, or violated Maryland procurement law when he performed the analysis outlined above.

Ultimately, the Procurement Officer decided that Catalyst's total proposal was the most advantageous to the State:

The evaluation came down to two offerors, Catalyst Rx and Caremark. Catalyst Rx was ranked #1 technical/#2 financial, but \$13M more expensive than Caremark or 2.5M/year over the five-year contract. Caremark was ranked #3 technical/#1 financial. Catalyst Rx was

the recommended awardee. All five evaluators were in agreement with the final ranking. I concur with their recommendations.

Joint Exhibit 34.

The record clearly demonstrates that the Procurement Officer correctly followed § 5.5.3 of the RFP and recommended award to the offeror whose proposal he deemed to be most advantageous to the State, considering technical evaluation factors and price factors. The Procurement Officer was not alone in his determination that Catalyst's proposal represented the most advantageous proposal to the State considering technical and price factors. All five members of the evaluation team ranked Catalyst as having offered the best overall technical proposal as well. Similarly, after consideration of financial proposals, and best and final offers, all five evaluators recommended Catalyst for award of the contract.

The record indicates that the Procurement Officer considered that Catalyst offered the better proposal in three technical areas. The Procurement Officer also considered that Caremark offered the proposal that was evaluated as one percent lower in price (or \$13.3 million). The Procurement Officer also considered that because of the evaluation of Caremark's proposal regarding transparency, full disclosure and pass through pricing, the evaluated price advantage offered by Caremark regarding dispensing fees and ingredient cost rebates could be illusory. Similarly, the Procurement Officer considered that Catalyst had offered savings of \$7 million in administrative fees as compared to Caremark. In addition, the Procurement Officer considered that Caremark was ranked third technically and

Catalyst was ranked first technically. The RFP required that technical factors be given greater weight than price factors. RFP §5.5.3. The decision of the Procurement Officer to select Catalyst was reasonable.

This Board has been very clear on its role in reviewing the decisions of procurement officials regarding Requests for Proposals (RFP) in a competitive negotiation²:

The competitive negotiation process is used when an award cannot be based solely on price. It involves an evaluation of technical factors as well as price in order to determine which proposal is most advantageous to the State. The evaluation of technical factors requires the exercise of discretion and judgment which is necessarily subjective. B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58 (1983). Moreover, such an evaluation is competitive in nature in that the proposals are considered in relation to one another. Ardinger Consultants and Associates, MSBCA 1890, 4 MSBCA ¶383 (1995). Thus, the determination of the relative merits of the various proposals is a matter for the procuring agency. This determination is entitled to great weight. The role of the Board of Contract Appeals is not to substitute its judgment for that of the agency. Accordingly, the Board "will not disturb an agency's determination regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations." Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994) at pp. 5-6 quoting

² The Board has used the terms "competitive negotiation" and "competitive sealed proposal" interchangeably over the years and continues that practice herein.

AGS Genasys Corp., MSBCA 1325, 2 MSBCA ¶158 (1987) at p. 12.

Raid, Inc., MSBCA 2197, 5 MSBCA ¶485 (2000) at p. 5.

The Board has emphasized that:

It is not the function of this [Board] to evaluate proposals in order to determine their relative technical merits. The contracting agency is responsible for determining which technical proposal best meets its needs, since it must bear the major burden for any difficulties incurred by reason of a defective evaluation. Accordingly, we have consistently held that procuring officials enjoy "a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award," and that such determinations are entitled to great weight and must not be disturbed unless shown to be unreasonable or in violation of the procurement statutes or regulations. (Underlining added) (Citations omitted).

United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 & 1409, 3 MSBCA ¶201 (1989) at pp. 58-59.

