

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

In The Appeal of Facchina-)
Trumbull-Skanska JV)
)
) Docket No. MSBCA 2630
)
Under SHA Contract No. AT3765B60)
(ICC Contract B))

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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 for a design-build contract for a portion of the Intercounty Connector highway.

FINDINGS OF FACT COMMON TO ALL ISSUES

1. Respondent, the Maryland State Highway Administration ("SHA"), is an agency of the State of Maryland which constructs and maintains State roads and bridges.
2. The Intercounty Connector ("ICC") is an 18.8 mile highway which is planned to connect I-270/370 with I-95/US1 in Montgomery and Prince George's Counties, Maryland.
3. Some of the largest contracts ever issued by SHA will provide for the design and construction of the ICC.
4. Contract B, the contract at issue in this appeal, is a design-build contract encompassing approximately seven miles of the ICC from MD97 to US29, including two interchanges, five new dual bridges and five new single lane bridges. This contract is designated Contract Number: AT 3765B60 by SHA ("Contract B").
5. Contract B is surrounded by parkland and is considered the most environmentally sensitive of the ICC projects.
6. Management and oversight of the ICC project corridor is being handled by SHA with the assistance of a joint venture of firms under contract to SHA, generally referred to as the General Engineering Consultant ("GEC").
7. The solicitation process for this contract was carried out in two steps, both of which were part of the same advertised competitive sealed proposal procurement.

8. In step one, SHA issued a Request for Qualifications ("RFQ") on August 14, 2007 that gave a general description of the project in order to elicit Statements of Qualifications from teams interested in the project.
9. In step two, SHA issued a Request for Proposals ("RFP") on December 14, 2007 that provided the specifications under which the project would be designed and constructed and sought technical and price proposals.
10. On November 29, 2007, three teams submitted Statements of Qualifications to SHA for Contract B: 1) MD200 (the Interested Party herein), a joint venture of Kiewit Southern Co., Corman Construction, Inc., and G.A. and F.C. Wagman, Inc., 2) FT, a joint venture of Facchina Construction Co., Inc., Trumbull Corporation, and affiliates of those companies, and 3) Skanska USA Civil Southeast, Inc. ("Skanska")
11. All three teams were judged as qualified to move to the second step and were so notified.
12. At this point, Skanska withdrew from the procurement and combined with the FT team to form Facchina-Trumbull-Skanska JV ("FTS"), the appellant herein.
13. The Instructions to Proposers ("ITP") in the RFP set forth - at §5.1 - the bases on which proposals were to be evaluated.
14. Eight evaluation factors were grouped in three categories:

Pass/Fail

1. Legal

2. Financial

Technical

1. Environmental
2. Financial Capability and Qualifications Improvement
3. Management Approach
4. Technical Solutions
5. Project Support

Price

15. Proposers had to pass both the Legal and Financial evaluations in order to move on to be evaluated on the technical and price factors.
16. The ITP stated the relative importance that each of the five technical factors would have in the evaluation process.
17. For a number of reasons, including the fact that the Federal Highway Administration's decision to approve the ICC was largely the result of efforts and assurances by SHA that SHA would go to extraordinary lengths to avoid, minimize, and mitigate the environmental impacts of the ICC, ITP §5.1.2 provided that the Environmental evaluation factor was "more important than any other technical evaluation factor."
18. As part of the emphasis placed on the environmental factor, the ITP also required that proposers achieve a "Good" or better rating in the Environmental evaluation factor in order for the proposer to be selected for the project.
19. The Management Approach and Technical Solutions factors were to be of equal importance and were to be of higher importance than the Financial Capability/Qualifications Improvement and Project Support factors, which were to be of equal importance.

20. The ITP stated that the technical factors together and the price were to be of approximately equal importance.
21. Technical proposals were to be evaluated separately from price proposals.
22. An Evaluation Committee would evaluate technical proposals, next consider price proposals, and, finally, recommend a selection to the Procurement Officer and the SHA Administrator. ITP §5.0.
23. By regulation and by the terms of the RFP, the Evaluation Committee, the Procurement Officer and the Administrator were required to judge which proposal "is most advantageous to the State, considering price and the evaluation factors set forth in the ITP." ITP §§5.0 and 5.7; see COMAR 21.05.03.03F.
24. The ITP provided that proposals would be evaluated using an adjectival or descriptive method. Each individual technical factor, and each proposal overall, was to be rated by the evaluators as either "Exceptional", "Good", "Acceptable", "Susceptible to Become Acceptable", or "Unacceptable" under the guidelines contained within the ITP. Furthermore, the evaluators had the discretion to assign "+" or "-" ratings (for example, "Good+" or "Good-" rather than merely "Good") to each technical rating and to the overall rating of a proposal.
25. All technical categories, other than the Environmental factor, required a grade of "Acceptable" or better in order for the proposer to be eligible for award of the contract. As noted, the Environmental factor required a grade of "Good" or better for contract award.

26. Six teams were formed to evaluate the technical proposals regarding each individual factor: a three-member Legal/Financial team; a two-member DBE compliance team; a three-member Environmental team; a four-member Management Approach team; a three-member Financial Capability/Qualifications Improvement and Project Support team; and, a seven-member Technical Solutions team.
27. Team members were chosen for their experience and their expertise in the area being evaluated.
28. The team chairs included: Robert Shreeve of the Environmental evaluation team, who is SHA's Environmental Manager for the ICC and who has over 20 years of experience in managing environmental projects and obtaining permits for SHA; Lisa Choplin of the Financial Capability and Qualifications Improvement and the Project Support team, who is SHA's Innovative Contracting Division Chief and who has over 20 years of experience working with construction projects for SHA; Mark Coblenz of the Management Approach team, who is SHA's Construction Manager for the ICC and who has over 20 years of experience dealing with construction projects with the SHA; and Kenneth Briggs of the Technical Solutions team, who is SHA's Deputy Director and Design Manager for the ICC and who has over 30 years of experience with projects with the SHA.
29. The Chair of each of the evaluation teams for each technical factor was also a member of the overall Evaluation Committee, which was chaired by Melinda Peters. Ms. Peters is SHA's Project Director for the

ICC and a SHA senior manager with approximately 15 years of experience with SHA.

30. The evaluation process utilized in this procurement process was detailed and thorough. Each team determined the pass/fail or the technical ratings of the proposals within that team's jurisdiction. Ratings were adjusted as information was received throughout the evaluation process. Each team arrived at a consensus for its factor. The ratings of each of the individual teams were provided to the Evaluation team. Each technical factor team was required to articulate the strengths and the weaknesses that supported the ratings assigned by that committee. The Evaluation Committee questioned each team leader and discussed the recommended ratings for proposers at length.
31. During the review of the technical proposals, request for clarification letters were sent to each proposer. Presentations by, and interviews of, both FTS and MD200 were held with the Evaluation Committee and with various members of the evaluation teams. After these meetings, the evaluation teams and the Evaluation Committee met to finalize the ratings for the proposals. Thereafter, the Price Proposal team presented its price evaluations to the Evaluation Committee.
32. Letters were then sent to MD200 and to FTS on May 30, 2008, listing items for discussion, including technical weaknesses and deficiencies.
33. Oral discussions were held on June 5, 2008. Separate discussions were held with FTS and with MD200.

