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MEMBER



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**MARYLAND STATE
BOARD OF CONTRACT APPEALS**

April 9, 2004

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Re: Appeals of Yellow Transportation, Inc.
Under Maryland Transit Administration RFP No. MTA 0981A
Docket Nos. MSBCA 2374, 2380, 2381, 2382 & 2389

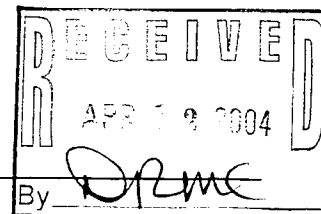
Dear Counsel:

Enclosed please find one copy of the Board's Decision in the referenced appeals.

Sincerely,

A handwritten signature in cursive script that reads "Michael L. Carnahan".

Michael L. Carnahan
Deputy Recorder



BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of Yellow)
Transportation)
) Docket Nos. MSBCA 2374,
Under Maryland Transit) 2380, 2381, 2382 & 2389
Administration RFP No. MTA)
0981A)

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OPINION BY BOARD MEMBER BURNS

Appellant Yellow has timely appealed the denial of several protests alleging bias and arbitrary and capricious evaluation of its technical proposal. These captioned appeals were consolidated for hearing and were heard on the merits during twenty-one (21) hearing days over several months.¹ For the reasons that follow, the captioned appeals are sustained.

¹Pending hearing are six additional appeals.

Findings of Fact

1. These consolidated bid protest appeals concern the procurement of paratransit services by Maryland Transit Administration (MTA).
2. The paratransit/Mobility services provided by MTA, pursuant to the Americans with Disabilities Act (ADA), are intended to offer disabled individuals similar public transportation resources as MTA provides on its fixed-route bus services.
3. Appellant has been MTA's contractor providing paratransit services in the Baltimore metropolitan area since 1998. During the year ending August, 2002, MTA's Mobility scheduled nearly 640,000 one-way trips. The area served by Mobility, and to be served under the Request for Proposals (RFP), includes Baltimore City, all portions of Baltimore and Anne Arundel counties located inside the Baltimore Beltway, and all other areas of those counties located within a three-quarter mile radius of the Baltimore metrorail system, the Central Light Rail line and MTA fixed-route bus service. In the current paratransit program, MTA operates 15 percent of the service with its own vehicles and drivers, and Appellant operates the remaining 85 percent of the service.
4. In December 2002, MTA issued Request for Proposals 0981 "Paratransit Services" (the First Solicitation) seeking proposals for the provision of paratransit services in the Baltimore metropolitan area.
5. The Procurement Officer for Request for Proposals 0981 was Mr. Mark Pemberton. The method of source selection for Request for Proposals 0981 was procurement by competitive sealed proposals under COMAR 21.05.01.01B and 21.05.03.
6. Technical and financial evaluation committees were established in order to review independently the technical and financial proposals.

7. The technical evaluation committee included Ms. Ruth Silverstone as the chair and members Ms. Joyce Callahan, Mr. Tom Curtis, Mr. Ken Hosen of KFH Group (KFH), Mr. Charles Samuel, and Mr. John Smolenski.
8. Ms. Silverstone's job title was Director of Mobility Services, and she was responsible for oversight of Appellant's incumbency as the paratransit contractor.
9. The financial evaluation committee included, among others, Ms. Buffy Ellis of KFH and Mr. Jim O'Donnell.
10. Mr. Pemberton provided the members of the technical evaluation committee with a copy of MTA's **Evaluation Committee Duties & Responsibilities**, which established rules governing the technical evaluation committee members. During his testimony, he stated that the rationales for these rules were, among other things, to insure the integrity of the procurement and to insure that information being provided to the vendors was fair and honest information.
11. The **Evaluation Committee Duties & Responsibilities** established "Responsibilities" among others to:
 1. [r]ender a fair, impartial evaluation based exclusively upon the evaluation criteria contained in the RPF, the contents of the offerors' proposal, and the information gained from clarification of proposals, oral presentations, discussions with offerors, or legitimate sources of reference.
 - ...
 4. [k]eep confidential all information contained in proposals or obtained during the evaluation process.
12. The **Evaluation Committee Duties & Responsibilities** provided "Duties" among others to:
 2. Read the RFP and acquaint yourself with the nature of the requested services or equipment.

If you have questions or suggestions, immediately contact the issuing office. Also read and comment on the evaluation sheets (form).

...

6. In the Committee meetings, decide how many references will be checked, who will check which references (reference checking can be divided among the committee members), and what uniform questions will be asked.

7. Each Committee member should read all proposals received and make appropriate notations directly on the evaluation sheets provided. These evaluation sheets with your written comments become a permanent part of the documentation of this procurement. In some instances notes may be available to a protester or its attorney. Therefore, notes should be factual, non-inflammatory and should contain neither offensive nor inappropriate remarks.

8. Notes should be consistent with your final overall ranking of all offerors. There should be a note for each significant area in which an offeror was either weak or strong. Also, frequently a new evaluation sheet will be provided after orals, discussions, and/or revised submissions. Although each set of evaluation sheets will be retained in the permanent procurement file, only the final one should be used for the final evaluation (evaluations aren't combined or averaged).

9. Clearly identify deficiencies/problems with each proposal. Vendors responding to an RFP who are judged to be reasonably susceptible of being selected for award of the contract, or potentially so, typically will be informed of problem areas identified by the Committee and be given an opportunity to resolve them.

13. The **Evaluation Committee Duties & Responsibilities** established "Evaluation Committee Cautions" that provided among others:

1. UNDER NO CIRCUMSTANCES SHOULD INFORMATION BE GIVEN OUT BY ANY MEMBER OF THE EVALUATION COMMITTEE TO ANY INDIVIDUAL OR GROUP OUTSIDE THE COMMITTEE, (this includes your co-workers, supervisor and, in particular, vendors.)

All information pertaining to the proposals or to the evaluation process is to be held in strict confidence by the Committee members both prior and subsequent to final contract award. Any recommendation for award made by members of the Committee is advisory in nature, i.e. is subject to final approval by the Procurement Officer and the Department Head or designee. Premature release of any procurement information may compromise the State's ability to procure goods and services. Likewise, disclosure of information about an offeror's proposals could be damaging to an offeror. Vendors will be reluctant to participate in the State's procurements if they do not believe the information provided to the State will be protected from improper disclosure.

2. Promptly report to the Procurement Officer any attempts by a vendor or other interested party to contact you regarding the evaluation process. Don't accept questions from any vendor or seek to provide any information, advice, directions, etc. All communication with the offeror is to be through the Procurement Officer or other officially designated contact person.

14. There was no other officially designated contact person for Request for Proposals 0981 so all communications should have gone through the Procurement Officer, Mr. Pemberton. Mr. Pemberton provided the members of the technical and financial evaluation committees with "Evaluator's Acceptance". Each member of the separate committees executed the Evaluator's Acceptance affidavit and swore to agree to specific promises.

15. The Evaluator's Acceptance stated, in part:

I promise:

(1) to keep all information obtained by me in

the course of the evaluation, including but not limited to the contents of the proposals and the results of the evaluations by me and other evaluators, in the strictest confidence and not to reveal such information to any person or discuss it with any person except with the prior consent of the Procurement Officer, his Representative, or their superiors in the MDOT;

- (2) to evaluate proposals fairly and impartially;
- (3) to have no direct contact with any party submitting a proposal for this procurement; and
- (4) to notify the Procurement Officer, his Representative, or their superiors in the MDOT immediately if:
 - (a) any person other than the Procurement Officer, his Representative, or their superiors in the MDOT attempts to contact me for any reasons regarding the procurement; ...

- 16. In the spring of 2003, MTA received proposals from several offerors, including Appellant, Laidlaw Transit Services, Inc. (Laidlaw), MV Transportation, Inc. (MV), and First Transit, Inc. (First Transit).
- 17. MTA requested two rounds of best and final offers (BAFOs) from those offerors MTA deemed reasonably susceptible of being selected for contract award.
- 18. Request for Proposals 0981 provided for a performance bond. Appellant filed bid protests and filed appeals with this Board asserting that the amount of the performance bond was excessive. Presumably as a result of performance bond issues, MTA cancelled the First Solicitation on June 26, 2003.
- 19. By email dated June 26, 2003, Mr. Charles Lockridge, one of the members of the financial evaluation committee, raised concerns to Mr. Pemberton about whether the current technical evaluation

committee would be "tainted since they have already been through the evaluation process."