The law in Maryland regarding competitive negotiations is, therefore, long-standing and clear. In a procurement by competitive sealed proposal, the process of weighing the technical merits is a subjective one that relies on the business and technical judgment of the Procurement Officer. Information Control Systems Corp., MSBCA 1198, 1 MSBCA ¶ 81 (1984). The evaluation of proposals in a competitive negotiation procurement is a matter left in the Procurement Officer's sole discretion after receiving the advice of an evaluation panel, if one is used. United Communities

Against Poverty, Inc., MSBCA 1312, 2 MSBCA ¶ 144 (1987). The MSBCA may overturn a procurement officer's determination to award to an offeror only if the procurement officer acts unreasonably, abuses discretion, or fails to follow a legal requirement in making that award. *Id.*, at p. 10.³ 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. Klein's of Aberdeen, MSBCA 1773, 4 MSBCA ¶ 354 (1994) at p. 7.

When evaluating the relative desirability and adequacy of proposals, a procurement officer is required to exercise business and technical judgment. Under such circumstances, a procurement officer enjoys a reasonable degree of discretion and, for this reason, his conclusions may not be disturbed by a reviewing board or court unless shown to be arbitrary or arrived at in violation of Maryland's Procurement Law.

Baltimore Motor Coach Company, MSBCA 1216, 1 MSBCA ¶94 (1985) at p. 10.; B. Paul Blaine Associates, Inc., *supra*, at p. 14.

Mere disagreement with the evaluation of proposals or the recommendation for an award is insufficient to meet an appellant's burden of proving that the evaluation of proposals, and/or the award of a contract, has been unreasonable. Delmarva Community Services, Inc., MSBCA 2302, 5 MSBCA ¶523 (2002) at p. 5. The Board does not second-guess an evaluation of proposals or the award of a

³ See also, RAID, Inc., *supra*; B. Paul Blaine Associates, Inc., *supra*; Baltimore Industrial Medical Center, Inc.; *supra*; and, AGS Genasys Corp., *supra*.

contract, but will, rather, limit its review to whether or not a reasonable basis exists for the conclusions reached by the Procuring officials.

As the party seeking to disturb the Procurement Officer's decision, Caremark bears the burden of proof in these appeals. The contest of an award is a serious matter and an Appellant such as Caremark 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.*, Delmarva Community Services, Inc., *supra*, at p. 5; Astro Painting and Carpentry, Inc., MSBCA 1777, 4 MSBCA ¶355 (1994) at pp.8-9; AGS Genasys Corporation, *supra*, at p. 10; Xerox Corporation, MSBCA 1111, 1 MSBCA ¶948 (1983). This is not a burden that is easily met by an appellant and Caremark has not come close, on any appeal ground, to meeting this substantial burden in either of these two appeals.

Caremark has, by way of these appeals, asked this Board to reconsider and reverse the evaluation and recommendation for award of the Procurement Officer. Having considered the testimony, the exhibits, and the argument of all parties, the Board finds, as a matter of fact and law, that Caremark has failed to establish that the recommendation to award this contract to Catalyst was in any way unreasonable. Caremark has failed to prove that the Procurement Officer's decision to recommend award to Catalyst was arbitrary, capricious, unreasonable or contrary to law.

The Procurement Officer and the Department recommended award to Catalyst. Their conclusion is that Catalyst, not

Caremark, represents the offeror most advantageous to the State of Maryland.

Caremark's reaction to this finding is understandable. Caremark has provided, however, no evidence upon which this Board can sustain any of its appeal grounds.

As discussed at length within this opinion, the Board, after consideration of Caremark's claims, finds that the actions and judgments of the Procurement Officer and the Department officials responsible for the award of the contract herein have clearly not been proven by Caremark to have been arbitrary, capricious, unreasonable or contrary to law and that there are, considering the facts and evidence, no bases for sustaining Caremark's appeals.

Caremark's appeals as memorialized in MSBCA 2544 and 2548 are, therefore, denied.

DECISION
MSBCA 2565
Motion to Dismiss/For Summary Decision

Catalyst has filed a Motion to Dismiss for Lack of Jurisdiction and, in the Alternative, for Summary Decision. Catalyst argues that the Board is without jurisdiction to consider Caremark's appeal because the underlying protest was not filed in a timely manner. The Department also filed a Motion to Dismiss, or, in the alternative, for Summary Disposition.⁴

For the reasons that follow, the Board finds that these Motions must be granted.

