

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF.

EMERGENCY ASSOCIATES OF PHYSICIAN'S  
ASSISTANTS & NURSE PRACTITIONERS, INC

Under RFP No 7254-AA-NS-DD

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) CAB No. P-500  
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For the Protester Musie T Meresee, President, Emergency Associates of Physicians Assistants & Nurse Practitioners. For the District Anne Cauman and Edward J Rich, Assistants Corporation Counsel

**OPINION**

Emergency Associates of Physician's Assistants & Nurse Practitioners, Inc ("EAP" or "Protester") challenges the proposed award of a contract to Riverside Healthcare, Inc ("Riverside") The Protester claims that the selection panelists were biased, prejudiced, and acted in a discriminatory fashion in their evaluation of its proposal We conclude that the Protester's allegations are without merit and are not supported by proof Accordingly, we deny the protest

**BACKGROUND**

On March 7, 1997, the Department of Administrative Services ("DAS") issued, in the open market, RFP No 7254-AA-NS-DD (the "RFP") for Physician's Assistants services to Department of Corrections ("DOC") facilities On April 17, 1997, DAS issued Amendment No 1 to the solicitation which extended the closing date for receipt of proposals to April 24, 1997. On April 24, 1997, DAS issued Amendment No 2 to the proposal, clarifying the contract type, changing the estimated quantities, and extending the closing date for receipt of proposals to April 28, 1997

The RFP's evaluation criteria weightings were (a) M 2 1-"Professional qualifications necessary for satisfactory performance of the required services" (30 points), (b) M.2 1 2- "Past performance on contracts with the District, or other governmental entities, and private industry in terms of cost control, quality of work, and compliance with performance schedules" (10 points), (c) M 2.1 3 "Specialized experience and technical competence in the type of work required" (10 points), (d) M.2.1 4 - "Capacity to accomplish the work in the required time" (10 points), (e) M 2 1 5 "Acceptability under other appropriate evaluation criteria" (10 points); (f) PRICE (30 points); (g) M 2 2 "Maximum Evaluation Criteria Points" (100 points)

Three offerors submitted proposals in response to the RFP The offerors were EAP, Riverside, and Diversified Medical and Information Services, Inc. ("Diversified") (Agency Report

("AR") Exhibit 5) Three DOC employees evaluated the proposals. They were James F. Coley, DDS, Eliza J. Taylor, MD, and David E. Link, Health Services Administrator for DOC. Mr. Link served as the Chairman of the evaluation panel. The evaluation panel scored the proposals as follows:

	EAP	Riverside	Diversified
Technical	23.3	34.2	50.5
Price	24.0	12.0	23.0
Total	47.3	46.2	73.5 <sup>1/</sup>

By memorandum dated May 13, 1997, Mr. Link reported the evaluation results to Willard Walton, DOC's Chief of Contracts and Procurement (AR Exhibit 6). By memorandum dated May 15, 1997, Mr. Walton sent the evaluation results to DAS with a recommendation to award the contract to Diversified (AR Exhibit 7).

The DAS Contracting Officer held discussions with each of the offerors on June 5, 1997. (AR Exhibits 8, 9, 10, 11, 12). By letter of the same date, he requested that each offeror submit Best and Final Offers ("BAFOs") by June 6, 1997 addressing the following issues:

- Elaborate on specific experience with regard to providing Physician Assistants in the District of Columbia or other jurisdictions
- Provide evidence of financial resources which would support this engagement, i.e. letter of credit
- Provide an organizational chart indicating the names of employees and their specific responsibility, additionally name the employee primarily responsible for this engagement
- Address price relative to the Best and Final Offer.
- Outline a strategic plan to perform this engagement specifically, indicate start-up time and the scheduling and training requirements for each Physician Assistant.
- Provide copies of certification of licenses for Physician Assistants who will work on this engagement

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<sup>1/</sup>The panel's evaluation memorandum mistakenly identifies Diversified's total score for the initial evaluation as 73.7 rather than 73.5.

Each of the offerors submitted a BAFO in response to the District's request. (AR Exhibits 9, 10, 11). The evaluation panel evaluated the BAFOs and scored them. The evaluation panel's average evaluation scores after the BAFOs were as follows.

	EAP	Riverside	Diversified
Technical	29.3	50.6	35
Price	25.0	28.3	24
Total	54.3	78.9	59.0

(AR Exhibit 13).

Riverside received the highest average score of 78.9. Diversified received an average score of 59<sup>2</sup>, and EAP received the lowest average score of 54.3 points. The evaluation panel scored EAP as follows.

