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Via Overnight Delivery

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Via Overnight Delivery

Ms. Rebecca Brooks
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RE: Contracting Officer's Final Decision

Protest by Capital Express Mobility Partners, LLC
Instructions to Proposers / Request for Proposals "Phase 1 of the I-495 & I-270 Public-Private Partnership Program Through a Phase Public-Private Partnership Agreement"

Dear Mr. Gansler and Ms. Brooks:

I am responding to your letter dated March 1, 2021 related to the above-referenced instructions to proposers / request for proposals (the "ITP" or the "RFP") issued by the Maryland Transportation Authority ("MDTA") and the Maryland Department of Transportation ("MDOT") (collectively referred to as "MDOT" or the "State") in which Capital Express Mobility Partners, LLC ("CEMP") protests the decision to select Accelerate Maryland Partners, LLC ("AMP") for award of the resulting Phase 1 public-private partnership agreement ("Phase P3 Agreement") as part of the public-private partnership program (the "P3 Program") referenced above. As the Contracting Officer, I have reviewed the issues raised in CEMP's protest letter.

The protest letter from CEMP asserted four main bases of protest. For the reasons set forth in greater detail below, each basis of protest is both untimely (or partially untimely) and fails on the merits. Essentially, CEMP generally failed to submit its allegations by the times required in the RFP. CEMP also alleges improprieties in the RFP, which CEMP was provided significant opportunity to review and comment on prior to the submission of proposals. CEMP is inaccurate on its allegations and objects to the business and technical judgments of MDOT, which determined the requirements of the State's solicitation and that a Proposer other than CEMP presented the most advantageous offer to the State. This letter sets forth my findings on each basis of protest and my final decision.

I. FACTUAL BACKGROUND.

A. The Request for Qualifications.

On February 2, 2020, and in accordance with State Finance and Procurement Article Title 10A of the Annotated Code of Maryland (the “Act”), as well as Chapter 6 of Subtitle 7 of Title 11 of the Code of Maryland Regulations (“COMAR”) and Chapter 17 of Subtitle 1 of Title 11 of COMAR, MDOT issued a Request for Qualifications (“RFQ”) on eMaryland Marketplace Advantage (“eMMA”) seeking Statements of Qualification (“SOQ”) for the selection of qualified Shortlisted Proposers that would later be allowed to compete under the RFP for selection of a Phase Developer for the P3 Program. *See, e.g.*, RFQ § 1.2. Various addenda were issued to the RFQ on eMMA.

RFQ § 1.1 described Phase 1 of the P3 Program as part of Maryland’s traffic relief plan for parts of I-495 and I-270. It described the geographical area as:

Phase 1 of the P3 Program includes improvements to I-495 from the vicinity of the George Washington Memorial Parkway in Virginia, across and including the ALB [American Legion Bridge], to its interchange with I-270 and I-270 from its interchange with I-495 to its interchange with I-70 (“Phase 1”). With respect to Phase 1, I-495 from the vicinity of the George Washington Memorial Parkway to I-270 and I-270 from I-495 to I-370 shall be developed and delivered first.

The overarching goals were congestion relief, minimizing impacts, no net cost to the State, accelerated delivery, and innovation. RFQ § 1.1 at p. 6. *See also* Phase P3 Agreement, Exhibit 6 § 1.2 at p. 1. It was expected that Phase 1 would be developed and delivered by the Phase Developer selected pursuant to the RFP initiated by the RFQ. *Id.* RFQ § 1.3 indicated that “[t]he Phase Developer will be expected to manage the successful preliminary development of Phase 1 consistent with the requirements” of the RFP.

RFQ § 2.1 explained that the State seeks to enter into a Phase P3 Agreement with a Selected Proposer for “predevelopment work” related to the Phase 1 work, to be detailed in the final Phase P3 Agreement to be attached to the final RFP. Once the predevelopment work is completed and a committed section proposal approved, the State will enter into one or more Section P3 Agreements with each Section Developer to perform aspects of the Phase 1 work.

The RFQ included an explanation of the overall solicitation process, allowed potential proposers to ask questions, and required a Statement of Qualifications (SOQ) submission by proposer teams that desire to be selected as Shortlisted Proposers and to proceed to the RFP process. *See* RFQ § 1.5 at pp. 12-13. Throughout the RFQ, the State placed an emphasis on a proposer’s overall team composition. *See, e.g.*, RFQ §§ 6.9, 8.3, 14. The RFQ included a process by which changes could be made to a Shortlisted Proposer’s team. RFQ § 8.9.

RFQ Addendum 8 explained some of the flexibility among team members to serve in more than one role and the anticipated need to subcontract some of the work. It provided, in part:

Each Respondent Team must include an Equity Member, a Designer, a Lead Contractor, and a Lead Project Developer. Any Equity Member or Major Non-Equity Member *may be designated with more than one (1) role within the Respondent Team*. The Lead Contractor, the Designer, and the Lead Project Developer are *not required to have sufficient capacity or appetite to perform all the Section Work for each Section of Phase 1 without forming joint ventures or subcontracting or otherwise teaming with other firms*.