20. On the same date, Ms. Magdaline Hamill, the Director of Contract Administration for MTA, sent an email to Mr. Pemberton and Ms. Silverstone. Ms. Hamill asked whether new technical and financial evaluation committees would be established. In response, Mr. Pemberton stated, "would recommend yes but will defer to MTA."
21. In the same email, Ms. Hamill also asked to be advised of the recommended transition period after the notice to proceed. Mr. Pemberton recommended a six-month transition period.
22. On July 7, 2003, a representative of Laidlaw, Mr. Kim Chin, sent an email to Mr. Pemberton and Ms. Silverstone. He indicated that Laidlaw would "confirm estimated vehicle delivery dates" as soon as he had the information.
23. As of July 7, 2003, Mr. Chin believed the new RFP would be issued on July 8, 2003. When Mr. Chin learned from an official at MDOT that the new RFP would not be issued on July 8, he so notified Ms. Silverstone.
24. On July 9, 2003, Mr. Chin sent an email to Ms. Silverstone concerning the delivery of gas-powered vehicles. Ms. Silverstone responded by email on July 24, 2003 and asked about diesel vehicles. Mr. Chin responded on July 24, 2003 with the delivery window for diesel vehicles.
25. By letter dated July 14, 2003, MDOT advised offerors of the opportunity to offer suggestions regarding the new RFP by forwarding written responses to MDOT's consultant, Nelson Nygaard.
26. Pursuant to COMAR 21.05.03, on July 29, 2003, MTA issued RFP 0981A paratransit services (the Second Solicitation). It contained a scope of work similar to the First Solicitation, but with a lower performance bond requirement.

27. The RFP sets forth certain Proposal Evaluation Process factors:

1. Qualifications of the Firm

- Specific experience in ADA paratransit service.
- Demonstrated understanding of the needs of the MTA and commitment to provide effective and efficient ADA paratransit services.
- Experience and capabilities to provide the requested services.
- Effective hiring and training program to ensure the program is fully staffed and employees well trained.
- Wage and benefit package adequate to recruit, hire and retain a qualified work force.
- Sound financial responsibility and financial capability.
- Quality of the proposed vehicles.
- Commitment and responsibility to work in partnership with the MTA to improve the Mobility program and provide effective, efficient, and quality service.

2. Qualifications of the Proposed Staff

- Experience and qualifications of the proposed Project Manager.
- Experience and qualifications of proposed staff for the remaining key positions: Operations Manager, Maintenance Manager, and Safety and Training Manager.
- Specific experience of the key management staff with ADA paratransit services.

3. Service Plan

- Effective work plan to meet all the requirements described in Section 3, Scope of Work.
- Effective maintenance plan to

ensure a well-maintained paratransit fleet, minimizing downtime and road calls.

- Detailed and reasonable start-up and implementation plan.
- Approach to dealing with peak period ridership demand.
- How the proposed response satisfies the goals and objectives of this RFP.

4. Economic Benefits to the State

28. The Procurement Officer for the Second Solicitation was again Mr. Mark Pemberton.
29. No person other than the Procurement Officer was designated as an official contact person.
30. The technical evaluation committee was again composed of Ms. Silverstone (again, as chair), Ms. Callahan, Mr. Curtis, Mr. Hosen, Mr. Samuel, and Mr. Smolenski. The record reflects that the Procurement Officer considered the judgement of the technical evaluation committee regarding the evaluation of the technical proposals.
31. The financial evaluation committee again included, among others, Ms. Ellis and Mr. O'Donnell.
32. The same **Evaluation Committee Duties & Responsibilities** governing the First Solicitation, as set forth in part above, governed the Second Solicitation. Likewise, the Evaluator's Acceptance and the promises contained therein carried over to the Second Solicitation.
33. The RFP and addenda established a common date of August 29, 2003 for the submission of technical and price proposals.
34. At the pre-proposal conference, the Procurement Officer informed offerors that contact with him, alone, was allowed.
35. By email dated August 12, 2003, Ms. Silverstone contacted Mr. Chin of Laidlaw and stated "Service hours are the same. Vehicle numbers have grown!"

36. By emails of August 28, 2003, Mr. Chin and Ms. Silverstone exchanged correspondence concerning the receipt of Laidlaw's proposal by MTA.
37. Appellant, Laidlaw, MV, First Transit and four other offerors submitted their respective technical and financial proposals on August 29, 2003. One firm was eliminated for failure to provide the required bid bond.
38. By email dated September 2, 2003, Mr. Chin indicated that Mr. Pemberton and Ms. Silverstone should "let us know if you need anything as you review the proposals." By email the next day, Ms. Silverstone contacted Mr. Chin and asked "[w]hat site have you identified???"
39. By email dated September 4, 2003, Mr. Chin transmitted an "excerpt" concerning Laidlaw's facility to Ms. Silverstone. Ms. Silverstone replied by email to Mr. Chin and stated that she "already read this in your [Laidlaw's] proposal."
40. By email dated September 8, 2003, Mr. Chin informed Mr. Pemberton and Ms. Silverstone of his personal travel plans due to illness of his father. The same day, Ms. Silverstone contacted Mr. Chin via email expressing condolences.
41. By email dated September 10, 2003, Mr. Chin transmitted an article from *Passenger Transport* to Ms. Silverstone. Ms. Silverstone contacted Mr. Chin via email in response stating "Thanks - Great Article."
42. By email dated September 11, 2003, Ms. Silverstone forwarded the *Passenger Transport* article to Ms. Callahan. Ms. Callahan responded to Ms. Silverstone regarding the article on September 11, 2003 and stated that Mr. Chin "is certainly a wonderful salesman, quite unobtrusive. Besides his product is also excellent as proven."
43. By email dated September 11, 2003, Ms. Callahan contacted Mr. Chin with a subject line of "thinking of you" to inform him that Ms. Silverstone "shared the article" with her and that Ms.

Callahan had "manipulated it into our daily clips for the powers to be to see. Keep up the good work."

44. On September 15 and 16, 2003, MTA conducted oral interviews and held discussions with Appellant, Laidlaw, MV, and First Transit.
45. Laidlaw's oral interview, which Mr. Chin did not attend due to the death of his father, was conducted on September 15, 2003. First Transit's oral interview was also conducted on September 15, 2003. Appellant's oral interview and MV's oral interview were conducted on September 16, 2003.
46. By email dated September 15, 2003, Ms. Callahan contacted Mr. Chin, regarding Laidlaw's oral interview, and stated:

your team did an excellent job, as you knew they would. you have definitely set the pace for the rest of the interviews to follow. I enjoyed meeting the additional team members, very hands on guy. My sincere condolences on the passing of your father. I recall talking to you that your mother had recently passed also? You are no stranger to the process, but it never makes it easier. Life can certainly throw us some fast balls when we are not looking, can't they? Hopefully this process of selection will soon be over and we can get on to quality customer service for our customers with disabilities. No matter the consequences I am privileged to know you and hold you as an example of excellence in this industry.

47. By email dated September 16, 2003, Mr. Chin thanked Mr. Pemberton, Ms. Silverstone, Ms. Callahan, Mr. Samuel, and Mr. Hosen for the oral interview. He stated that he would check with those individuals by telephone to see if anything else was needed from Laidlaw.
48. The same day, September 16, 2003, Ms. Callahan contacted Mr. Chin by email and stated, in part, "[y]ou are welcome and, the pleasure was all mine. I certainly did enjoy seeing what is possible for our future success."
49. The next day (September 17, 2003), Ms. Silverstone contacted Mr.

Chin by email and, after offering condolences on the death of his father, informed him "[t]he presentation was good, but we did miss you."