34. SHA requested detailed cost and price data from each proposer. The data received in response by SHA was reviewed and analyzed.
35. A second meeting with each proposer was held on June 26, 2008 to further discuss price.
36. Best and Final Offer ("BAFO") proposals were requested and were received on July 2, 2008. These proposals were evaluated in detail by the technical teams and, once again, each team arrived at a consensus for its factor.
37. The team ratings were presented to the Evaluation Committee on July 8, 2008.
38. As with the initial proposals, the Evaluation Committee extensively discussed the recommended rating with each team leader.
39. After a full and thorough review, the Evaluation Committee, by unanimous agreement, agreed on final technical factor ratings, as well as the overall rating, for each BAFO proposal. The Evaluation Committee ratings were:

<u>Factor</u>	<u>FIS</u>	<u>MD200</u>
Legal/Financial	Pass	Pass
DBE	Pass	Pass
Environmental	Good+	Exceptional-
Technical Solutions	Good	Good-
Management Approach	Good-	Good-
Financial Capability/ Quality Improvement	Good+	Exceptional-
Project Support	Good-	Good-
Overall	Good+	Exceptional-

40. The price evaluation team then presented the BAFO prices and its price evaluations to the Evaluation Committee.
41. The result was FTS received the second highest overall technical rating with a rating of "Good+" and the lowest price in the amount of \$559,073,500 and MD200 had the highest overall technical rating with a rating of "Exceptional-" and the second lowest price of \$559,745,500.
42. The price difference between the two offers was \$672,000, or approximately .12%.
43. Following the conclusion of the BAFO review process, the Evaluation Committee next determined which of the two offers was "most advantageous" to the state.
44. The Evaluation Committee did not use a formulaic approach, rather considering the strengths and weaknesses on which the ratings were based, and what those meant in the context of such a minor difference in price.
45. The Evaluation Committee reasonably deemed that the price difference between the two proposals was so close to be essentially the same. After examining the strengths and weaknesses of each proposal, the Committee determined that the difference between the overall technical proposal ratings of "Exceptional-" for MD200 versus "Good+" for FTS was more significant than the price difference of .12%. That determination was not irrational, arbitrary, or capricious or in any way contrary to Maryland Law or Regulations.
46. With regard to MD200's higher rating on the Environmental factor, which was the most important of the technical evaluation factors, the Evaluation

Committee determined that, although FTS had made a good proposal, MD200's environmental proposal and commitments provided SHA with greater confidence that expensive environmental compliance delays and shutdowns would be avoided under MD200's proposal and that SHA's environmental commitments, a key to the approval of the ICC, would be more likely to be achieved on Contract B under MD200's proposal. Those determinations were not irrational, arbitrary, or capricious or in any way contrary to Maryland Law or Regulations.

47. Md200's environmental strengths, along with the high quality solutions, management and staff contained with its proposal, led the Evaluation Committee to unanimously decide that the proposal of MD200 was the most advantageous to the State and that MD200 should be recommended for award of the contract. Those determinations were not irrational, arbitrary, or capricious or in any way contrary to Maryland Law or Regulations.
48. The Evaluation Committee's recommendation was presented by the Evaluation Committee chair and the Procurement Officer to a selection committee which included Douglas Rose, the SHA Deputy Administrator. Geoffrey Kolberg, the Chief Engineer for the Maryland Transportation Authority, and SHA Administrator Neil Pedersen (who was also the selecting authority). They approved the recommendation on July 9, 2008.
49. By letter dated July 23, 2008, FTS was informed that FTS had not been awarded the contract.
50. By letter dated July 30, 2008, FTS protested the award of the contract to MD200. FTS filed seven additional,

supplemental protests, the last of which was filed on October 1, 2008.

51. On October 7, 2008, Robert Gay, the Procurement Officer for Contract B, issued a decision denying FTS's protests.

52. On October 17, 2008, FTS filed an appeal of the Procurement Officer's decision with the Maryland State Board of Contract Appeals ("Board").

53. FTS listed three grounds for the appeal:

1. The overall technical evaluation was essentially a tie; and SHA violated the RFP to break that tie, when Maryland procurement law mandates that price be used as the tie-breaker;
2. MD200's overall technical rating and environmental rating were arbitrarily, capriciously, and irrationally increased to "Exceptional minus", and when those ratings are corrected, FTS is the clear winner; and,
3. SHA's Environmental rating was based, in significant part, on MD200's improper inclusion on its project team of Greenman-Pedersen, Inc. ("GPI") which had a non-waivable organizational conflict of interest.

54. Due to the nature of this appeal and the need for an expeditious resolution of this appeal, the parties requested, and the Board granted, a request that the Board rule on this appeal from the bench at the conclusion of the Hearing to be held in this appeal.

55. The Hearing was held on January 7, 8, 9, 12, 13, and 14, 2009.

56. As requested by the parties, a bench decision for this appeal was rendered on January 16, 2009.
57. A detailed decision concerning the Board's findings of fact and law was rendered from the bench on January 16, 2009.
58. The appeal was denied by the Board.

FINDINGS OF FACT CONCERNING THE MOTION
OF INTERESTED PARTY
MD200 FOR PARTIAL SUMMARY DECISION

59. The Board hereby adopts and incorporates findings of fact numbers 1-57 herein.
60. One of the three appeal grounds listed by appellant FTS concerns its allegation that SHA's Environmental rating was based, in significant part, on MD200's improper inclusion on its project team of Greenman-Pedersen, Inc. ("GPI") which had a non-waivable organizational conflict of interest.
61. On August 14, 2007, SHA issued a RFQ for Contract Number :AT 3765B60 - ICC Contract B.
62. §3.3 of the RFQ listed an engineering firm, GPI, among firms which the RFQ stated had "received or expected to receive monetary compensation under a contract with the Administration as a member of the General Engineering Consultant team that has assisted with this procurement and therefore are ineligible to participate on a Proposer's team."
63. By letter dated August 17, 2007, GPI requested an opinion from the Maryland State Ethics Commission as

- to GPI's eligibility for participation as a member of a design-build team for ICC Contract B.
64. By letter dated September 25, 2007, the General Counsel for the Ethics Commission, Jennifer K. Allgair, wrote that GPI was not precluded from participation as a member of a design-build team for roadway projects associated with the ICC under the Public Ethics Law.
 65. Ms. Allgair stated that "the Commission has concurred with SHA's view that contractors providing design services for environmental mitigation and stewardship projects that are not within the limits of the mainline ICC would not be precluded from being a member of a design/build team on one of the ICC construction projects."
 66. Based on the Ethics Commission's letter, SHA determined that GPI was not ineligible to participate as a member of a proposer's team.
 67. MD200 included GPI as Environmental Compliance Manager in its Statement of Qualifications ("SOQ") which it submitted to SHA on November 29, 2007.
 68. On December 14, 2007, SHA issued the RFP for ICC Contract B.
 69. §1.8.4 of the RFP stated that there had been no revisions to the list of firm that are eligible to participate on Proposer teams included in §3.3 of the RFP. That statement was incorrect.
 70. GPI was not listed in Appendix D of the RFP's Instructions to Proposers as ineligible, but GPI had been listed as ineligible in the RFQ issued approximately four months earlier.