Name of Evaluator	Link	Coley	Taylor	Average Score	Max Points
Professional Qualifications	20	21	5	15.3	30
Past Performance	5	1	0	2.0	10
Specialized Experience	4	9	9	7.3	10
Capacity to Accomplish Work	3	6	5	4.7	10
Price	<u>30</u>	<u>25</u>	<u>20</u>	25.0	30
Total Individual Scores	62	62	39		

Mr. Link, transmitted the results to Mr. Walton by memorandum dated June 18, 1997 (AR Exhibit 13). By memorandum dated June 20, 1997, Mr. Walton forwarded the BAFO evaluation results to the DAS Contracting Officer with a recommendation consistent with that of the panel that award be made to Riverside in the amount of \$2,446,080. Mr. Walton stated that the price was determined to be fair and reasonable (AR Exhibit 14). DOC explained the scoring of prices in a memorandum dated July 10, 1997 (AR Exhibit 16).

By memorandum dated July 10, 1997, Mr. Walton responded to a concern of the DAS Contracting Officer that Mr. Link's scoring of price for Riverside should have been lower. Mr. Walton stated that the award should be made because Riverside received the highest score for

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<sup>2</sup>Problems noted since the initial evaluation, including Diversified's filing for bankruptcy under Chapter 11, and the fact that some of its staff had "failed to show at the work site due to nonpayment of wages" resulted in the lowering of Diversified's score (AR Exhibit 14)

technical and price from the three evaluation panelist, and even if the price score were reduced by the maximum point value assigned to this criterion, Riverside's would still remain the highest scored proposal. (AR Exhibit 16)

On July 5, 1997, EAP filed this protest with the Board challenging the proposed award to Riverside <sup>3/</sup>

The District filed an Agency Report on July 29, 1997. EAP challenged the District's refusal to disclose certain documents on the basis that they were protected. By orders dated August 21 and 22, 1997, the Board determined which documents were to be released to EAP. On September 2, 1997, the Protester filed a response to the Agency Report which was supplemented on September 15, 1997. <sup>4/</sup> By order dated October 15, 1997, the Board ordered that the protest would be decided on the record without a hearing. There were several motions filed by the parties <sup>5/</sup> and the record was closed on December 31, 1997.

## DISCUSSION

### A. Discovery and Related Issues

Despite being advised by the Board of various dangers and disadvantages in proceeding *pro se*, EAP pursued this protest without the benefit of an attorney. During a telephone conference with the parties held within one month of filing the protest, the Board informed EAP that it would be unable to review certain proprietary information contained in the proposals of the other offerors, because EAP did not have outside counsel admitted under a protective order (July 24, 1997, Order

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<sup>3/</sup>The District distinguishes EAP's challenge to award to Riverside under the RFP which is the subject of this protest (RFP No 7254-AA-NS-DD) from the award to Riverside under Contract No 7414-AA-NS-3-DD for a period of 30 to 90 days. No timely protest of the latter contract was ever raised (AR note 5).

<sup>4/</sup>EAP filed a handwritten response to the Agency Report that the Board ordered the Protester to resubmit in typewritten format. Board Rule 107.8 requires that all submissions filed with the Board be typewritten.

<sup>5/</sup>On December 19, 1997, EAP filed a list of three people's names identified as individuals who "might be able to witness (sic) regarding the bias involved against our organization" [emphasis added] and asked that the Board request written statements of the individuals. The Board denied the Protester's request.

and Report on Telephone Conference) See 27 DCMR §1610 <sup>6/</sup> EAP was informed that, as a competitor, it would not be permitted access to a significant portion of its competitors' proposals. Less than a month later, the Board again informed EAP that it would not have access to proprietary documents contained in the proposals of the other offerors, unless it retained counsel properly admitted under a protective order. EAP was informed that all documents would be available to an attorney pursuant to a protective order. (August 21, 1997, Order and Report on Telephone Conference) In its Response to the Agency Report of the District of Columbia, dated September 15, 1997, EAP complained that it was being unfairly denied access to documents that it was entitled to receive through the Freedom of Information Act. <sup>7/</sup> The Board reviewed the complete record *in camera*. The record contained, among other things, the proposals and BAFO of the other offerors and source-selection material. We determined that substantial portions of the record were protected from disclosure because they contained proprietary, confidential, and source-selection-sensitive material. See Board Rule 104, 45 D C Reg 1389 (Mar 13, 1998)