50. Following the oral interviews, MTA deemed the proposals of Appellant, Laidlaw, MV, and First Transit reasonably susceptible of being selected for contract award, and by letters dated September 24, 2004, the Procurement Officer requested BAFOs from those four offerors and provided the offerors with "Technical Clarifications" and/or "Financial Questions."
51. Appellant, Laidlaw, MV and First Transit submitted their respective BAFOs on October 2, 2003.
52. On October 2, 2003, Mr. Chin and Ms. Silverstone exchanged emails in which Ms. Silverstone confirmed receipt of Laidlaw's BAFO.
53. By email on October 2, 2003 to Ms. Silverstone, Mr. Chin informed Ms. Silverstone "[a]ll technical questions answered with a 2% reduction in overall costs for all three years."
54. During her testimony, Ms. Silverstone claimed she didn't know what he [Mr. Chin] was talking about when Mr. Chin informed her of a "2% reduction in overall costs."
55. The final meeting of the technical evaluation committee occurred on October 10, 2003.
56. By email dated October 10, 2003, Mr. Chin transmitted a newspaper article to Ms. Silverstone and Ms. Callahan which was apparently not favorable to Appellant and MTA's existing paratransit operation.
57. By email to Mr. Chin the same day, October 10, 2003, Ms. Silverstone decried the article and stated that "[s]oon we will be able to announce the REAL improvements to the Service!"
58. By email on October 10, 2003, Ms. Callahan contacted Mr. Chin regarding the article and stated that "I hope this encourages you to come show em [sic] how paratransit service should operate. A perfect opening for you."

59. By email dated October 13, 2003, Mr. Chin informed Ms. Silverstone and Ms. Callahan that Mr. Steve Hirano, editor and associate publisher of Metro Magazine, a trade journal, "would be willing to do a story on the new and improved Mobility. Let me know as soon as it is appropriate."
60. By email dated October 13, 2003, Ms. Callahan contacted Mr. Chin and stated:
- [y]ou should know by the end of the week, I would suspect. Let me just say, we chose the two vendors that would turn this city around and have the nation take notice of Baltimore on HOW TO run paratransit. I think it may be very sweet for Laidlaw, after the transition, which will not BE sweet. I look forward to a new era. Please make this note disappear! The biggest load will be on YOU.
61. By email the following day, October 14, 2003, Ms. Silverstone contacted Mr. Chin in response to when Metro Magazine could do a story on MTA Mobility, and she stated "After Award!"
62. On October 14, 2003, Mr. Pemberton met with Ms. Silverstone and Mr. Hosen of the technical evaluation committee, as well as Ms. Ellis and Mr. O'Donnell of the financial evaluation committee, to decide on the final selections and recommendations for contract award. There is no evidence that the recommendations of the technical evaluation committee had changed significantly between October 10, 2003 and October 14, 2003.
63. By email dated October 15, 2003, Mr. Chin asked Ms. Silverstone "any feel for when an announcement will be made?" Ms. Silverstone contacted Mr. Chin via email the next day and stated "STAY TUNED!!"
64. The Procurement Officer made a recommendation for contract award to Laidlaw and MV by memorandum to the MTA Administrator dated October 16, 2003.
65. Mr. Pemberton and Ms. Silverstone briefed the MTA Administrator, Mr. Robert Smith, who approved such recommendation on October

- 17, 2003. Mr. Smith generally asked Mr. Pemberton about the process and whether various procedures had been followed.
66. Mr. Pemberton was unaware of many of the email communications between Mr. Chin, Ms. Silverstone, and Ms. Callahan until the hearing of the appeal. Had he been aware of such communications he would have made inquiry prior to his award recommendation. He acknowledged that such communications were precluded by the evaluators' promise to have no direct contact with offerors. When examined by the State, however, he opined that no confidential, proprietary, or source selection information was exchanged in these emails, and that none affected the integrity of the procurement process. Mr. Pemberton further opined that the evaluation process was fair and was conducted according to law. He did not regard any technical evaluator as being biased or partial, and he was comfortable in relying on their technical judgement in the evaluation of the proposals.
67. Mr. Smith was unaware of the email communications between Mr. Chin, Ms. Silverstone, and Ms. Callahan until the hearing of the appeal. Had he been aware of such communications, he would have made inquiry prior to approving the Procurement Officer's award recommendation, and he would have discussed the matter with legal counsel. He acknowledged that such communications were precluded by the evaluators' promise to have no direct contact with offerors. When examined by the State, however, he opined that with knowledge of the email correspondence he would still have approved the Procurement Officer's award recommendation. He further opined that no confidential, proprietary, or source selection information was exchanged in these emails.
68. The emails set forth above evidence that Ms. Silverstone and Ms. Callahan were biased in favor of Laidlaw. Similar communications do not exist between Ms. Silverstone, Ms. Callahan, and representatives of MV, Appellant, and First Transit. Expressions of condolences to the representative of an

offeror, confirmation of receipt of offers, discussion of routine procedural matters, and exchanges of pleasantries as contained in some of the email correspondence set forth above do not reflect bias in favor of such offeror. However, receipt of a magazine article which is then manipulated by Ms. Callahan into daily clips for the powers to be to see, receipt of information by Ms. Silverstone apparently kept to herself and not shared with the Procurement Officer relating to a 2% cost reduction, and Ms. Callahan's critique of the performance of a single offeror compared to others in an oral interview during the competitive process provide "substantive hard facts or evidence" of the existence of bias, in this case favoritism towards Laidlaw during the technical evaluation process.

Decision

The Board has been very clear on its role in reviewing the decisions of evaluators of proposals submitted in response to Requests for Proposals (RFP) in a competitive negotiation:

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 judgement which is necessarily subjective. B. Paul Blaine Associates, Inc., MSBCA ¶123, 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 judgement 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 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 and 1409, 3 MSBCA ¶201 (1989) at pp. 58-59.

Mere disagreement with the judgment of the evaluators assigned to an evaluation panel for procurement is insufficient to show that the evaluation of proposals 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 a proposal, but will determine whether or not a reasonable basis exists for the conclusions reached. Baltimore Industrial Medical Center, Inc., MSBCA 1815, 4 MSBCA ¶368 (1994) at p. 5.

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. Astro Painting and Carpentry, Inc., MSBCA 1777, 4 MSBCA ¶355 (1994) at pp.8-9; AGS Genasys Corporation, MSBCA 1362, 2 MSBCA ¶158 (1987) at p. 10; Xerox Corporation, MSBCA 1111, 1 MSBCA ¶948 (1983). Bias will not be attributed to procurement officials or those engaged in a procurement process based on inference or supposition. W. M. Schlosser Company, Inc., MSBCA 2126, 5 MSBCA ¶465 (1999) at p. 5; B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58 (1983). "Bias must be demonstrated to exist by substantive hard facts or evidence." Benton & Associates, MSBCA 2196 and 2201, 5 MSBCA ¶487 (2000) at p.6. The existence of actual bias for or against an offeror must be shown to be present. Benton & Associates, *supra*, at p. 6.

This Board has, however, also stressed the importance of insuring competition among offerors on an equal basis. See, e.g., United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989) at p.59; Systems Associates, Inc., MSBCA 1257, 2 MSBCA ¶116 (1985); B. Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶58 (1983). COMAR recognizes the importance of equal treatment of offerors in 21.05.03.03C.(3)(a) in stating that "offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarifications of proposals."

A protester may establish that a procurement determination is unreasonable by demonstrating that the procurement procedure followed involved a clear and prejudicial violation of applicable statutes and regulations. United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989) at p.59.

If a technical evaluation panel is utilized in an RFP evaluation the evaluators are required to act impartially and not in an arbitrary or unreasonable manner. AGS Genasys Corporation, MSBCA 1362, 2 MSBCA ¶158 (1987) at p. 10.

For the reasons that follow, the Board finds that the actions of technical evaluation committee members Ms. Ruth Silverstone and Ms.

Joyce Callahan were clearly biased in favor of Laidlaw Transit Services, Inc. (Laidlaw) during this procurement process. The numerous contacts with Laidlaw's representative, Mr. Kim Chin, provide clear "substantive hard facts or evidence" that both Ms. Silverstone and Ms. Callahan were not impartial in evaluating proposals submitted pursuant to this RFP.

A brief review of the timeline involved in this RFP is in order. On July 29, 2003, the Maryland Transit Administration (MTA) issued an RFP for paratransit services. This followed the issuance and withdrawal in 2003 of a similar RFP for paratransit services.

On August 29, 2003, proposals were received from eight offerors. Four of the proposals were eliminated for various reasons, leaving four offerors remaining, including: First Transit, Inc. (First Transit), Laidlaw, MV Transportation, Inc. (MV), and Appellant Yellow Transportation (Appellant Yellow).

Following receipt of proposals, oral interviews with the four qualified firms were held on September 15, 2003 (Laidlaw and First Transit) and on September 16, 2003 (Appellant Yellow and MV).