71. THE RFQ and the RFP both contained a list of ineligible firms. GPI was on the ineligible list in the RFQ but was not listed as ineligible in the RFP.
72. By letter dated December 14, 2007, SHA approved MD200's SOQ, which included GPI.
73. On July 23, 2008, SHA sent a Notice of Award to MD200 for Contract B.
74. On July 30, 2008, FTS protested the award of Contract B to MD200, partly on the grounds that MD200 should be disqualified because of MD200's improper inclusion of its project team of GPI.
75. The Procurement Officer denied this protest ground and FTS appealed that denial.
76. On December 3, 2008, MD200 filed a Motion for Summary Decision requesting the dismissal of the portions of Appellant FTS's appeal relating to the participation of GPI on MD200's design-build team as having been untimely filed by FTS.
77. COMAR 21.10.02.03A and B provide:
 - A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing dated for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier.

78. Johnson, Mirmiran & Thompson, Inc. ("JMT") closely worked with FTS on the FTS proposal, serving as part of FTS's design-build team.
79. JMT served as the lead designer for FTS in this procurement.
80. The team agreement between FTS and JMT called for the sharing of information.
81. FTS agreed to pay JMT the entire \$700,000 stipend which SHA had agreed to pay for the submission by FTS of a bid on this project.
82. JMT represented FTS, and was in attendance, at several important activities throughout the procurement process. These included FTS's presentation and interview and the initial and the price discussions.
83. At the May 28, 2008 oral presentation by FTS to SHA FTS designated 16 representatives, of which six members of "The FTS Team" were from JMT. The other ten representatives of FTS included: three representatives from Facchina; 4 representatives from Trumbull; two representatives from Skanska; and, one representative from Straughan Environmental Services.
84. At the June 5, 2008 discussions with SHA, FTS included a representative of JMT among the six persons allowed to participate on behalf of FTS.
85. At the June 26, 2008 price proposal discussions with SHA, two JMT representatives were included on the FTS team along with one representative from Facchina, two

representatives from Trumbull, and one representative from Skanska.

86. In an April 10, 2008 email from Mr. Bill Woolford of Trumbull Corporation to various persons at Skanska and Trumbull, Mr. Woodford noted that:

“Our designer [JMT] and environmental groups are our partners. We wash our laundry together. By that I mean that we need to keep these conversations within Constructware.” [Constructware was a web-based communication system being utilized by various entities].

87. JMT was a key member of the FTS team throughout this procurement.

88. Mr. John [Jack] A. Moeller, the Executive Vice-President and Chief Operating Officer of JMT, sent an email to various individuals associated with the FTS bid on October 19, 2007 stating:

The latest news on Teaming for Contract B is that Kiewit has taken the place of Granite on the Contract A team. All other team members are the same. This puts Wegman and Corman back together. The designers will be PTG, Jacobs and KCI for environmentalists.

89. Mr. Moeller sent an email to Linda Kelbaugh of GPI on November 16, 2007 stating:

I take it that you must be already on another ICC team since you haven't returned my three phone calls. I got used to rejection in High School, so there is no need to avoid me.

90. According to the testimony of Mr. Moeller, Mr. Moeller saw and spoke with both Linda Kelbaugh and Bill Park of GPI on May 28, 2008 when Mr. Moeller saw Ms. Kelbaugh and Mr. Park and “the MD200 team leaving” the

building in which the May 28, 2008 presentations before SHA were to take place. Mr. Moeller also spoke with other MD200 representatives at that time as well.

91. According to the testimony of Mr. Moeller, at the May 28, 2008 encounter with the representatives of GPI and MD200:

Question	Did it cross your mind, on or about May 28, 2008, after this brief encounter, that GPI might be on MD 200's team?
Answer	Yeah, that's when I figured for sure they were on a team.
Question	And when you came to that conclusion, did you tell anybody at FTS?
Answer	No. I mean there was a lot of other people there, too. There was people from their whole design and engineering group.
Question	When you say their, who are you referring too?
Answer	I'm talking about MD 200's team. I saw some people from AMT, GPI, KCI, you know, the full alphabet soup of engineering firms.

Hearing Transcript, January 8, 2009, at p.166.

92. According to the hearing testimony of Mr. Moeller:

Question	In that timeframe, December 14, '07 and July 23, 2008, did you ever tell anybody at FTS that GPI was on MD 200's team?
Answer	No, I did not.

Hearing Transcript, January 8, 2009, at p.164.

93. JMT, the lead designer for FTS, had actual, certain knowledge of GPI's involvement with MD200 on May 28, 2008, at the latest.
94. JMT's knowledge concerning GPI's involvement with MD200 was and is imputed to FTS.
95. FTS's protest on the issue of GPI's involvement with MD200 was filed with the procurement officer on July 30, 2008, 63 days after May 28, 2008.
96. A hearing was held before the Board concerning MD200's Motion for Summary Decision at the conclusion of the appellant's case during the hearing on appellant's appeal on January 12, 2009.
97. A detailed decision concerning the Board's findings of fact and law was rendered from the bench on January 13, 2009.
98. Interested Party MD200's Motion for Partial Summary Decision was granted.

Decision

Interested Party MD200's Motion for Partial Summary Decision

The Interested party herein, MD200, filed a Motion for Partial Summary Decision regarding the portions of Appellant Facchina-Trumbull-Skanska, JV's (FTS) appeal relating to the participation of Greenman-Pedersen, Inc. (GPI) on MD200's design-build team for the contract at issue.

A hearing was held on this Motion at the conclusion of FTS's case at the hearing held on this appeal. Argument was heard from all parties and the Board rendered a bench decision on January 13, 2009. In that decision, the Board

granted MD200's Motion, finding that FTS had failed to protest GPI's involvement with MD200 within seven days of when it knew, or should have known, of GPI's involvement with MD200's bid. COMAR 21.10.0203.

The Board's decision from the bench is hereby reprinted in full, and adopted and incorporated as part of this opinion¹:

CHAIRMAN BURNS: Good morning ladies and gentlemen. We are resuming the appeal of FTS, our number 2630. We are here today to rule on the motion filed by the Interested Party for Partial Summary Decision. The limited issue presented by this motion, to which the State concurs, by the way, is the timeliness of the filing of the Appellant's claim, that Maryland 200 should be disqualified as a bidder due to the involvement of GPI on Maryland 200's team.

Now we understand that we have to evaluate the evidence in the light most favorable to the party opposing this motion, which in this case is FTS, and we've done so. As you know, we considered this matter yesterday afternoon extensively. We met this morning as a Board and talked about it. Not surprisingly I and the other Board members have been thinking about it last evening, and have given it a lot of thought. And this is, this is where we are on this.

The specific question, obviously, is pursuant to COMAR, and that's 21.10.02.03. When did the proposer, which is FTS, know or should have known about the involvement of GPI on Maryland 200's team? Okay. And as we know, that's your standard know or should have known to, to raise an issue of protest. That's the seven days. You have seven days from the time where you know of should have known of an, of an issue, a basis of a protest to file a protest.

¹ All transcript excerpts herein are reprinted verbatim.

Now we have to, to look at a couple of things in order to determine that. We have to, we have to look at the, whether the knowledge held by JMT, which is FTS's designer here, should be imputed to FTS. Now when we look at that, we're going to have to consider a number of things, and the Board wants to note the following: Now JMT wasn't a member of the FTS joint venture, and they weren't in a legal partnership with FTS, but JMT was the principal party included in the teaming agreement developed by FTS joint venture on the bid for the ICC B Contract. JMT was designated and served as the lead designer for FTS for a contract, which currently sits at about \$550 million, a very substantial design-build contract. Now the teaming agreement between FTS and JMT called for the sharing of information. Well, of course it would. I mean how in the world could these two entities possibly work together to prepare a bid unless they did share information? Of course they would. They had to. FTS agreed to pay its designer, JMT, the entire stipend, which SHA agreed to pay for the submission of a bid on the project, which is, I believe, \$700,000.