## B. Merits

### Allegations of Bias, Prejudice, and Discrimination

EAP states that "We have a strong [belief] that there was a biased, prejudiced, and discriminating behavior against our company and its members by some of the selection panelists." EAP argues that Mr Link, the chairman of the evaluation panel, had developed a working relationship with Diversified, since he had been a contract administrator of the previous Physician's Assistant service contract which was performed by Diversified. EAP argues that Mr Link should not have been allowed to sit on the evaluation panel because he would be biased in Diversified's

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<sup>6/</sup>During the pre-award period of a competitive sealed proposal (CSP) procurement, only the contracting officer and others specifically authorized may transmit technical or other information and conduct discussions with prospective contractors (27 DCMR §1610 2) No District employee or agent shall furnish information to a prospective contractor if, alone or together with other information, it might give the prospective contractor an advantage over others. However, general information that is not prejudicial to others may be furnished upon request (27 DCMR §1610 3)

<sup>7/</sup>Although we do not have any jurisdiction over EAP's FOIA request, we note that the District of Columbia Freedom of Information Act (D.C. Code § 1-1521, *et seq*) provides that government information should be available to the public, absent a compelling reason for non-disclosure. D C Code § 1-1524 also provides the following exemption from disclosure:

- (a)(1) Trade secrets and commercial or financial information obtained outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained

favor EAP also alleges that Mr Link made a statement to one of the Protester's references as follows: "Mr Meresee to get this contract HA...HA...HA, no way with his bad English" (Response to the Agency Report of the District of Columbia, dated Sept. 15, 1997)

In reviewing allegations of bias, the Board presumes that Government officials, acting in their official capacity, do so in good faith. A protester must come forward with evidence to overcome the presumption. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. *Ameriko Maintenance Co.*, B-253274, Aug 25, 1993, 93-2 CPD ¶ 121. Thus, where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating a bias against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. *Advanced Sciences, Inc.*, B-259569.3, July 3, 1995, 95-2 CPD ¶ 52.

The District correctly states that Mr Link's role as a contract administrator of the previous contract does not support an allegation of bias and that the statement attributed to Mr Link by which EAP intended to demonstrate bias is unsupported. The fact that Mr Link was a contract administrator for the previous contract for physician's assistants services does not raise a presumption of bias nor shift the burden of proof from EAP. In fact, Riverside, not Diversified, was selected for contract award and there was no allegation that Mr Link worked with Riverside. EAP alleged that its reference, Mr Leroy Hackett, could attest to the alleged statements of Mr Link. The Board afforded EAP the opportunity to provide evidence in support of its allegations but EAP failed to provide an affidavit of Mr Hackett or other supporting evidence. Therefore, EAP has not carried the burden of proof required for us to find bias on the part of Mr Link.

### Evaluation Challenges

EAP challenges several of the agency's evaluations. In reviewing a protest which challenges the propriety of an agency's evaluation of proposals, it is not the function of the Board to independently evaluate proposals and to substitute the Board's judgment for that of the agency. In determining the propriety of an evaluation, we examine the record and we will question an agency's technical evaluation only where the record shows that the evaluation does not have a reasonable basis, lacks supporting documentation, is inconsistent with the evaluation criteria listed in the solicitation, or otherwise violates law or regulations. *Health Right, et al.*, CAB Nos P-507, 510, 511, Oct 15, 1997, 9 P D 7372, 7395, *Biochemical Genetics - Newborn Screening Laboratory*, CAB No P-470, Feb. 25, 1997, 44 D.C. Reg. 6795, 6800.

The protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not in itself render the evaluation unreasonable. *Contel Information Systems, Inc.*, B-220215, Jan 15, 1986, 86-1 CPD ¶ 44, *Litton Systems, Inc.*, 63 Comp. Gen. 585, 84-2 CPD ¶ 317.

EAP argues that an analysis of its bid price and the calculation of its overhead costs would have given the evaluator an ample opportunity to determine if EAP could have afforded an "attractive" pay. This complaint appears to refer to a comment of evaluator, Dr. Eliza Taylor, regarding criteria M 2.1.6, "Price", that EAP's "[H]ourly rate would not be attractive to an experienced PA; believe there would be a problem recruiting and maintaining staff" (AR Exhibit 13, Selection Evaluation Form signed and dated 6/18/97). The evaluator awarded 20 points to EAP for this factor out of a possible 30 points. On the record presented here, EAP has not demonstrated that the evaluation lacked a reasonable basis or was inconsistent with the evaluation criteria.