Following the oral interviews, Mr. Mark Pemberton, the Chief Procurement Officer at the Maryland Department of Transportation (MDOT) and the Procurement Officer in this RFP, sent a letter dated September 24, 2003 to each of the four offerors, seeking responses to various questions and requesting a Best and Final Offer (BAFO) from each offeror.

On October 2, 2003, the four remaining offerors submitted their BAFOs to the Procurement Officer.

On October 10, 2003, five members of the technical evaluation committee, including Ms. Silverstone and Ms. Callahan, met with the Procurement Officer to discuss the technical proposals of the four offerors. In that meeting, which was the final meeting of the technical evaluation committee, the committee reached a final consensus for the ranking of offerors. The committee members ranked Laidlaw first, closely followed by MV second and First Transit third.

Appellant Yellow's proposal was ranked fourth by each member of the technical evaluation committee. These rankings were the final recommendation of the technical evaluation committee. See, RX13², AX33, Curtis, Tr. 3/9: 1420-21³; Samuel, Tr. 2/17: 149. Mr. Ken Hosen, the sixth member of the technical evaluation committee, was not present at the October 10, 2003 meeting but had submitted his recommendations prior to that meeting. His rankings matched those of the other members of the committee.

On October 14, 2003, the Procurement Officer met with two members of the technical evaluation committee, including Ms. Silverstone⁴, and two members of the financial committee to discuss the findings of both committees. Pemberton, Tr. 3/8: 1270; Silverstone, Tr. 2/11: 117. A consensus was reached that Laidlaw and MV should be recommended for award. Pemberton, Tr. 3/8: 1271.

The Procurement Officer requested, and received, memoranda summarizing the recommendations of the technical and financial committees. RX15; AX72; Hosen, Tr. 3/8:1152; Pemberton, Tr. 3/8: 1275-77. The memoranda from the technical evaluation committee (drafted by Mr. Hosen), summarized the committee's findings and recommended MV for Option A and Laidlaw for Option B.⁵

In a written determination dated October 16, 2003, the Procurement Officer recommended award of Option A to MV and Option B to Laidlaw. AX33. The MTA Administrator, Mr. Robert Smith, approved those recommendations on October 17, 2003. AX33.

As the MTA itself admits, the Procurement Officer used the

²Appellant's Exhibits are designated as "AX" followed by the appropriate exhibit number. Respondent's Exhibits are designated as "RX" followed by the appropriate exhibit number.

³Transcript references are made to the last name of the witness, followed by the date of the witness's testimony and the relevant transcript page(s).

⁴Ms. Silverstone served as the chair of the technical evaluation committee.

⁵Option A provides for 40% of the services to be awarded under the RFP and Option B provides for 60% of the services to be awarded under the RFP.

memorandum from the technical evaluation committee, as well as his notes from the meetings he had with the committee, to reach his judgment and make his recommendations.

Appellant argues that Ms. Silverstone and Ms. Callahan were biased in favor of offeror Laidlaw. The MTA argues, in a footnote to its brief, that "Yellow's suggestions of a 'coziness' between Laidlaw and certain technical evaluation committee members are built on electronic communications that are inferential and not direct evidence of bias" and that Appellant Yellow has no "direct evidence" of bias. Respondent MTA's Post-Hearing Brief at p. 55, Footnote No. 14.

As will be shown, Respondent is clearly wrong in this assertion. The Board finds that there are ample "substantive hard facts or evidence" for finding that Ms. Silverstone and Ms. Callahan were biased in favor of Laidlaw during this RFP process. Benton and Associates, *supra*. The Board also finds the existence of actual bias on behalf of Laidlaw and resulting bias against First Transit, MV, and Appellant Yellow. *Id.*

Respondent urges that only emails that occurred during the technical evaluation committee's evaluation process could have impacted that evaluation process. Respondent MTA's Post-Hearing Brief at p. 61. Following Respondent's argument, only those emails that occurred after the RFP was issued on July 29, 2003 and before the final meeting of the technical evaluation committee on October 10, 2003 could have influenced the technical evaluation committee's evaluation of offerors' proposals.

Without ruling on the merits of Respondent's assertion, the Board will confine its examination to the period suggested by Respondent. The relevant communications which occurred during that period, however, provide overwhelming "substantive hard facts or evidence" of the bias of Ms. Silverstone and Ms. Callahan.

The first email submitted into evidence which occurred during

the evaluation period (July 29, 2003-October 10, 2003) was an email exchange between Mr. Chin and Ms. Silverstone (AX124):

8/8/2003 - Chin to Silverstone and Pemberton: "I will be out of the country on urgent family business August 15-22. If you need anything while I am gone, please contact Susan Spry, VP Business Development at susan.spry@laidlawtransit.com. Her office number is 303-454-6980, and her cell is 303-356-0524. Thanks, Kim Chin".

8/12/2003 - Silverstone to Chin: "Sorry. Service hours are the same. Vehicle numbers have grown! Ruth".

It should be noted that the Procurement Officer, Mr. Mark Pemberton, apparently received Mr. Chin's email on August 8, 2003. Pursuant to the **Evaluation Committee Duties & Responsibilities** (AX20) Mr. Pemberton should have informed Mr. Chin not to contact Ms. Silverstone and should have informed Ms. Silverstone not to communicate with Mr. Chin. ("All communication with the offerors is to be through the Procurement Officer or other officially designated contact person."⁶ - AX20) According to the record, Mr. Pemberton did not so inform Mr. Chin or Ms. Silverstone.

On August 12, 2003, Ms. Silverstone responded to Mr. Chin with a message largely unrelated to Mr. Chin's email of August 8, 2003. The record does not reflect why Ms. Silverstone responded to Mr. Chin's message in this fashion. Ms. Silverstone's email violated her promise not to have direct contact with any party submitting a proposal for this procurement (Evaluator's Acceptance, AX86(h)).

The next email communications are dated August 28, 2003 between Mr. Chin and Ms. Silverstone (AX125):

8/28/2003 - Chin to Silverstone - "Just a FYI - Package delivered at 11:11 a.m. and signed by "M.Heary". Thanks, Kim Chin".

⁶The record does not reflect the existence of any officially designated contact person other than the Procurement Officer.

8/28/2003 - Silverstone to Chin - "Now relax and enjoy the weekend. Ruth".

8/28/2003 - Chin to Silverstone - "Ruth-Thanks, I will! Look forward to seeing you soon. As always, please call should you or Mark need anything. Kim Chin".

Pursuant to AX20, Ms. Silverstone should not have been telephoning Mr. Chin and should have made Mr. Chin aware of the prohibition against such contacts. Ms. Silverstone also should have informed the Procurement Officer of this exchange. According to the record, Ms. Silverstone took none of these actions. Again, Ms. Silverstone's email contact with Mr. Chin violated her Evaluators's Acceptance (AX86(h)).

The next email communications (AX107) are:

9/2/2003 - Chin to Pemberton and Silverstone - "Mark and Ruth - let us know if you need anything as you review the proposals. My cell is 919-264-5254. Thanks! Kim Chin".

9/3/2003 - Silverstone to Chin - "What site have you identified??? Ruth".

Once again, the Procurement Officer apparently knew of Mr. Chin's contact with Ms. Silverstone. Once again, the Procurement Officer should have informed Mr. Chin not to have contact with Ms. Silverstone and Ms. Silverstone not to have contact with Mr. Chin. Once again, apparently, the Procurement Officer did not take these actions.

Whatever Ms. Silverstone meant by her email to Mr. Chin, it clearly should not have been sent by a technical evaluation committee member - let alone the chair of the technical evaluation committee - to a representative of an offeror. Obviously, such a communication is, on its face, clearly improper, violative of Ms. Silverstone's promise in her Evaluator's Acceptance (AX86(h)), and provides "substantive hard facts or evidence" that Ms. Silverstone was engaged

in improper contacts with Laidlaw's representative.

The next email communications are contained in AX23:

9/4/2003 - Chin to Silverstone - "Here is an excerpt on the facility in case you need it. Let me know if you need anything else. Thanks, Kim Chin".

9/4/2003 - Silverstone to Chin - "Thanks, Kim. I have already read this in your proposal. Ruth".

AX23 is, apparently, a continuation of the conversation contained in AX107. Whatever the case, an offeror should not have been contacting a member of the technical evaluation committee - and should certainly not have offered to supplement their initial proposal through such a contact. Nor should a member of the technical evaluation committee be requesting any such information. Whatever was sent to Ms. Silverstone by Mr. Chin, whether included in Laidlaw's proposal or not - clearly should not have been sent to Ms. Silverstone at all.