At the May 28, 2008, oral presentation by FTS to the State Highway Administration (and this is from State's Exhibit 3, by the way), FTS designated 16 representatives of which six of what was called, quote, the FTS Team, unquote, were JMT employees. Now according to my math, there were more JMT employees there than there were representatives from Facchina or Trumbull or Skanska or Strolick (ph.).

When you look at the June 5, 2008 discussions with State Highway (and this comes from State's Exhibit 4), FTS included a representative of JMT amongst the six persons allowed to participate on behalf of FTS at that meeting. And, you know, what it says, the following six individuals will represent FTS at our discussion: Paul Facchina, George Mazey (ph.), Peter McKenna (ph.), Bill Woodford (ph.), Rick Reardon, and Jack

Moeller* of JMT.

At the June 26, 2008 price proposal discussions with State Highway, two JMT representatives were included on the FTS Team, along with a representative from Facchina, two representatives of Trumbull, and one from Skanska. And that's reflected in State's Exhibit 5.

And you can go back to April 10th of 2008, and that's State's Exhibit 1, that's an e-mail from Skanska, and it's been, oh, my gosh, it's been read into the record I don't know how many times, but just to point out what it said was our designer, which is JMT, and environmental groups are our partners. We wash our laundry together. By that, I mean we need to keep these conversations Constructware (ph.), which as we know is the Joint Ventures Communication System for Internet Purposes.

Now consistent with this, this notion of sharing of information between JMT and FTS, you can go back to October 19, 2007, which is reflected in an e-mail that's State Exhibit 2, where JMT reported to FTS that JMT believed that TFKCI (ph.) 6:16 was the environmental team for the competing bidder, Kiewit*, which later evolved into Maryland 200, even though that information was ultimately found to be incorrect.

So you look at all of these bits of evidence, and it is clear there was and there had to be a close working relationship between FTS and JMT, especially when you consider the delegation of design responsibilities to JMT by FTS. JMT's knowledge gained in connection with the ICC B Project really does have to be fairly imputed to the Joint Venture of FTS. There is, there is no other rational conclusion based on this evidence.

And, obviously, for purposes of a written decision, that would be flushed out much more in that written decision.

Okay, so we got that though, all right. So the issue becomes when did JMT and FTS therefore, when did FTS know or should have

known of the involvement of GPI on the competing team? Okay.

Let's look at State's Exhibit first. That's the November 16th e-mail from Mr. Moeller of JMT to Ms. Kellbaugh of GPI, and that, that says from Mr. Moeller, I take it you must already be on another ICC team since you haven't returned my three phone calls. And there's some other stuff there. I mean what Mr. Moeller says there is undisputed. So, obviously, there's an indication -- whether Mr. Moeller is fishing or knows, clearly there's an indication that JMT had knowledge back in November of 2007 that GPI's involved in this, in this procurement.

In any case, in any case, we've got Mr. Moeller's testimony here in front of the Board involving the May 28, 2008 encounter between, you know, Mr. Moeller and representative -- a representative or representatives of GPI. As you all may recall, Mr. Moeller testified that, I think as GPI was leaving a meeting with State Highways, Mr. Moeller was entering, or vice-a-versa. But they clearly in one of those odd happenstances, they happened to run into each other. And amongst the things Mr. Moeller said, and I wrote it down myself, and I -- because I found it to be significant, the following quote: Mr. Moeller figured for sure they were on Maryland 200's team. May 28, 2008.

We, we've given FTS the benefit of the doubt in, in this, and resolved any close calls in their favor as the way we're supposed to do in a motion. This -- the argument that FTS should have known on December 14, 2008, when the, when the RFP was issued that there was a matter to either protest or ask a question about concerning GPI as a result of the, the inconsistency between the statement that there had been no changes to the list and the fact that there were changes to the list of prohibited entities. There's an argument to be made that FTS should have known at that point that there was an issue regarding GPI's

qualifications, and it should have been addressed. But it's an awful close call, and it's not, frankly, FTS's responsibility or fault that that inconsistency occurred. It was a mistake by the State. people make mistakes. They happen all the time. It's not the end of the world. They don't get sent to prison for life hopefully over the fact they put two inconsistent things in a proposal. But the Board's given it a lot of thought, and we're going to give FTS the benefit of the doubt on that. We're not going to require you to have done that. There's a real argument to be made that maybe you should, but we're not going to do it.

However, there, there is just overwhelming evidence, as we've discussed, and we will certainly elaborate on in a written decision, that, that JMT -- before FTS had certainly actually clear knowledge of GPI's involvement with MD-200 by May 28, 2008 at the latest. And you can argue that it goes all the way back to that November 16, 2007 e-mail. But, again, we really attempted for purposes of a motion to resolve all close calls in favor of the party against whom the motion had been made.

No protest was filed until July 30, 2008. That would be, oh, gosh, I guess more than six months after that November e-mail, and more than two months after the May 28, 2008 encounter between GPI and JMT. If FTS wanted to raise an objection concerning GPI's eligibility to work on the project, they could have done so well before July 30, 2008, and it should have done so, and it did not do so. JMT's knowledge about GPI's involvement is, is imputed by this Board to the joint venture it served, was doing design work for, and was in line to get paid \$700,000 by the State of Maryland.

Therefore, the Motion for Summary Decision in this case filed by the Interested Party is going to be granted, and the grounds for appeal filed by FTS based on GPI's work with Maryland 200, those, those protests are deemed to be untimely and will not be

considered by the Board.

Now in making this ruling, ladies and gentlemen, the Board's going to reserve the opportunity of setting forth further bases for granting this Motion for Summary Decision when we do our written decision, at which time the Board may well like to address the substantive bases of GPI's eligibility to participate in the ICC B Contract amongst other reasons because of the ruling of the Maryland Ethics Commission as reflected in the revised RFP. But for present purposes, the GPI basis of the FTS appeal is dismissed in its entirety because it was not timely filed. And whether or not we get to the merits, that will come down the road in the written decision.

The Board's bench opinion as reprinted above shows the ample reasons why MD200's Motion must be granted. Without repeating what was said on January 13, 2009, suffice it to say that it is clear that FTS's lead designer, Johnson, Mirmiran & Thompson, Inc. (JMT), had actual knowledge of GPI's involvement with MD200 by May 28, 2008, at the latest (and that date gives FTS the benefit of every doubt) and that FTS did not file a protest on the issue until July 30, 2008 - 63 days after the May 28, 2008 date.

This is confirmed by the testimony of Mr. John [Jack] A. Moeller, the Executive Vice-President and Chief Operating Officer of JMT. At the hearing, Moeller testified as follows concerning the May 28, 2008 encounter with the representatives of GPI and MD200:

Question	Did it cross your mind, on or about May 28, 2008, after this brief encounter, that GPI might be on MD 200's team?
Answer	Yeah, that's when I figured for sure they were on a team.

Question	And when you came to that conclusion, did you tell anybody at FTS?
Answer	No. I mean there was a lot of other people there, too. There was people from their whole design and engineering group.
Question	When you say their, who are you referring too?
Answer	I'm talking about MD 200's team. I saw some people from AMT, GPI, KCI, you know, the full alphabet soup of engineering firms.