⁴ In MSBCA 2565, Caremark alleged four protest grounds. Three of those grounds were found by the Board to be included within the appeals MSBCA 2544 and 2548 and the Board ruled that those three grounds would be decided within the Decision for MSBCA 2544 and 2548. The Board, therefore, will concern itself with the one remaining appeal ground in 2565. That ground is the claim that the Procurement Officer engaged in impermissible and illegal discussions with Catalyst in April of 2006.

Caremark claims that the Department, specifically the Procurement Officer, engaged in impermissible and illegal discussions with Catalyst in April of 2006.

Specifically, Caremark cites two emails dated April 3, 2006 and April 4, 2006 as proof of these improper and illegal discussions.

Unfortunately for Caremark, the facts are clear that Caremark was on notice as to this claim on August 23, 2006 but waited until September 14, 2006 to file a protest. Caremark's failure to file its protest with the Procurement Officer within seven days of receiving notice of the claim (by August 30, 2006) clearly violates COMAR 21.10.02.03B. The failure by Caremark to file this protest with the Procurement Officer within seven days after the basis for the protest was known or should have been known means that the Procurement Officer is without authority to consider the protest. COMAR 21.10.02.03C.

The Board is, therefore, without jurisdiction to hear and rule on such an untimely filed protest. *E.g.*, Chesapeake System Solutions, Inc., MSBCA 2308, 5 MSBCA ¶501 (2002); Clean Venture, Inc., MSBCA 2198, 5 MSBCA ¶486 (2000). This time requirement is mandatory and must be strictly construed. Initial Healthcare, MSBCA 2267, 5 MSBCA ¶512 (2002). It is clear that whether a bidder knew or should have known the basis for a protest has also been strictly construed by the Board. Clean Venture, Inc., *supra*. The Board is without discretion to waive or toll the seven day filing deadline requirement. *In re* FMC Technologies, Inc., MSBCA 2312, 6 MSBCA ¶527 (2003).

The relevant facts make clear the reasons for the Board's decision. Pursuant to Caremark's request for production of relevant documents the Department produced

and forwarded a number of documents to Caremark's attorneys on August 23, 2006. Those documents included two emails relevant to this appeal - Appellant's Exhibits 101 and 102.

Appellant's Exhibit 101 is an April 3, 2006 email from the Procurement Officer, Edward Bannat, to a Mike Donovan of Catalyst (a copy also was sent to a Troy Loney of Catalyst). Appellant's Exhibit 101. This email also included an attachment document titled "State of Maryland Formulary Analysis Top 20 Disrupted Brand Drugs, Analysis based on Caremark Paid Claims Data for July 1, 2005-January 31, 2006". (In this appeal, Caremark has claimed that the attachment to the April 3, 2006 email improperly disclosed data that was proprietary to Caremark.).

The text of the April 3, 2006 email states:

Mr. Mike Donovan:

As we just discussed, we are trying to minimize disruption to State employees under the new contract. So I have two main questions for Catalyst Rx and some detail questions under each main question.

I. Can your formulary mimic the current State formulary? I think you can because you noted in your proposal that you offered "complete formulary customization".

- a) If so, is there any cost for this?
- b) If there is, how much would this cost be?

II. Can your formulary mimic the current State formulary for the top 20 drugs for which members would pay a higher copay under the Catalyst Rx formulary than under the formulary in the current contract? (The list of the top 20 drugs is attached in an Excel spreadsheet.)

- a) Is there any cost for this?

b) If there is, how much would this cost be?

Let me know,
Ed Bannat
Procurement Officer

Appellant's Exhibit 101.