EAP also challenges Dr. Taylor's conclusion that EAP had "little work experience on individual bases." EAP argues that its personnel average of 14-16 years experience "is not little." Dr. Taylor awarded EAP 5 points out of a maximum of 30 on criteria M 2.1, "Professional Qualifications Necessary For Satisfactory Performance of the Required Services" (AR Exhibit 13, Selection Evaluation Form signed and dated 6/18/97). Dr. Taylor's score of 5 points is significantly lower than the other evaluators' scores of 20 and 21 points. Upon review of the experience information, we find that EAP's individual staff experience ranged from less than one year to over 23 years. EAP claimed 12 years average experience in its proposal and 14-16 years in its protest. The record reflects that approximately nine of EAP's proposed staff had no past experience as Physicians Assistants while several others had five years or less experience. Dr. Taylor may have presumably scored EAP lower than the other offerors upon consideration of this information. However, neither increasing this score by another 15 points to within the range of the other evaluators or by a maximum of 25 points gives EAP a score high enough to place it above Riverside.

In conjunction with the statement that an average of 14-16 years "is not little", EAP stated that "a zero credit is unrealistic." This statement does not make sense for the professional qualification criterion M 2.1, because no evaluator gave EAP a "zero" for this criterion. The only "zero" credit that was awarded EAP was for M 2.1.2, "Past Performance On Contracts With The District, Other Governmental Entities, And Private Industry In Terms of Cost Control, Quality of Work, and Compliance With Performance Schedules." Dr. Taylor gave EAP no points with the comment "No previous experience with District entities." That evaluation is supported by the record which shows that EAP, as a business entity, had no previous experience with the District, other governmental entities, or private industry.

EAP argues that the evaluators failed to consider information relevant to the criteria regarding capacity to accomplish the work in the required time. EAP specifically charges that Mr. Link did not consider (1) the notarized affidavit that stated that Mr. Meressee, EAP's President, intended to resign from DOC; (2) that EAP had other staff to perform the job, or (3) that Mr. Meressee was the only member of the organization who was currently employed by DOC. The comments were "Transition period needed. Proposed employees would need to resign current positions with DOC to work. Conflict of interest"; "Current DOC employees. Conflict of interest for some. No adult correctional experience for others"; "Two proposed employees out on LWOP from DOC. Recent graduates for May. No statement from present contractor (Oak Hill) as to performance." (AR Exhibit 13). EAP has not offered any evidence that Mr. Link or the other evaluators failed to consider the relevant information provided with EAP's proposal. Upon review of the record we find no evidence of

unreasonableness in the conclusions of the evaluators. Approximately seven of EAP's proposed staff members were employed at DOC at the time of the proposal and it was reasonable for the evaluators to consider the impact on the transition time needed for those individuals. (AR Exhibit 2)

### Other Challenges to the Evaluation

EAP also claims (1) a discrepancy in the evaluation criteria and the technical points for Section M 2.1, (2) the evaluation scores do not reflect the average score that was provided the Protester, (3) an inability to respond to the arithmetical error discussion raised in the Agency Report; and (4) that it did not change anything in its BAFO and therefore the evaluation of the BAFO's should not have affected its scores. EAP adds that it had the best technical proposal and the lowest price

EAP appears to be arguing that there are no objective criteria for Section M 2.1.5 which provides a maximum of 10 points for "Acceptability under other appropriate evaluation criteria." The evaluators decided not to score under this criterion because it is unspecified.<sup>8/</sup> Therefore, the maximum score that a firm could receive from each individual panelist was reduced from 100 to 90 total points. The total cumulative points a firm could receive was reduced by 30 from 300 to 270. This change was explained in a memorandum dated May 15, 1997, from Willard Walton to Kevin A. Green. (AR Exhibit 7) No offeror including EAP was prejudiced by the panel's action.

With regard to EAP's arguments that the evaluation scores do not reflect the average score which was provided EAP, the Board rejects this vague and unsupported allegation.

As for various arithmetical errors, none had any material effect on the ranking of the offerors. The District acknowledges arithmetical errors in the initial evaluation results in a memorandum dated May 13, 1997.<sup>9/</sup> (AR note 3). (See, AR Exhibits 6 and 7) The District also notes that there are arithmetical discrepancies between the average scores for the offerors' BAFOs reported in memoranda dated June 18, 1997, and June 20, 1997. The scores in the June 18, 1997 memorandum appear to be the correct numbers. (AR Exhibit 13) The errors in the June 20 memorandum appear to be due to (1) a transposition error in Diversified's first score (a score of 30 was typed as 20), and (2) a transposition error in Riverside's score (a 1 was transposed as a 5) (AR Exhibit 14) The District notes, further, that these discrepancies had no effect on the ranking of the offerors. (AR, at

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<sup>8/</sup>The contracting officer should have corrected or deleted this provision prior to issuance of the RFP. If the error was discovered after issuance, the contracting officer should have issued an amendment correcting or removing the criterion.