Hearing Transcript, January 8, 2009, at p.166.

Clearly, Moeller of JMT knew by May 28, 2008, at the latest, that GPI was working with MD200 on obtaining this contract.

In further testimony, Moeller testified that he had not notified FTS of GPI's participation on MD200's team:

Question	In that timeframe, December 14, '07 and July 23, 2008, did you ever tell anybody at FTS that GPI was on MD 200's team?
Answer	No, I did not.

Hearing Transcript, January 8, 2009, at p.164.

JMT, the lead designer for FTS, clearly had actual, certain knowledge of GPI's involvement with MD200 on May 28, 2008, at the latest. JMT's knowledge concerning GPI's involvement with MD200 was, is, and must be imputed to FTS.

Under COMAR 21.10.02.03 FTS had seven days from May 28, 2008, in which to file a protest with the procurement officer regarding the issue of GPI's involvement with

MD200. FTS did not file such a protest with the procurement officer until July 30, 2008, 63 days after May 28, 2008.

That protest was clearly untimely under COMAR 21.10.02.03. The requirements for filing a protest are jurisdictional and are strictly construed. NumbersOnly-Nusource JV, MSBCA 2303, 5 MSBCA ¶521 (2002) at p. 3. A protest filed even one day late is not allowed, and, pursuant to COMAR 21.10.02.03C, may not be considered. E.g., Id. at p. 4; ISmart, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997), aff'd, Maryland State Board of Contract Appeals v. ISmart, LLC, No. C-97-034415 (Cir. Ct. How. Co, March 17, 1998). This Board has no choice but to grant MD200's Motion for Partial Summary Decision and to dismiss all appeal grounds relating to GPI's involvement with the MD200 team in this procurement process.

That being the case, there was and there is no need to get to the merits of those grounds.

Decision as to Remaining Issues

A hearing was held on Appellant FTS's appeal regarding this procurement on January 7,8,9,12,13 and 14, 2009. At the request of all parties to the appeal, a decision from the bench was issued. Argument was heard from all parties and the Board rendered a bench decision on January 16, 2009. The appeal was denied.

The Board's decision from the bench is hereby reprinted in full, and adopted and incorporated as part of this opinion:

CHAIRMAN BURNS: All right. We understand. Ladies and gentlemen, once again, thank you, without belaboring the point, for the excellent job you all did in

preparing and presenting this case to the Board. It is much appreciated.

You know, over the course of this hearing and, obviously prior to it and since the closing argument we've had an opportunity of going through literally hundreds of pages of exhibits and documents introduced into evidence. We have, believe me when I tell you, carefully reviewed the testimony and your very fine argument, counsel. We have considered the entirety of these proceedings and we are going to rule from the bench, as you've requested, as follows:

By way of a very streamlined background, this bid protests concerns a contract ability InterCounty Connector or ICC, a substantial highway project located primarily in Montgomery County, Maryland, which has been in various stages of planning for decades.

The contract in dispute here is ICC Contract B which calls for the construction of approximately seven miles of toll road from just east of Maryland 97, Georgia Avenue, to just west of Route 29 which is Colesville Road, Columbia Pike. It includes two interchanges and, importantly, crossing at various locations of environmentally-sensitive forests, fields, streams and wetlands. ICC-B is the center portion of the ICC. It is anticipated for completion late in the year 2011 at a cost in excess of one-half of one billion dollars.

The procurement of the ICC-B contract is by way of a two-step competitive sealed bid process. In order to identify qualified bidders, on August 14th, 2007, the State Highway Administration or SHA, as I'll be referring to it, issued a Request for Qualifications or RFQ and then proceeded to issue a Request for Procurement or RFP on December 14, 2007. By the submission due date of May 8, 2008, two joint venture firms submitted proposals in response, namely the Appellant, Facchina-Trumbull-Skanska or FTS, as it's become affectionately known, and Maryland or MD, I'm sorry, 200, the

Interested Party and the awardee -- the tentative awardee of the contract.

Throughout that month of May 2008, SHA commenced a complex evaluation process to rank and rate the technical proposals of both MD-200 and FTS. The selection official was the State Highway Administrator, Neil Peterson. The Selection Committee was chaired by Mr. Peterson and included three other SHA officials as well as a representative of the Federal Highway Administration and the Maryland Transportation Authority.

The Procurement Officer herein was Robert Gay. SHA's Evaluation Committee consisted of ten persons and was chaired by Melinda Peters, SHA's Project Director the InterCounty Connector, the ICC.

Several additional subcommittees were also designated. They included a Legal Financial Evaluation Team, which consisted of six persons, and a DBE Compliance Team of two persons. Four technical evaluation teams were also appointed, an Environmental Evaluation Team chaired by Mr. Robert Shreeve, another team that focused solely on financial capability qualification, a third group referred to as the Management Approach Evaluation Team, and the fourth technical evaluation team referred to as the Technical Solutions Evaluation Team. Finally, there was a four member Price Evaluation Team. Technical proposals were, first, thoroughly examined and evaluated without knowledge of any bidder's price proposal, but ultimately all evaluation factors were merged in an integrated analysis for the purpose of selecting a contract awardee.

According to Section 5.7 of the RFP, SHA's determination of the successful proposer was "based on a determination of the proposal that is most advantageous to the State, taking into consideration the technical and price factors," as more fully set forth in the RFP. In order to be susceptible to the award, a proposal was required to receive a score of pass on both the DBE as well as the

legal financial rating. The proposal was then required to receive a score of at least good on the environmental factor and acceptable on all the other factors, namely technical solutions, management approach, financial capability and project support.

The most important element in the technical rating of proposals was the environmental factor followed by two factors to be given lesser weight, namely technical solutions and management approach, which were then followed by two factors to be afforded a third and lesser tier of importance. They were financial capability and project support.

In considering these three weighted groups consisting of a total of five factors as components of SHA's technical rating of each proposal, a grade was given of either acceptable, good or extraordinary, and each of these ratings, A for acceptable, G for good, E for extraordinary, was further refined with the possibility of assigning a + or a - for each grade.

The crux of this dispute essentially entails the environmental ratings of the two proposals, that factor being assigned the greatest weight, "more important than other technical factors." MD-200 was ultimately assigned a rating of E- as its environmental score while FTS was assigned a lower rating of G+. The overall rating of each of the two bidders was the same as their environmental score with MD-200 receiving an overall score of E- and FTS a G+.

Parenthetically, FTS beat MD-200 in technical solutions, G to G-, while MD-200 beat FTS on financial capability, E- to G+.

The grading of both of these proposals was an ongoing evolving process. The process began with an initial evaluation of the first written submissions received on May 8, 2008, in response to the Request for Proposals. Both proposers received written instructions to participate in an interview presentation meeting, the notice detailing how the meeting would be conducted and containing questions

for each proposer to consider and respond to. The interview presentation meetings were held with both proposers on May 28th, 2008.

By way of letters dated May 30th, 2008, both proposers were notified by the State Highway Administration that SHA had decided to initiate discussions with the two proposers. Both proposers were also requested to provide certain information to SHA in advance of a meeting to be held between SHA and each proposer on June 5, 2008. Both proposers were notified that their prices offered were considerably higher than anticipated by SHA and were requested to find ways to reduce their prices. After further review of the price and technical proposers, another meeting was scheduled for June 26, 2008, with each proposer to discuss each team's pricing proposal and to discuss questions regarding the design and construction aspects of each proposal.