Appellant's Exhibit 102 is an email dated April 4, 2006 from the Procurement Officer to Troy Loney of Catalyst. Appellant's Exhibit 102 shows that copies also were sent to a Mike Donovan of Catalyst and a Diane Bell of the Department. The April 4, 2006 email also included the text of the April 3, 2006 email text as well. (i.e. the April 4, 2006 email contains an email "chain" that also includes the text of the April 3, 2006 email).

The text of the April 4, 2006 email which is unique to that email reads as follows:

Mr. Troy Loney,

As we just discussed, disregard my question in my first email below on mimicking the whole current State formulary. Also, restate my 2nd below question on the top 20 drugs to:
"How much would it cost (on a per month basis) if we delayed implementation of the Catalyst list for the top 20 drugs?"

Also, as we discussed, the evaluation ranking sheet is attached.

Also, I found out that the data on the top 20 drug list is, as stated, for the July 1, 2005 - January 31, 2006 period.

Ed Bannat
Procurement Officer

Appellant's Exhibit 102.

By way of a four-page letter dated August 28, 2006, Caremark raised numerous issues with the Department concerning what Caremark considered to be incomplete production of documents by the Department. Caremark's August 28, 2006 letter did not, however, mention the April 3, 2006 and/or April 4, 2006 emails, or request any responses which may have existed to those emails.

Between August 23, 2006 and September 4, 2006, Caremark did not ask the Department whether there had been any response from Catalyst to the April 3, 2006 and/or April 4, 2006 emails from the Procurement Officer.

There is no evidence that the Department and/or the Procurement Officer did anything to mislead Caremark regarding the contents of the April 3, 2006 and/or April 4, 2006 emails or the facts regarding the exchanges between Catalyst and the Procurement Officer evidenced by the April 3, 2006 and/or April 4, 2006 emails.

Clearly, Caremark knew, or should have known, on August 23, 2006 the facts on which it based its September 14, 2006 protest alleging improper post-BAFO discussions between the Department and Catalyst, including the protest allegation alleging improper disclosure of Caremark proprietary data.

There is ample evidence of this. The text of the April 3, 2006 and April 4, 2006 emails themselves clearly provided Caremark with the knowledge necessary to be on notice as to the basis of its protest, i.e. that the Department engaged in improper post-BAFO discussions and, in the process thereof, released allegedly confidential information from Caremark's formulary.

The clear text of both Appellant's Exhibits 101 and 102 leave no doubt that there were discussions occurring between the Procurement Officer and Catalyst by way of those emails. Additionally, both Exhibits contain the text "[a]s we just discussed", clearly indicating that as least two other conversations besides those memorialized within those two emails had taken place between the Procurement Officer and Catalyst.

As to the allegation of the disclosure of confidential information regarding Caremark, the information contained within the email attachment quite clearly notified Caremark of this protest ground on August 23, 2006.

Nothing additional from the Department is even asserted in the protest Caremark filed or in the evidence before the Board on the protest issue regarding confidential information disclosure. Yet the protest on that basis was also filed three weeks after Caremark received a copy of the April 3, 2006 email and its attachment. To the extent that this issue is even a separate protest basis, it too is clearly untimely and must be dismissed. COMAR 21.10.02.03B and o3.C.

Caremark's September 14, 2006 protest itself illustrates why the protest was untimely. First, Caremark's protest letter specifically refers to the April 4, 2006 email as evidence of improper and illegal discussions:

The purpose of this letter is to protest the award of this contract to [Catalyst] on two grounds:

First, on or about April 4, 2006, the procurement officer engaged in

discussions with Catalyst in violation
of COMAR 21.05.03.03D.

Caremark's September 14, 2006 protest even contained the April 4, 2006 email as an exhibit supporting the protest.

Additionally, at a hearing on September 11, 2006, Caremark's counsel clearly indicted to the Board that the April 4, 2006 email provided Caremark with notice that improper and illegal discussions had taken place.

By its own words and actions Caremark has acknowledged that the April 3, 2006 and April 4, 2006 emails constituted notice for the appeal filed on September 14, 2006 regarding improper and illegal discussions (as well as the improper disclosure of confidential information).