<sup>9/</sup>The District states: "Riverside's total score is listed as 46.2 while Riverside's total score is listed as 47.3 [The score of] 46.2 appears to be the correct figure. The difference between the two figures appears to be due to both an arithmetical error and a different rounding of an averaged figure from .6 to .7. Using the .6 figure is consistent with all the other rounding of the averaged figures."



2-4, n.3-4) The Protester claims an inability to respond to arithmetical errors acknowledged by the District because it has not been granted access to enough information to formulate its response. The Board finds this argument to be without merit due to EAP's voluntary refusal to obtain counsel who could have obtained access to protected information on EAP's behalf. In any event, the arithmetical errors in the final evaluation scores for Diversified and Riverside had no effect on the ranking of the three offerors.

EAP's argument that it did not change anything [from its initial proposal] in its BAFO and therefore its scores should not have been affected does not take into account that the evaluators sought BAFOs and additional information in order to more fully evaluate proposals. The law provides for an agency's solicitation, evaluation, and scoring of BAFOs. Here, all offerors were afforded the opportunity to provide information in their BAFOs that could have affected relative standing<sup>10</sup>. In the context of the evaluation where the relative merits of offerors' BAFOs are compared and scored, EAP's failure to change anything in its BAFO simply does not compel the conclusion that its relative standing would remain unchanged.

The PPA requires that the contracting agency's award of a contract under competitive sealed proposals shall be made to the responsible offeror whose proposal is determined to be the most advantageous to the District government, considering price and the evaluation factors set forth in the request for proposals. D.C. Code § 1-1183.5(f). Underlying the statute's emphasis on a legitimate evaluation of competitive proposals are the corresponding statutory requirements that the RFP shall indicate the relative importance of each evaluation factor and that the RFP's statement of work is to be used as a basis for the evaluation of proposals. *Id.* § 1-1183.5(c)-(d). The District's implementing regulations prescribe procedures the contracting officer must follow in making the selection decision based on the agency's evaluation of BAFOs.

1622.6 After evaluation of the best and final offers, the contracting officer shall select that source whose best and final offer is most advantageous to the District, considering only price and other factors included in the solicitation.

1622.7 The contracting officer shall prepare supporting documentation for the selection decision that shows the relative differences among the proposals and their strengths, weaknesses, and risks in terms of the evaluation factors. The supporting documentation shall include the basis for the selection.

27 DCMR §§ 1622.6-1622.7 (1988). See *Recycling Solutions, Inc.* CAB No. P-377, Apr. 15, 1994, 42 D.C. Reg. 4550, 4583.


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<sup>10</sup>Both EAP and Riverside improved their technical and price scores, while Diversified's technical score fell and its price score improved by a mere 1 point.

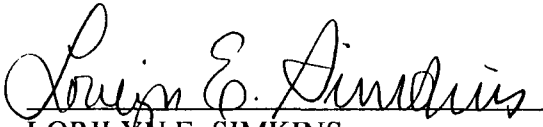
We conclude that the information in the record – the contemporaneous evaluation scoring, the summary statements of evaluated strengths, weakness and risks, and the post-protest amplifications – provided a sufficiently clear and reasonable basis for the award decision. Certainly there was enough information available to understand the agency's rationale for the award decision. The Board finds that the evaluation was reasonable and in accordance with the evaluation criteria listed in the solicitation and that there were no violations of procurement laws or regulations. Therefore, the protest is **DENIED**.

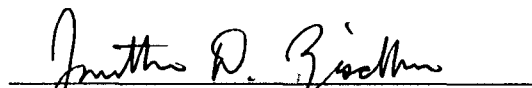
**SO ORDERED.**

**DATE:** December 15, 1998

  
PHYLLIS W. JACKSON  
Administrative Judge

CONCURRING

  
LORILYN E. SIMKINS  
Chief Administrative Judge

  
JONATHAN D. ZISCHKAU  
Administrative Judge

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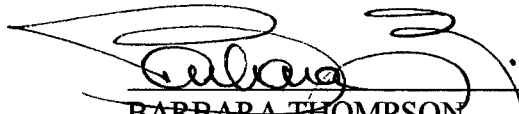
December 15, 1998

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SUBJECT: CAB No. P-500, Protest Of: **Emergency Associates of Physician's Assistants  
& Nurse Practitioners, Inc.**

Attached is a copy of the Board's Opinion denying protest

  
BARBARA THOMPSON  
Secretary to the Board