Just as clearly, Ms. Silverstone should not have accepted this information, should have told Mr. Chin the contact was impermissible, and should have reported this matter to the Procurement Officer immediately. Ms. Silverstone took none of these actions.

AX24 contains the next email exchange:

9/8/2003 - Chin to Silverstone and Pemberton - "Ruth and Mark - I received word that my father has taken a turn for the worse, and so I will need to travel to see him, possibly tomorrow. I am sending you this mail in anticipation of my travel and will call to let you know the latest. If I need to travel, Susan Spry, VP Marketing will be available (Cell is 303-356-0524) as will Pat Smith, GM (Cell 412-812-0815). We are of course looking forward to be your contractor of choice, so let us should [sic] you need anything else for your meetings on Tuesday. Thanks, Kim Chin".

9/8/2003 - Silverstone to Chin - "We wish you

well on this latest journey!! Hope your father is better soon. Ruth".

This exchange, on its face, is innocuous enough. The Procurement Officer is aware of the communication from Mr. Chin to Ms. Silverstone and himself.

There was, however, no need for Mr. Chin to be sending this information to a member of the technical evaluation committee. It should have been sent to the Procurement Officer but not to the chair of the technical evaluation committee, Ms. Silverstone. Again, the Procurement Officer should have advised Mr. Chin that direct communications with Ms. Silverstone or any member of the technical evaluation committee were improper. Again, he apparently failed to do so.

AX25 began a completely unacceptable series of communications that resulted in serious violations of law and regulations and clearly compromised the fairness of the evaluation process of this RFP:

9/10/2003 - Chin to Silverstone - "Ruth - in case you have not read this in PT. Kim Chin" ("PT" refers to *Passenger Transport*, which is published by the American Public Transportation Association).

9/11/2003 - Silverstone to Chin - "Thanks -Great article. Ruth".

This exchange is clearly impermissible and violative of Maryland procurement law and regulations. Laidlaw's representative (Mr. Chin) is sending information of some kind to the chair of the technical evaluation committee (Ms. Silverstone). Ms. Silverstone reads the information and replies to Mr. Chin thanking him for the "[G]reat article."

Offerors should not be forwarding any articles during an RFP evaluation process to evaluation committee members. Evaluation

committee members certainly should not be receiving and reading such articles.

Clearly, this information - whatever was contained in the article - supplemented Laidlaw's RFP proposal. Whatever was in that article, the article should not have been sent by an offeror to an evaluation committee member.

Just as clearly, Ms. Silverstone should not have read the article, should have reported the incident to the Procurement Officer, and should have informed Mr. Chin that such communications were not permissible. Ms. Silverstone took none of these actions.

Reasons for Ms. Silverstone to have taken these actions are amply illustrated in AX127 and AX26, in which Ms. Silverstone forwards Mr. Chin's email to Ms. Joyce Callahan of the technical evaluation committee. AX127 consists of:

9/10/2003 - Chin to Silverstone - "Ruth - in case you have not read this in PT. Kim Chin".

9/11/2003 - Silverstone to Chin - "Thanks -Great article. Ruth".

9/11/2003 - Silverstone to Callahan - "FYI Ruth".

9/11/2003 - Callahan to Silverstone - "Kim is certainly a wonderful salesman, quite unobtrusive. Besides his product is also excellent as proven. Jlc".

This exchange between Ms. Silverstone and Ms. Callahan should not have occurred. Ms. Silverstone should not have sent this information - furnished by Mr. Chin of Laidlaw - to another evaluation committee member (Ms. Callahan). Because of Ms. Silverstone's action in doing so, a second member of the technical evaluation committee, Ms. Callahan, was tainted by the introduction of this information from Mr. Chin of Laidlaw.

In addition, Ms. Callahan's remarks - which it should be noted

took place several days before the oral interview of Laidlaw and the other offerors by the technical evaluation committee - clearly indicate bias from Ms. Callahan in favor of Laidlaw - Mr. Chin is "certainly a wonderful salesman" and "his [Chin's] product is also excellent as proven."

The Board finds that Ms. Callahan's remarks in AX127 clearly constitute "substantive hard facts or evidence" of bias from Ms. Callahan toward Laidlaw. This is especially true coming as they do before the oral interviews of offerors on September 15-16, 2003.

The contacts continued in AX26:

9/11/2003 - Callahan to Chin - "Ruth shared the article and I had not seen it, but I manipulated it into our daily clips for the powers to be to see. Keep up the good work. Jlc".

9/13/2003 - Chin to Callahan - "Thanks Joyce. Let us know if you need anything. I am sorry that I can't be there in person for the Monday interview, but our team is ready, willing and able! Kim Chin".

9/15/2003 - Callahan to Chin - "Dear Kim Chin, your team did an excellent job, as you knew they would. [y]ou have definitely set the pace for the rest of the interviews to follow. I enjoyed meeting the additional team members, very hands on guy [sic]. My sincere condolences on the passing of your father. I recall talking to you that your mother had recently passed also? You are no stranger to the process, but it never makes it easier. Life can certainly throw us some fast balls when we are not looking, can't they [sic]? Hopefully, this process of selection will soon be over and we can get on to quality customer service for our customers with disabilities[.] No matter the consequences I am privileged to know you and hold you as an example of excellence in this industry. Joyce Callahan".

AX26 provides striking evidence why Ms. Silverstone should not have forwarded Mr. Chin's email (AX25) to Ms. Callahan and, further, that Ms. Callahan was clearly biased in favor of Laidlaw. The first

email of Ms. Callahan to Mr. Chin illustrates that Ms. Callahan had not read the article supplied by Mr. Chin to Ms. Silverstone until Ms. Silverstone sent the article to her. Once again, a technical evaluation committee member received information from an offeror outside of the established RFP evaluation process, this time by way of the chair of the technical evaluation committee! Ms. Callahan then told Laidlaw's representative, Mr. Chin, that she had "manipulated it into our daily clips for the powers to be to see."

Ms. Callahan, therefore, not only read the article supplied by Laidlaw, but also took affirmative action to insure others saw the article. Ms. Callahan testified that the article in question concerned a positive paratransit experience that mentioned Laidlaw. Callahan, Tr. 2/11:196-197.

To this day it is impossible to know just who besides Ms. Silverstone and Ms. Callahan read this article. Testimony at the hearing indicated that no other members of the technical evaluation committee were sent this article by Ms. Silverstone.

Ms. Callahan also called on Laidlaw's representative, Mr. Chin, to "[K]eep up the good work" - bolstering the finding of a pattern of bias from Ms. Callahan in Laidlaw's favor.

Mr. Chin responds to Ms. Callahan informing him of her placing the article into the "daily clips" by stating "[L]et us know if you need anything." There is no permissible reason whatsoever that the representative of an offeror in this procurement could have had for making that offer to a member of the technical evaluation committee. Ms. Callahan should have reported the offer to the Procurement Officer immediately. She did not do so.

Next follows Ms. Callahan's September 15, 2003 email to Mr. Chin. Ms. Callahan emails Mr. Chin that the Laidlaw team "did an excellent job" and that they "have definitely set the pace for the rest of the interviews to follow." Ms. Callahan continues to extol the virtues of Mr. Chin "as an example of excellence in this industry."

Whatever AX26 indicates, it does not, to say the least, provide evidence of a fair and unbiased RFP committee evaluator. It should be noted that Ms. Callahan sent this email to Mr. Chin on September 15, 2003, before two offerors, MV and Appellant Yellow, had given their oral presentations. Ms. Callahan's testimony that she had told all offerors at the end of their oral presentations that they had done an excellent job may or may not be true. The fact is, however, that she sent this email to Mr. Chin before two of the oral presentations were held on September 16, 2003.

The Board finds that this aspect of Ms. Callahan's testimony lacks credibility.

AX26 provides "substantive hard facts or evidence" that Ms. Callahan was clearly not impartial in her actions. Ms. Callahan was clearly biased in favor of Laidlaw, going to the extent of putting information forwarded by Laidlaw into the "daily clips" at a State agency and then bragging about that action to Laidlaw's representative, Mr. Chin.

AX25, 26, and 127 illustrate impermissible and completely unacceptable behavior for evaluation committee members, behavior clearly at variance with Maryland procurement law and regulations. The Board finds that, in and of themselves, AX25, 26, and 127 provide clear "substantive hard facts or evidence" of bias in favor of Laidlaw by two technical evaluation committee members (Ms. Silverstone and Ms. Callahan) during this procurement.