Caremark's response to Board precedent, undisputed facts, clear evidence and admissions seems to have several bases of argument. Caremark argues - very creatively if not convincingly - that it "did not have facts available to it to 'actually constructively know its basis for protest.'" "

In response the Board will simply note that the April 3, 2006 and April 4, 2006 emails produced by the Department and given to Caremark contained, as a matter of fact and law, more than sufficient information to place Caremark on notice that it had a basis for filing a protest concerning improper and illegal discussions between the State (specifically the Procurement Officer) and Catalyst (including the ground of improper disclosure of confidential information). Caremark's arguments, while interesting and imaginative, are irrelevant and immaterial and simply cannot counter the plain facts.

Any other reading of these two emails and the attachments thereto simply defies simple logic and common

sense. To adopt any of Caremark's arguments and find the protest contained in MSBCA 2565 as having been timely filed would render COMAR 21.10.02.03 meaningless.

Appellant's Exhibits 101 and 102 contained clear, obvious bases for protesting improper and illegal communications between Catalyst and the Procurement Officer (and the improper discloser of confidential information as well). These two exhibits - emails dated April 3, 2006 and April 4, 2006 - were supplied to Caremark by the Department on August 23, 2006. Pursuant to COMAR 21.10.02.03B., Caremark knew or should have known these protest bases existed upon receipt of these two emails. Pursuant to COMAR 21.10.02.03B, Caremark was under an obligation to file those protest bases with the Procurement Officer within seven days of the date of receipt of these two emails.

Caremark did not file those protest bases with the Procurement Officer within seven days. Pursuant to COMAR 21.10.02.03C. the Procurement Officer was strictly prohibited, therefore, from considering those protest bases. This Board is, consequently, without jurisdiction over these protest bases.

MSBCA 2565 must, therefore, be dismissed.

The Motions of both the Department and Catalyst are, therefore, granted and MSBCA 2565 is dismissed.

DECISION
MSBCA 2565
Merits-Dicta

The Board does not wish to add to an already lengthy opinion by offering detailed dicta as to the merits of

MSBCA 2565 as that appeal has been dismissed on timeliness grounds.

For the completeness of the record, however, the Board notes, without going into unnecessary detail, that had MSBCA 2465 not been dismissed on timeliness grounds Caremark's appeals would have been denied on their merits.

The discussions between the Department and Catalyst in April of 2006 were not improper or illegal. Confidential and/or proprietary information belonging to Caremark was not disclosed during these brief conversations.

There was no change to Catalyst's BAFO or to the proposed contract between the State of Maryland and Catalyst. The Department provided Catalyst with no opportunity to revise or modify its technical, financial, or BAFO proposals. The information provided by Catalyst to the Department was in no way essential or relevant in determining the acceptability of Catalyst's proposal. Caremark suffered no prejudice and the Department disclosed no confidential or proprietary information during these brief discussions.

Post-award communications dealing with contract implementation details that do not rise to the level of matters essential to the fairness of the pre-award competitive negotiation process are permissible communications. See Maximus, Inc., MSBCA 2376, 6 MSBCA ¶541 (2004). The post-award discussions herein similarly were permissible.

Since these matters are clearly dicta, however, the Board will merely note the above for the record and state, again, that had MSBCA 2565 required a decision on the merits the appeal would have been denied.

In The Appeals of Caremark PCS)
)
)
) Docket Nos. MSBCA 2544, 2548
) & 2565
Under DBM Solicitation No.)
 F10R6200071)

ORDER

Wherefore, it is Ordered this day of March, 2007
that the appeals of Caremark PCS in Docket Nos. MSBCA 2544
and 2548 in the above-captioned matter are denied, and the
appeal of Caremark PCS in Docket No. MSBCA 2565 is
dismissed.

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 2544, 2548 & 2565, appeals of Caremark PCS under DBM Solicitation No. F10R6200071.

Dated:

Michael L. Carnahan
Deputy Clerk