After consideration of the best of the written and oral discussions, SHA requested each party to submit a best and final offer, otherwise known as a BAFO, no later than July 2nd, 2008. BAFOs were received from both parties and reviewed as part of the evaluation process. Naturally, considerable discussions occurred both within each evaluation team and between each team and the central Evaluation Committee. Grades changed during this process, which was described in testimonies as dynamic and organic, ultimately evolving into a single final grade for each factor as well as for the sum total of technical factors overall. No grade was finalized until a unanimous consensus was achieved by all of the evaluators reviewing each aspect of each proposal.

Although initial pricing was disparate between the two bidders, at the conclusion of BAFOs, quite remarkably, the difference between the cost of the two proposals was approximately \$672,000 or about one-tenth of one percent of the total contract price. Actually, it's .12 percent. FTS offered the low bid of \$559,073,500, while MD-200 offered

a nearly identical but slightly higher price of \$559,745,500, both of which were considerably in excess of SHA's pre-bid engineering estimates and funding reserves for the project.

For approximately three hours on July 8, 2008, the Evaluation Committee met and deliberated upon the proposals during one final round of discussions, at which time it considered all ratings, rankings and price information, and unanimously determined that the proposal set forth by MD-200 was the "most advantageous to the State." The final overall grade assigned to MD-200 was E- while the final overall grade given to FTS was a slightly lower G+.

In explaining the examination ratings of the committee she chaired, Ms. Peters summarized the unanimous view of the members of the Evaluation Committee, concluding that MD-200's proposal was "clearly superior" and, in particular, was superior to FTS in regard to environmental safeguards and issues, the most important factor in the technical proposal rating.

This recommendation was presented to the Procurement Officer and to the State Highway Administrator, Mr. Neil Peterson -- the Procurement Officer, obviously, was Mr. Gay -- the following day and Mr. Peterson, as selection official, adopted the Evaluation Committee's recommendation which was publicly announced to the bidders on July 23, 2008, following which FTS filed several bid protests raising several objections to SHA's procurement process. FTS protests were denied resulting in an appeal to the Board of Contract Appeals. This appeal was heard before this Board over the past two weeks. All the parties to this appeal have requested that the Maryland State Board of Contract Appeals render a decision from the bench at the conclusion of this hearing. This is that decision.

Appellant's Allegations: Appellant raised three grounds for this appeal, first, "The overall technical evaluation was essentially

a tie, and SHA violated the RFP to break that tie when Maryland procurement law mandates that price be used as the tie-breaker." Two, Maryland-200s -- I'm sorry, "MD-200's overall technical rating and environmental rating were arbitrary, capriciously and irrationally increased to 'exceptional-minus' and, when those ratings are correct, FTS is the clear winner." Three, "SHA's environmental rating was based in significant part on MD-200's improper inclusion on its project team of Greenman-Pedersen, Inc. or GPI which had a non-waivable organizational conflict of interest."

Appeal ground number 3 concerning the GPI conflict of interest issue has been dismissed by the Board by way of the Interested Party's, MD-200, Motion for Summary Decision. The basis for that ruling appears on the record and is incorporated for purposes of a final decision herein.

As to the first two grounds of FTS's appeal, the Board will, once again, review the standards under which this Board operates in appeals such as the one at issue herein. This Board has been very clear on its role in reviewing the decisions of procurement officials regarding Requests for Proposals in a competitive negotiation. The Board has used the terms competitive negotiation and competitive sealed proposal interchangeably over the years and continues that practice herein.

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 the most advantageous to the State. The evaluation of technical factors requires the exercise of discretion and judgment which is necessarily subjective. That comes from the B. Paul Blain Associates, Inc. case, 1 MSCBA 58. Moreover, such an evaluation is competitive in nature in that the proposals are considered in relation to one another, the Ardinger Consultants and Associates case, 4

MSBCA 383. 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 an 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, 4 MSCBA 368, which is quoting AGS Genesis Corporation, 2 MSCBA 158. All that can be found in RAID, Inc., 5 MSBCA 485.

This 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, United Technologies, Corp. and Bell Helicopter Textron, Inc., 3 MSBCA 201.

This Board does not constitute 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 undermine the procurement system and process in Maryland.

The law in Maryland regarding competitive negotiations is clear. In procurement by competitive sealed proposal, the process of weighing the technical merits is a subjective

one which relies on the business and technical judgment of the Procurement Officer, Information Control Systems, Corp., 1 MSBCA 81. 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., 2 MSBCA 144.

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. 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, Kliens of Aberdeen, 4 MSBCA 354.

For example, 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 or her 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, 1 MSCBA 94, B. Paul Blaine Associates, supra.

Mere disagreement with the evaluation of proposals or the recommendation for an award is insufficient to meet an appellant's burden to show that the evaluation of proposals and/or the award of a contract has been unreasonable, Delmarva Community Services, Inc., 5 MSBCA 523. The Board does not second guess an evaluation of a proposal, but will determine whether or not reasonable basis exists for the conclusions reached, Baltimore Industrial Medical Center, supra.

The role of the Board of Contract Appeals is not to substitute its judgment for that of an agency absent clear and substantial

evidence, not supposition, conjecture, opinion or speculation, that the determination was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion.

The contest of an award is a serious matter and an appellant has the burden of proving that a Procurement Officer's award of a contract was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion, Delmarva Community Services, supra; AGS Genesis Corporation, supra; Astro Painting and Carpentry, Inc., which is 4 MSBCA 355; Xerox Corporation, 1 MSBCA 948.

As the party seeking to disturb the recommendation for award decision here, FTS bears the burden of proof in this appeal, and we note for the record this is not a burden that is easily met. Within this framework, after considering the testimony and exhibits introduced in this appeal, the Board finds as a matter of fact and of law that Appellant FTS has not met its burden of proof and that this appeal must be denied. The judgment of SHA is reasonable and will not be disrupted by this Board.

The Board finds that SHA's conclusion that MD-200 offered the proposal that was most advantageous to the State was not illegal, arbitrary, capricious, an abuse of discretion, contrary to law or regulation or otherwise irrational or disallowed. Indeed, it is the Board's opinion that SHA's determination of this contract award was based upon a thorough factual foundation and well-reasoned decision making by dozens of highly competent evaluators.

First, the Board notes that, as the agency which bears the responsibility not only of selecting the successful bidder, but also supervising its work from date of contract award until the project is completed and being directly responsible for the success or failure of this project, SHA has an enormous stake in getting this procurement right.

Officials such as Robert Shreeve who served as the leader of the Environmental Evaluation Team and serves as the Environmental Manager for the Office of the ICC, and Melinda Peters who serves as Chair of the Evaluation Committee and serves as the Project Director of the ICC, had and have a tremendous incentive to ensure that this procurement process results in a contract award to the offeror best capable of best fulfilling the requirements of ICC Contract B.

According to his testimony, Shreeve served a similar role in the environmental evaluation role in his evaluation of ICC Contracts A and C as he served in Contract B. By his testimony, he is the Environmental Manager for the Office of the ICC. Shreeve has extensive experience with the ICC contract evaluation process and the environmental evaluation process. According to Ms. Peters' testimony, Shreeve is accountable as the Environmental Manager of the ICC project. Shreeve clearly had substantial knowledge and experience with both the contract evaluation process and the environmental issues surrounding the building of the ICC.