The email communications continued in AX27:

9/16/2003 - Chin to Pemberton, Silverstone, Callahan, Samuel, and Hosen - "Thanks for the opportunity of seeing you again and presenting our commitment to the MTA for operating Mobility under your direction. Our team under Marvin's leadership is in the starting box and ready to deliver high quality service to the community. We have been very impressed with the focus that the MTA has shown in this procurement against a very challenging political backdrop, and as we have indicated on several occasions, are eager to demonstrate that we are here for the long

haul and that we are right along with you. As you finalize your evaluation, please let us know if there are additional items or areas that you would like us to elaborate on. I am scheduled to return this Friday and will be in the office Monday 9/22, and will check with you by phone to see if there is anything that you need. You can email me in the meantime, and Pat and Marvin will be your contacts on the ground if anything comes up in the next few days. Do take care as you prepare for Isabel. If communications are disrupted, please let us know how you wish us to contact you. We look forward to talking with you soon. Kim Chin".

9/16/2003 - Callahan to Chin - "You are welcome and, the pleasure was all mine. I certainly did enjoy seeing what is possible for our future success. Jlc"

Mr. Chin's email was perfectly reasonable going to the Procurement Officer. There was, however, no reason to send it to evaluation committee members Silverstone, Callahan, Samuel, and Hosen, and Procurement Officer Pemberton should have informed Mr. Chin that such contacts were not allowed. Mr. Pemberton should have also emphasized that the phone calls suggested by Mr. Chin in the email to evaluation committee members were not allowed. Again, no such communications from the Procurement Officer seem to have taken place.

As to Ms. Callahan's email on 9/16/2003, the Board finds that it provides additional evidence of bias from Ms. Callahan toward Laidlaw.

AX28 contains the text of Mr. Chin's email of 9/16/2003 from AX27. AX28 then continues:

9/17/2003 - Silverstone to Chin - "Dear Kim, My condolences upon the death of your father. This has been a year filled with loss and grief for you and your family. I hope that you will be healed by the sweet memories you have. The presentation was good, but we did miss you. Hope your return trip is safe and swift. Ruth".

Once again, Ms. Silverstone should not have been in direct contact with Mr. Chin.

AX1 memorializes extremely improper communications between Ms. Silverstone and Mr. Chin:

10/2/2003 - Chin to Pemberton and Silverstone - "Mark and Ruth - delivery confirmation." (Delivery information omitted).

10/2/2003 - Silverstone to Chin - "Good! Thanks, Ruth".

10/2/2003 - Chin to Silverstone - "Thanks Ruth - glad you got it. Talked with Mark and he indicated that the committee meets next week, and that a recommendation goes to the Deputy the week after. We will be attending the TAM at Ocean City, MD. Will you be going? Kim Chin".

10/2/2003 - Silverstone to Chin - "Yes Mark has it and I pick it up tomorrow a.m. No. Maybe next year for TAM and ME. Thanks, Ruth".

10/2/2003 - Chin to Silverstone - "Thanks Ruth - Marvin and I will miss you!

All technical questions answered with a 2% reduction in overall costs for all three years. Kim Chin". (Bold emphasis added).

10/2/2003 - Silverstone to Chin - "I'll miss you guys too. What dates are you going to be there?? Ruth".

AX1, in and of itself, provides ample reasons why this procurement needs to be redone.

In AX1, Mr. Chin contacted both Mr. Pemberton, as the Procurement Officer, and Ms. Silverstone, as the technical evaluation committee chair, in order to make sure that Laidlaw's BAFO had been received. That was certainly permissible.

Mr. Chin also inquired as to whether Ms. Silverstone would be in attendance at a meeting.

Then, seemingly out of the blue, Mr. Chin sends an email to Ms.

Silverstone at 3:51 p.m. on 10/2/2003, which states that "[A]ll technical questions answered with a 2% reduction in costs for all three years."

Whatever the reason, Mr. Chin of Laidlaw sent financial information directly to the chair of the technical evaluation committee, Ms. Silverstone. Ms. Silverstone has testified that this information meant nothing to her. Silverstone, Tr. 2/9:1703-1705.

The Board cannot accept that testimony. Ms. Silverstone was Director of Mobility Services for the MTA at the time of this RFP and had worked at the MTA for 26 years. As Director of Mobility Services, Ms. Silverstone was responsible for overseeing the entire MTA paratransit system under the paratransit contract. It strains credibility to accept that the information in AX1 simply came out of nowhere and meant nothing to Ms. Silverstone.

Even accepting Ms. Silverstone's dubious testimony, it is still beyond dispute that, for whatever reason, Mr. Chin of Laidlaw transmitted this financial information to Ms. Silverstone, the chair of the technical evaluation committee. The record also reveals that this information was not transmitted to the other members of the technical evaluation committee.

The Procurement Officer was very clear in testifying that the technical evaluation committee was to consider technical information and the financial evaluation committee was to consider financial information. He also made it very clear that such technical and financial information was to remain separate from the other committee. Pemberton, Tr. 1/27:124-127.

Upon receipt of this information from Mr. Chin, Ms. Silverstone should have immediately contacted the Procurement Officer. That did not occur, and this contact between Mr. Chin and Ms. Silverstone remained known only to Mr. Chin and Ms. Silverstone until months after the RFP evaluation process concluded.

This Board finds without hesitation that AX1: 1) constitutes "substantive hard facts or evidence" of bias in favor of Laidlaw by

Ms. Silverstone; 2) constitutes the supplying of improper financial information to at least one member of the technical evaluation committee, Ms. Silverstone, by an offeror, Laidlaw; and, 3) is so violative of Maryland procurement law and regulations that this one communication from Mr. Chin to Ms. Silverstone constitutes sufficient grounds, in and of itself, to require this procurement to be redone.

Had Ms. Silverstone informed the Procurement Officer of this communication at the time of receipt, it might well be that this defect could have been cured by speedy remedial action. The Procurement Officer was not, however, notified by Ms. Silverstone, and this completely impermissible information was successfully supplied by Laidlaw to the chair of the technical evaluation committee without the knowledge or consent of the Procurement Officer.

This communication strikes a body blow at fundamental notions of fair and impartial procurement procedures and is violative of any number of Maryland procurement laws and regulations. See, e.g., COMAR 21.01.01.03 A., B., F., G., and H.; *State Finance and Procurement Article, Annotated Code of Maryland §11-201(a) (1), (2), (3), and (4)*.

AX29 and AX128 provide evidence of the bias of Ms. Silverstone and Ms. Callahan on October 10, 2003, the actual day that the technical evaluation committee met to make its final recommendations to the Procurement Officer. Mr. Chin apparently sent some type of article to both Ms. Silverstone (AX29) and Ms. Callahan (AX128). Both exhibits contain the same initial email from Mr. Chin:

10/10/2003 - Chin to Silverstone (AX29), Chin to Callahan (AX128) - "Good morning. This appeared in today's paper, and wanted to make sure you got it. Our friends in DC are not having it easy either. See their article. Kim Chin".

Ms. Silverstone's response in AX29 was:

10/10/2003 - Silverstone to Chin - "I feel rotten about this inaccurate article. We are not dysfunctional!! It is soooooo [sic] awful to read

this stuff!! Soon we will be able to announce the REAL [sic] improvements to the Service! Ruth".

Ms. Callahan's response in AX 128 was:

10/10/2003 - Callahan to Chin - "I hope that this encourages you to come show em [sic] how paratransit service should operate. A perfect opening for you. Jlc".

It should be noted that Ms. Silverstone's email to Mr. Chin was sent at 8:58 a.m. (AX29) and Ms. Callahan's email to Mr. Chin was sent at 9:50 a.m. (AX128) on October 10, 2003. Thus, both emails were sent early in the morning of the very day that the technical evaluation committee met to consider its final recommendations to the Procurement Officer.

Once again, both Ms. Silverstone and Ms. Callahan should have informed the Procurement Officer of these communications from Mr. Chin. They did not do so. They both read the information Mr. Chin sent to them, again without that information apparently being disseminated to the other members of the technical evaluation committee. Both exhibits AX29 and AX128 constitute "substantive hard facts or evidence" indicative that Ms. Silverstone and Ms. Callahan were biased in favor of one offeror - Laidlaw. In fact, these exhibits indicate bias on the very day that the technical evaluation committee met to consider the offerors' proposals and make final recommendations to the Procurement Officer.