RFQ Addendum 8, § 14.1 (emphasis added). There was no requirement for self-performance of any of the Section Work by the Lead Contractor, the Designer, or the Lead Project Developer and each team member could fill more than one role for the predevelopment work. The responsibility of the Phase Developer under the Section P3 Agreement was to control and/or establish the Section Developer; the Section Developer would be responsible to, among other things, design and construct the price-managed lanes. RFQ § 1.3(b) at pp. 10-11.

The RFQ described the evaluation process and criteria for SOQ submissions. RFQ § 8 at pp. 35-42. It set forth three evaluation criteria, some with sub-criteria, to be addressed by Proposers in their SOQs. These criteria were: 1) Phase Developer Team (Critical); 2) Key Personnel (Significant); and 3) Understanding of Development Approach (Important). RFQ § 8.3-8.5 at pp. 38-40. Each criterion and sub-criterion was categorized as Critical, Significant, or Important, each with different weights. The RFQ explained the SOQ evaluation process, stating that the SOQ would be evaluated as Exceptional, Good, Acceptable, or Unacceptable with pluses and minuses available to further differentiate within Exceptional, Good, and Acceptable ratings. RFQ § 8.2 at pp. 37-38.

Potential or actual proposers were given an opportunity to protest any alleged improprieties in the RFQ. RFQ § 9. No protests related to the RFQ were filed.

Interested proposer teams submitted SOQs. On July 17, 2020, MDOT named four teams as Shortlisted Proposers in a press release. *See* Press Release dated July 17, 2020 (link found at <https://www.mdot.maryland.gov/tso/pages/newsroomdetails.aspx?newsId=532&PageId=38>). This meant that those four teams would move forward in the P3 Program solicitation process and would have an opportunity to submit technical and financial proposals in response to the final RFP. *See* RFQ § 1.4. AMP and CEMP were both named as Shortlisted Proposers. Those two teams were described in the MDOT press release, respectively, as:

Accelerate Maryland Partners LLC

Lead Project Developer / Equity: Transurban (USA) Operations Inc. and Macquarie Infrastructure Developments LLC

Lead Contractor: Archer Western Construction, LLC

Designers: Dewberry Engineers Inc. and Stantec Consulting Services Inc.

Capital Express Mobility Partners

Lead Project Developer / Equity: Cintra Global SE, Meridiam Capital Express, LLC, and John Laing Investments Limited

Lead Contractor: Ferrovial Agroman US Corp.

Designers: AECOM Technical Services, Inc.

Following submission of the SOQs and after being named as Shortlisted Proposers, both CEMP and AMP requested changes to their Proposer teams. MDOT approved these requests.

B. The Instructions to Proposers (“ITP”) / Request for Proposals (“RFP”).

MDOT issued the first draft RFP to Shortlisted Proposers on July 24, 2020. The solicitation process was collaborative. MDOT sought comments and suggestions from the Shortlisted Proposers to assist in developing the final RFP and various attachments thereto, including the Phase P3 Agreement and the Section P3 Agreement terms (collectively referred to, with all exhibits and attachments, as the “RFP”). MDOT issued responses to 1,539 Requests for Clarifications (“RFCs”) submitted by Shortlisted Proposers before issuance of the final RFP. These were questions, suggestions, and requests that Shortlisted Proposers had submitted in response to draft versions of the RFP documents. On December 18, 2020, MDOT issued the final RFP, including final attachments, to Shortlisted Proposers.

The RFP provided that “[t]he Selected Proposer will be expected to manage the successful preliminary development of Phase 1 consistent with the requirements of the RFP” and that the Phase Developer would be “responsible for the predevelopment work.” RFP § 1.3 at p. 8.

A detailed scope of predevelopment work was set forth in the RFP. *See, e.g.*, Phase P3 Agreement, Exhibit 6. To summarize, predevelopment work generally references the phase of a capital project between the origination of the concept and the initiation of the final design and construction of the capital project. It is the period of gathering information, exploring options, eliminating and reducing risks and making decisions around the definition of a capital project. The predevelopment work involves, in large part, developing a financially feasible project in collaboration with all parties and stakeholders. The predevelopment work will develop a project that is bankable, can obtain debt financing, and can reach close of finance, allowing the final design and construction to proceed.

Like the RFQ, the RFP acknowledged that changes to a Proposer's team and/or key personnel could occur after SOQ submission and the naming of Shortlisted Proposer teams. *See* RFP § 1.18. The RFP provided that in order to make such changes, the Proposer needed to submit such information as required by MDOT to demonstrate that "the changed *team* is just as or better qualified than the *team* being replaced, as determined in MDOT's sole judgment." RFP § 1.18(a) at p. 21 (emphasis added).

The RFP defined various entities that compose the Proposer team. RFP Appendix 1 "Definitions." "Lead Contractor" was defined as "the member of the Proposer Team with primary responsibility for work related to design and construction, and other technical development work with respect to the Predevelopment Work, including design management." RFP at p. 81. The RFP did not require the Lead Contractor to self-perform any of the eventual final design and construction work on the future capital project, or Section Work.