Peters is, by her own testimony, ultimately responsible for the ICC project. As Chair of the Evaluation Committee, Peters was also responsible for ensuring the evaluation process was fair and thorough. As Project Director, Peters also had an additional incentive to ensure that the offeror who offered the most advantageous proposal to the State was selected for contract award.

Testimony and evidence introduced also showed that other persons involved in the evaluation process were associated with the ICC project. Like Shreeve and Peters, these individuals brought both their own particular experience and expertise regarding aspects of the ICC to the procurement evaluation process and also brought, by nature of their responsibility for aspects of the

construction of the ICC, a personal incentive to "get this procurement right."

Considering these and all relevant factors, the Board simply cannot find that the evaluation of this procurement was in any way arbitrary, capricious or unreasonable. It also was not conducted in any way counter to law or regulation.

In the context of recognizing the substantial discretion that is enjoyed by State agencies in the selection of vendors for the products and services they procure, the Board next turns to a brief analysis of the merits of various elements of the FTS protest.

One, was this procurement fatally flawed due to the absence in the RFP of a properly articulated standard for selecting the successful bidder? The answer is no. The RFP did set forth precise standards for the evaluation and selection of the successful bidder and SHA followed those standards in the course of its long evaluation process. SHA's evaluation process was fair and applied equally to both of the bidders. Even if it had not been, the bidders could have complained about the alleged imprecision of the evaluation process prior to the bid due date, but neither elected to do so.

SHA determined to use adjectival rather than a numerical rating system, as is it allowed to do. By its own admittedly arbitrary analysis, even FTS concludes that MD-200 ranks higher, if only slightly so, in this procurement evaluation. It is not necessary for an RFP to set forth a precise formula for calculating cost benefit analysis and, indeed, in many procurements such as this one it may well be ill-reasoned to attempt to do so. The evaluation standards in SHA's RFP for ICC-B were properly articulated, not objected to prior to bid submission and followed by the evaluation that actually occurred.

Two, were the evaluation ratings ultimately determined by SHA to rank the technical proposals arbitrary, capricious or

an abuse of discretion? Again, the answer is no. Focusing on the environmental evaluation which is at the heart of this controversy, FTS complains that it should have received a higher grade for the environmental aspects of its proposal and that MD-200 should have received a lower grade. However, SHA has thoroughly explained to the Board SHA's reasoning in determining that MD-200 presented a superior plan to ensure environmental compliance and minimize the very real potential of a construction shutdown due to environmental degradation in violation of any one of a number of requisite permits.

As simply and literally pointed out by counsel for MD-200 in the closing argument, one need only look at the organizational chart of the two proposals and observe that FTS appears to offer to SHA only two Environmental Compliance Crews while MD-200 offers at least three. But a fuller analysis reveals that the proposal MD-200 also includes a number of "value added" full-time dedicated Environmental Protection Specialists and inspectors above and beyond the minimum positions required by the procurement.

These not only include an Environmental Compliance Manager, Environmental Design Liaison and two other Environmental Specialists, but also, and very importantly to SHA's environmental evaluation team, a high-level Deputy Project Manager to be able to focus on logistical scheduling to assure environmental protection as well as a highly trained and experienced person to handle solely the responsibility of working as a reviewer to assure work compliance and approvance by the Maryland Department of the Environment.

MD-200's proposal was impressive to SHA, as well as it should have been. This is not to say that the environmental proposal submitted by FTS was not also impressive, nor did anyone connected with SHA evaluation ever make such a determination. Indeed, the

initial tentative environmental grade proposed for FTS progressed from G ultimately to a G+, but MD-200's initial tentative grade of G went up even higher as SHA came more fully to appreciate the various specific elements of the MD-200 proposal and it ultimately was awarded the grade of E- on this most important of the evaluation factors. MD-200 got a higher environmental grade than FTS because MD-200's environmental proposal was superior to the proposal put forward by FTS and not because any evaluation was arbitrary, capricious or an abuse of discretion.

Three, were the true technical rankings of the two bidders, MD-200 and FTS, essentially equal and was the selection of the winner, therefore, required to be based on the lowest price? It's been argued that both of these statements are incorrect by various counsel at various times in this hearing, and both statements are, indeed, found by the Board to be incorrect.

Ratings of proposals are by necessity subjective evaluations. In SHA's evaluation of bids for the construction of ICC-B, dozens of highway, construction and environmental experts subjected the two proposals to rigorous and careful examination and open deliberation. It may appear to some that the two proposals were quite close to one another, both in technical aspects as well as price, but they were clearly not identical.

MD-200 was found by the Evaluation Committee to be slightly better technically than FTS, and MD-200, correspondingly, received a higher technical grade than did FTS. MD-200 was better than FTS largely because of the higher rating received by MD-200 for environmental protection, a slightly higher rating than MD-200 earned in contrast to FTS because MD-200 successfully persuaded SHA that its offer was technically superior to its competitor on this important factor.

Furthermore, even if the technical rankings of the two bidders had been the same, nowhere in the RFP was it set forth

that price and price alone would be used as the tie-breaker. SHA was obligated to follow the dictates of its RFP in evaluating bids and that required SHA to make a fully integrated analysis, which it did. Moreover, price was never identified as a tie-breaker and, in any case, there was no tie in the technical evaluation.

Did SHA make mistakes in the evaluation of the technical proposal of FTS and/or Maryland -- I'm sorry, MD-200 and, if so, did those mistakes cause SHA wrongfully to recommend award of this contract to MD-200? That would be number four. This ground of appeal is separately stated by FTS in its protest, but it is actually quite similar to question number 2, which the Board has already answered in the negative. FTS believes that it was not given adequate credit for its environmental safeguards and, simultaneously, that MD-200 was the benefactor of great inflation and double credit for the positive environmental aspects of its proposal. It is impossible for this Board to pretend to enter the mind of each of the evaluators --

(Phone rings)

CHAIRMAN BURNS: Just let that go. Well, don't let it go.

It is impossible for this Board to pretend to enter the mind of each of the evaluators of these proposals and substitute its judgment for that of the evaluators who examined each offer -- each offer, I'm sorry, and legally the Board is neither expected nor allowed to do so. The judgment of SHA must be affirmed provided only that it is not arbitrary, capricious or an abuse of discretion.

The Board has already identified some of the superior environmental personnel components which caused SHA to rank MD-200 higher than FTS. In addition, a significant organizational superiority offered by MD-200 in comparison to FTS was that FTS sought to include environmental inspection only within the chain of communications of its quality control planning, viewing the additional

environmental personnel proposed by MD-200 as redundant.

As the witnesses and counsels explained, however, it is easy to imagine that a quality control component of construction management may easily be overwhelmed with the demands of facilitating construction, focusing on such items as structural integrity of bridge components, for example, as asphalt curing rather than saving box turtles, protecting brown trout, replanting trees or draining sediment control ponds in advance of predicted rainfalls. The primary purpose of highway construction is, after all, building a road.

With respect to ICC-B, SHA decided to afford supremacy in its considerations to environmental concerns. Having a contractor willing to expend the additional resources necessary to have an entire management structure focusing solely on the many environmental responsibilities of this particular project was rationally favored by SHA over a contractor which may have deemed those additional resources unnecessary or even contrary to the intent of the RFP, as FTS apparently did.