Other emails which were generated outside of the time period of RFP issuance and the final evaluation of the offerors' proposals by the technical evaluation committee - July 29, 2003 thru October 10, 2003 - also provide evidence of the bias of Ms. Silverstone and Ms. Callahan in favor of Laidlaw. See, e.g., AX30, 52, 87, 100, 109, 110, and 123.

The Board must comment on AX30. AX30 took place three days after the final meeting of the technical evaluation committee. AX30 first consists of a series of communications between Mr. Chin of Laidlaw

and Mr. Steve Hirano of Metro Magazine/Metro Express (omitted). Mr. Chin then sent a copy of these communications to Ms. Callahan:

10/13/2003 - Chin to Callahan - "Steve Hirano from Metro Magazine/Metro Express sounds like he would be willing to do a story on the new and improved Mobility. Let me know as soon as it is appropriate. Thanks, Kim Chin".

10/13/2003 - Callahan to Chin - "Kim, You should know by the end of the week, I would suspect. Let me just say that we chose the two vendors that would turn this city around and have the nation take notice of Baltimore on HOW TO [sic] run paratransit. I think it may be very sweet for Laidlaw, after the transition, which will not BE [sic] sweet. I look forward to a new era. **Please make this note disappear!** The biggest load will be on YOU [sic]. Jlc". (Bold highlighting added).

Ms. Callahan admitted in her testimony that she knew her communication in AX30 to be wrong. Callahan, Tr. 2/11:210-212. To find a communication sent by an evaluation committee member to an offeror containing the warning "Please make this note disappear!", even if it takes place after the evaluation is completed by that committee, is deeply disturbing and evidence of activities which do not evidence fairness and impartiality.

People with nothing to hide do not put phrases such as "Please make this note disappear!" into their communications. To find such a request in a communication from an RFP evaluation committee member to an offeror does not - by anyone's definition - "Provide for increased public confidence in the procedures followed in public procurement," COMAR 21.01.01.03A., or provide "for increased confidence in State procurement." *State Finance and Procurement Article, §11-201(a)(1), Annotated Code of Maryland.*

After a review of the email exhibits previously discussed herein, as well as the complete record of these appeals, the Board finds there are overwhelming "substantive hard facts or evidence" of impermissible contacts between one offeror - Laidlaw - and two

members of the technical evaluation committee - Ms. Silverstone and Ms. Callahan. See, Benton & Associates, *supra*, at p.6. These repeated contacts evidence impermissible bias in favor of Laidlaw on behalf of technical evaluation committee members Ms. Silverstone and Ms. Callahan. The other offerors in this procurement - First Transit, MV, and Appellant Yellow - were clearly not "accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarifications of proposals." See, COMAR 21.05.03.03C.(3)(a).

There was actual bias in favor of Laidlaw by Ms. Silverstone and Ms. Callahan, which, in turn, resulted in actual bias against First Transit, MV, and Appellant Yellow. See, Benton & Associates, *supra*, at p. 6.

The Board further finds that this bias contaminated the workings and evaluations of the technical evaluation committee, which in turn contaminated the judgement of the Procurement Officer, resulting in a Recommendation for Award by the Procurement Officer and the Administrator of the MTA which this Board finds to have been, because of the actions of Ms. Silverstone and Ms. Callahan, unreasonable and violative of Maryland procurement law and regulations. See, e.g., Raid, Inc., *supra*, at pp. 5-6; Baltimore Industrial Medical Center, Inc., *supra*, at pp.5-6; United Technologies Corp. and Bell Helicopter, Textron, Inc., *supra*, at pp.58-59; AGS Genasys Corp., *supra*, at p. 12.

Respondent argues that these email contacts between two members of the technical evaluation committee and an offeror "may constitute a technical violation" of the guidelines contained in AX20, but that "such conduct does not constitute a violation of procurement law and is not necessarily fatal to the underlying procurement". Respondent's Post-Hearing Brief at p. 69.

Respondent notes that "a failure to comply with a published statement of 'policy,' or 'internal documents' to guide employees, or agency 'guidelines,' has been held not to invalidate agency action,

absent a showing of prejudice." Board of School Commissioners of Baltimore City v. James, 96 Md. App. 401, 421-22, (citations omitted) cert. Denied, 332 Md. 382 (1993).

Respondent misses the point. These email contacts between Mr. Chin of Laidlaw and Ms. Silverstone and Ms. Callahan certainly are violative of AX20 and AX86(h) (Ms. Silverstone) and AX86(c) (Ms. Callahan). Ms. Silverstone and Ms. Callahan should have followed the directives of AX20. Ms. Silverstone and Ms. Callahan should have fulfilled the responsibilities they promised to in AX86(h) and AX86(c). Their failure to do so resulted in a tainted and flawed procurement process that clearly prejudiced offerors First Transit, MV, and Appellant Yellow.

Ms. Silverstone's and Ms. Callahan's actions, however, go far beyond simply violating AX20, AX86(h) and AX86(c).

To adopt Respondent's position on the email communications at issue would countenance repeated communications between an offeror and evaluation committee members during an RFP evaluation process - communications which included: information from the offeror to these individuals which was outside the BAFO process; materials and information furnished by the offeror to these individuals outside of the normal submission process called for in procurement procedures; and information which was furnished by an offeror to some, but not all, members of an evaluation committee and was not furnished to the Procurement Officer.

To rule as Respondent suggests would require this Board to ignore numerous clear and vital policies and purposes of Maryland procurement law and regulations, including:

- 1) Provide for increased public confidence in the procedures followed in public procurement. COMAR 21.01.01.03A. See also, State Finance and Procurement Article, §11-201(a)(1), Annotated Code of Maryland.
- 2) Ensure the fair and equitable treatment of all persons who deal with the procurement system of this State. COMAR 21.01.01.03B.

See also, State Finance and Procurement Article, §11-201(a)(2), Annotated Code of Maryland.

- 3) Provide safeguards for the maintenance of a procurement system of quality and integrity. COMAR 21.01.01.03F. See also, State Finance and Procurement Article, §11-201(a)(3), Annotated Code of Maryland.
- 4) Foster effective broad-based competition through support of the free enterprise system. COMAR 21.01.01.03G. See also, State Finance and Procurement Article, §11-201(a)(4), Annotated Code of Maryland.
- 5) Promote development of uniform procurement procedures to the extent possible. COMAR 21.01.01.03H. See also, State Finance and Procurement Article, §11-201(a)(10), Annotated Code of Maryland.

Allowing this procurement to stand would not provide for increased public confidence in the procedures followed in public procurements; would not ensure fair and equitable treatment of the offerors involved in this procurement; would not provide safeguards for the maintenance of a procurement system of quality and integrity; would not foster effective broad-based competition; and, would not promote development of uniform procurement procedures.

Such a ruling, allowing one offeror to communicate with certain members of an evaluation committee, in some cases furnishing those members with information, while other offerors, who obeyed the rules, did not engage in such communications, would be at complete odds with the policies and purposes of Maryland procurement law and regulations.

A ruling that countenanced the activity that took place in this RFP would be a green light for offerors in every State procurement to contact evaluation committee members and furnish them information. That would result in a complete undermining of the procurement process in Maryland.

"Qualified offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and

clarifications of proposals. The procurement officer shall establish procedures and schedules for conducting discussions." COMAR 21.05.03.03C.(3)(a). That does not mean that evaluation committee members are free to have repeated contacts with one offeror in an RFP process concerning matters related to the RFP evaluation. It certainly does not mean that evaluation committee members are free to receive information altering an offeror's BAFO without all offerors being given a similar opportunity. It also does not mean that evaluation committee members are free to receive information from one offeror and then not share that information with the procurement officer or other members of the evaluation committee. It does not mean that an offeror may supply information, without the knowledge of the procurement officer, to one or more members of an evaluation committee.

Simply put, everyone who participates in the procurement process has the right to be treated fairly and equally with every other participant in that process. When that does not happen, as clearly occurred here, the "quality and integrity" of the process is compromised and the honesty of the procurement system itself is brought into question.

That cannot be tolerated and will not be tolerated by this Board.