FTS to some degree appeared to SHA to not fully share that very high priority in its highway construction mission. The cost of a partial or a total shutdown of a project due to a permit violation, court order or other environmental related reason would constitute a dramatic and expensive setback to construction. That SHA determined that one offeror provided more to prevent such an eventuality than another offeror and was willing to contract with that first offeror, even at a very slight higher contract price, was and is completely rational. Such determinations and decisions were for SHA to determine, not this Board, and this Board cannot conclude as a matter of law that SHA's determination was wrong in recommending MD-200.

Finally, number five. Was SHA incorrect as a matter of law when it determined that

the proposal offered by MD-200 was the most advantageous to the State? Again, the Board, based on all the evidence presented, simply cannot conclude that SHA was incorrect as a matter of law when it determined that the proposal offered by MD-200 was the most advantageous to the State of Maryland. Indeed, that decision appears to the Board to be quite rational and well reasoned after careful and thoughtful evaluation. It is not and never was necessary for SHA expressly to calculate the value in precise dollar amounts of the superior environmental protections SHA determined were offered by MD-200's proposal, and it is not for this Board to substitute its judgment for the considerable evaluation conducted and finally completed by SHA herein. This Board must be satisfied only that SHA's process and conclusion was not arbitrary, capricious or an abuse of discretion. SHA has determined that MD-200 offers the best value to achieve a successful outcome on this daunting and extremely controversial project.

In summary, SHA has concluded that MD-200 has offered the proposal most advantageous to the State. SHA has determined that MD-200 is the proper offeror. This Board concludes that that determination is entirely rational. The appeals of FTS are, therefore, denied.

That will conclude the bench decision. Before I do that, though, if this were a written decision, it would be signed off by all the Board members. For the record, I will ask all three Board members if they agree with this decision. On behalf of myself, I do. Board Member Collins, you have heard this decision. Are you in agreement with it?

MR. COLLINS: I agree.

CHAIRMAN BURNS: Board Member Dembrow, you have also heard this decision. Are you in agreement with it?

MR. DEMBROW: Yes, I also concur.

CHAIRMAN BURNS: All right. Ladies and gentlemen, unless there are other matters that we need to discuss, that will conclude

the appeal of FTS, Facchina-Trumbull-Skanska, R Number 2630. If anyone has anything, please stand up. Otherwise, one final time, thank you all for your unbelievably outstanding and professional performance.

Without repeating the reasoning of the Board's decision of January 16, 2009, the Board simply notes, once again, that in Maryland State procurements the determination of the needs of the State and the method of accommodating such needs is primarily the responsibility of the procuring agency which therefore is responsible for the overall determination of the relative desirability of the proposals submitted. The determination of the relative merits of proposals is, therefore, the responsibility of the procuring agency and it must bear the burden of any difficulties incurred by reason of a defective evaluation. E.g., AGS Genays Corporation, MSBCA 1325, 2 MSBCA ¶158 (1987) at p.12; Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994) at p.5. Since procuring officials enjoy a reasonable range of discretion in evaluating proposals and in determining which offeror or proposal is to be accepted for award, their determinations are entitled to great weight. Id. This Board does not second guess an evaluation of proposals, but merely concerns itself with whether or not a reasonable basis exists for the conclusions and results reached or determined. E.g., Baltimore Motor Coach Co., MSBCA 1216, 1 MSBCA ¶94 (1985); Baltimore Industrial Medical Center, Inc., supra.

Appellants such as FTS have the burden of proving that a procurement officer's award of a contract is contrary to law or regulation or otherwise unreasonable, arbitrary,

capricious or an abuse of discretion. An Appellant's disagreement with the evaluation of it's, or another's, proposal or a recommendation for award, although understandable, is not sufficient to meet this burden.

In this case, FTS has not come close to meeting this admittedly difficult burden.

Considering the importance of this procurement to the State of Maryland, it is clear that the procuring and evaluating officials went to great lengths to insure a fair procurement process aimed at finding the best possible contractor for this project. In particular, individuals such as Robert Shreeve, chair of the Environmental evaluation team, who is also the Maryland State Highway Administration's (SHA) Environmental Manager for the ICC; Mark Coblentz, chair of the Management Approach team, who is also SHA's Construction Manager for the ICC; Kenneth Briggs chair of the Technical Solutions team, who is also SHA's Deputy Director and Design Manager for the ICC; and Melinda Peters, chair of the overall Evaluation Committee, who is also SHA's Project Director for the ICC, all will spend years of their lives working on this project and had and have a direct, personal incentive to insure the best possible result from this procurement process.

Clearly, as noted in the bench opinion, the decisions and evaluations within this procurement were not contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion. In fact, the Board's review of the evidence finds exactly the opposite to be the case here.

As to the specific environmental factor evaluation appeal ground, the Board finds no merit in FTS's appeal. For a number of reasons, including the fact that the

Federal Highway Administration's decision to approve the ICC was largely the result of efforts and assurances by SHA that SHA would go to extraordinary lengths to avoid, minimize, and mitigate the environmental impacts of the ICC, the Instructions to Proposers (ITP) within the RFP, at §5.1.2, provided that the Environmental evaluation factor was "more important than any other technical evaluation factor." As part of the emphasis placed on the environmental factor, the ITP also required that proposers achieve a "Good" or better rating in the Environmental evaluation factor in order for the proposer to be selected for the project.

Considering the history and controversial nature of the Intercounty Connector (ICC) project, for SHA to place special emphasis on the environmental factor in evaluating proposals was entirely appropriate. The costs of construction delay on this contract due to environmental factors could be enormous, both in time lost and money cost to the State. For the RFP and the evaluators to emphasize the environmental plans and personnel of proposers was and is simple common sense.

The evaluators, after a complete review of the proposals and proposers, graded MD200's environmental proposal higher (Exceptional-) than FTS's environmental proposal (GOOD+). When considered in light of the miniscule difference in the price proposals, approximately .12% out of a \$550 million-plus contract, and when evaluated in total by the evaluators, MD200's proposal was felt by the evaluators and the decision-making authorities to provide the most advantageous offer to the State of Maryland.

By regulation and by the terms of the RFP, the Evaluation Committee, the Procurement Officer and the

Administrator were required to judge which proposal "is most advantageous to the State, considering price and the evaluation factors set forth in the ITP." ITP §§5.0 and 5.7; see COMAR 21.05.03.03F. They did so, finding the MD200 proposal the "most advantageous to the State". That determination was in no way contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion. In fact, quite the opposite.

Appellant's arguments, although well thought out and skillfully presented, are merit less. Appellant's remaining appeal grounds are denied.

In The Appeal of Facchina-)
Trumbull-Skanska JV)
)
) Docket No. MSBCA 2630
)
Under SHA Contract No. AT3765B60)
(ICC Contract B))

ORDER

Wherefore, it is Ordered this day of April, 2009
that the appeal of Facchina-Trumbull-Skanska JV in Docket
No. MSBCA 2630 in the above-captioned matter is denied.

Dated:

Michael W. Burns
Chairman

I Concur:

Michael J. Collins
Board Member

Dana Lee Dembrow
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

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

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

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2630, appeal of Facchina-Trumbull-Skanska JV under SHA Contract No. AT3765B60 (ICC Contract B).

Dated:

Michael L. Carnahan
Deputy Clerk