The Board also finds that when State agencies choose to utilize procedures such as the "**Evaluation Committee Duties & Responsibilities**" (AX20) document and the Evaluator's Acceptances (AX86 a-j) that were employed in this RFP process, the State has an obligation to insure that RFP evaluation committee members truly understand the rules and requirements contained in these documents. These documents do not have the force of law or regulations, but neither are they meaningless "window dressing". Cautions against committee members contacting and being contacted by offerors in a competitively bid procurement make good sense and should be followed by committee members. State agencies and procurement officials must

ensure that RFP evaluation committee members understand such cautions.

The Board must note that there is no evidence that either Ms. Ruth Silverstone or Ms. Joyce Callahan were motivated by any evil or malicious purpose during this procurement process. Both were, at the time of the RFP, involved on a daily basis with paratransit issues and services. Both clearly are passionate advocates for the users of paratransit services.

In their zeal to provide the best quality paratransit services to the people of the Baltimore area, however, Ms. Silverstone and Ms. Callahan lost sight of their responsibilities as members of the technical evaluation committee. Whether recognized by them or not, the relationship of Ms. Silverstone and Ms. Callahan to Mr. Chin of Laidlaw - as evidenced by the numerous emails previously cited between these two individuals and Mr. Chin - was impermissible and evidenced definite bias in favor of Laidlaw during the RFP evaluation process. This bias was not known to the other members of the technical evaluation committee or to the Procurement Officer. This bias tainted the evaluation of the technical evaluation committee, which, in turn, tainted the evaluation and recommendation of the Procurement Officer.

In summary, the Board finds:

1. that Ms. Silverstone and Ms. Callahan were biased in favor of Laidlaw;
2. that this bias contaminated the RFP evaluation process;
3. that this bias included information being sent from Laidlaw to Ms. Silverstone and/or Ms. Callahan which was not only impermissibly sent to these technical evaluation committee members (Ms. Silverstone and Ms. Callahan), but which also was withheld from other members of the technical evaluation committee and the Procurement Officer;
4. that neither the Procurement Officer nor the MTA Administrator knew of the nature and extent of these impermissible communications and that both testified

- that, had they known, they would have investigated the matter before making any final recommendation for award⁷;
5. and, that the resulting Determination and Recommendation for Award (AX33) was unreasonable and contrary to Maryland procurement law and regulations.

This procurement must be redone. No other conclusion, which takes the law, regulations and fairness goals of competitive negotiated procurements in Maryland seriously, is possible.

Appellant, in its numerous written appeals and its lengthy presentation during the hearing, has also claimed bias during the RFP process directed against Appellant from numerous persons, including: members of the technical evaluation committee other than Ms. Silverstone and Ms. Callahan; the Procurement Officer; the Secretary of Transportation; and the Deputy Secretary of Transportation.

After what is believed to be the longest bid protest hearing in the history of the Board of Contract Appeals - a 21-day hearing during which Appellant presented witnesses including the Secretary of Transportation, the Deputy Secretary of Transportation, an Assistant Secretary of Transportation, each of the six members of the technical evaluation committee, and the Procurement Officer as part of its case - the Board finds, quite simply, no "substantive hard facts or evidence" to support any of Appellant's claims of bias directed against Appellant during this RFP process from any persons other than Ms. Silverstone and Ms. Callahan.

Appellant has claimed bias by MDOT Secretary Robert Flanagan and MDOT Deputy Secretary Trent Kittleman against Appellant.

We find no "substantive hard facts or evidence" whatsoever that Secretary Flanagan and/or Deputy Secretary Kittleman were biased for

⁷Both gentlemen also testified at other points during the hearing that even if they had known of these communications, their decisions in recommending the contract to Laidlaw and MV would not have changed. Considering the nature and extent of the documented communications between Mr. Kim Chin of Laidlaw and Ms. Silverstone and Ms. Callahan, the Board has discounted these "suppositions" of what might have happened had these communications been known to Mr. Pemberton and Mr. Smith and focused on what did happen during this procurement process.

or against Appellant - or for or against offerors First Transit, Laidlaw, or MV for that matter.

In fact, Deputy Secretary Kittleman went to some lengths to make it known to the Procurement Officer and to the evaluation committees that she and Secretary Flanagan were not biased against Appellant. In her testimony, Deputy Secretary Kittleman stated that she telephoned the Procurement Officer on August 11, 2003, early in the RFP process, and wanted it made very clear to both of the evaluation committees involved in the paratransit RFP evaluation process that neither she nor Secretary Flanagan were biased for or against Appellant and "that we want them to issue an unbiased, straightforward, honest decision based on the RFP." Kittleman, Tr. 2/6:1512-14.

Appellant also claims that the Procurement Officer was biased against Appellant. Appellant questioned the Procurement Officer at length over six days concerning this RFP.

After a review of that testimony and the entire hearing record, this Board finds no "substantive hard facts or evidence" that the Procurement Officer was biased in favor or against any offeror, including Appellant.

Appellant claims that various members of the technical evaluation committee, including Ms. Silverstone and Ms. Callahan, were biased against Appellant Yellow. After a hearing that included testimony from each member of the technical evaluation committee, and after a review of the evidence presented, the Board disagrees and finds that no members of the technical evaluation committee acted with any specific and malicious intent to injure Appellant. No technical evaluation committee members were biased for or against Appellant.

Appellant Yellow was prejudiced by the actions of Ms. Silverstone and Ms. Callahan, but no more than MV and First Transit were prejudiced. The bias we have found was in favor of one offeror, Laidlaw. The bias of Ms. Callahan and Ms. Silverstone, which was unknown to the Procurement Officer, other members of the technical

evaluation committee, the MDOT Secretary and Deputy Secretary, and the MTA Administrator, compromised the evaluation activities of the technical evaluation committee, compromised the judgment of the Procurement Officer and compromised the Recommendation for Award from the MTA Administrator. The Board finds no "substantive hard facts or evidence" that the bias of Ms. Silverstone and Ms. Callahan was, however, specifically directed at Appellant.

In fact, there is evidence that there was, actually, bias in favor of Appellant Yellow during the procurement process. At a meeting of the technical evaluation committee held in September, 2003, there were concerns expressed by committee members about finding some way to recommend Appellant for part of the contract. Committee member Mr. Thomas Curtis, however, urged that committee members should vote their conscience for the offerors who were best based on their proposals, oral interviews and BAFOs. Hosen, Tr. 3/8: 1149-50.

Looking at all of the facts and circumstances, it was MV and First Transit which were most directly affected by the bias of Ms. Silverstone and Ms. Callahan in favor of Laidlaw, not Appellant. The record clearly evidences that, although MV and Laidlaw were ranked ahead of First Transit, the differences were not so great as to find, as a matter of fact or law, that the bias on behalf of Laidlaw did not influence the final outcome of this RFP. Had the bias in favor of Laidlaw not occurred in the technical evaluation committee, MV might well have received recommendation for Option B instead of Option A. That might well have resulted in First Transit being recommended for Option A. Such results are, admittedly, speculative, but they are within the realm of possibility considering the record developed by this hearing.

The bottom line is simply that, because of the bias shown on behalf of Laidlaw during the RFP evaluation process by two technical evaluation committee members, Ms. Silverstone and Ms. Callahan - which was unknown to the Procurement Officer, the MTA Administrator,

the Secretary or Deputy Secretary of Transportation or to the other four members of the technical evaluation committee - no one can know what the outcome of the evaluation and recommendation process would have been had this impermissible bias not existed.

The evaluation process was tainted, resulting in an award that was unreasonable and in violation of Maryland procurement law and regulations. This procurement must be redone.

Appellant in this matter has also raised a host of other issues and claims in support of the appeals filed herein. Because of the ruling of the Board, it is unnecessary for the Board to rule on the remainder of these issues and claims.

For the foregoing reasons, the appeals are sustained.

Wherefore, it is Ordered this 9th day of April, 2004 that the appeals are sustained.

Dated: April 9, 2004

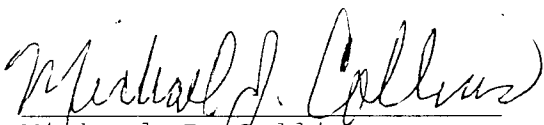


Michael W. Burns
Board Member

I Concur:



Robert B. Harrison III
Chairman



Michael J. Collins
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 2374, 2380, 2381, 2382 & 2389, appeals of Yellow Transportation under Maryland Transit Administration RFP No. MTA 0981A.

Dated:

April 9, 2004



Michael L. Carnahan
Deputy Recorder