The RFP set forth five technical evaluation criteria, all with sub-criteria, to be addressed by Proposers in their technical proposals and, in turn, evaluated by MDOT. Each criterion and sub-criterion was categorized as Critical, Significant, or Important, each with different weights. The technical evaluation criteria were:

- 1) Delivery Certainty (Critical);
- 2) Minimize Impacts (Significant);
- 3) Maximizing Value to the State (Significant);
- 4) Opportunity MDOT/Community Benefits (Important); and
- 5) Congestion Relief (Important).

RFP § 3.2 at pp. 43-47. The RFP explained the technical evaluation process, including informing Shortlisted Proposers that the technical proposal would be evaluated qualitatively as Exceptional, Good, Acceptable, or Unacceptable with pluses and minuses available to further differentiate within Exceptional, Good, and Acceptable ratings. RFP § 4.6 at pp. 57-59.

The RFP, including Form G – Financial Proposal Form, set forth seven financial proposal criteria. RFP § 4.7 at pp. 59-62 & RFP Form G. Each of the financial criteria, with a very brief summary, is set forth below. Complete definitions are set forth in the RFP.

- 1) Proposal Equity IRR. This generally references the internal rate of return for equity invested that the Proposer proposes to receive, reflected as a percentage. *See* RFP § 4.7(a) at pp 59-60, RFP Appendix 1 "Definitions" at p. 84, & RFP Appendix 5 "Financial Proposal Instructions" at pp. 105-06.

2) Developer Closing Fee Percentage. This generally references the maximum closing fees proposed to be paid to a Phase Developer or Section Developer, reflected as a percentage. The developer closing fee is the amount that the developer may be paid at Financial Close to reimburse the developer for certain fees incurred for reaching Financial Close. *See* RFP § 4.7(b) at p. 60, RFP Appendix 1 “Definitions” at p. 79, & RFP Appendix 5 “Financial Proposal Instructions” at p. 106.

3) Development Rights Fees. This generally references the development rights fees proposed to be paid to the State in circumstances described in the Phase P3 Agreement, reflected as a dollar amount. It is the amount to be paid to the State by the developer at the Financial Close for each section of Phase South A in exchange for the right to develop the project and share in the revenue received from tolls. *See* RFP § 4.7(c) at pp. 60-61, RFP Appendix 1 “Definitions” at p. 79, & RFP Appendix 5 “Financial Proposal Instructions” at p. 106.

4) Predevelopment Cost Cap. This generally references the maximum amount of “Allowed Costs” proposed to be reimbursed to the Phase Developer or a Section Developer, reflected as a dollar amount. *See* RFP § 4.7(d) at p. 61, RFP Appendix 1 “Definitions” at p. 83, & RFP Appendix 5 “Financial Proposal Instructions” at pp. 106-07.

5) D&C General Conditions Cost Percentage. This generally references the maximum amount of direct project overhead costs, without contingencies, incurred for supervision and administration of the design and construction work proposed to be applied in the D&C Costing Model, reflected as a percentage. *See* RFP § 4.7(e) at p. 61, RFP Appendix 1 “Definitions” at p. 78, & RFP Appendix 5 “Financial Proposal Instructions” at p. 107. *See also*, Phase P3 Agreement, Exhibit 6 at § 1.20.2 at pp. 29-30.

6) Contractor Markup Percentage. This generally references the maximum amount of contractor (or subcontractor) markup costs, including indirect overhead costs and profit, for the design and construction work proposed to be applied to the D&C Costing Model, reflected as a percentage. *See* RFP § 4.7(f) at p. 61, RFP Appendix 1 “Definitions” at pp. 77-78, & RFP Appendix 5 “Financial Proposal Instructions” at p. 107. *See also*, Phase P3 Agreement, Exhibit 6 at § 1.20.2 at pp. 29-30.

7) Renewal Work General Conditions Cost Percentage. This generally references the maximum amount of direct project overhead costs for Renewal Work (operations and maintenance (“O&M”)) proposed to be applied to the O&M Costing Model, reflected as a percentage. *See* RFP § 4.7(g) at p. 62 & RFP Appendix 1 “Definitions” at p. 85, & RFP Appendix 5 “Financial Proposal Instructions” at pp. 107-08. *See also*, Phase P3 Agreement, Exhibit 6 at § 1.21.2 at pp. 33.

RFP § 4.7 at pp. 59-62. The RFP set forth the point values for all financial criteria. Any Proposer could have determined its own financial proposal score through mathematical calculations based upon what it proposed. Each of the financial criteria had a cap, an amount over which no Proposer was allowed to propose. None of the financial criteria had a floor, an amount under which no Proposer was allowed to propose. The financial proposal criteria, limitations, and points are summarized in the table below.

RFP Pricing Structure Summary Table			
Financial Criteria	Cap / Maximum	Floor / Minimum	Possible Points
1. Proposal Equity IRR	17.0%	None	0 – 457*
2. Developer Closing Fee Percentage	1%	None	0 - 40
3. Developmental Rights Fees	\$145,000,000	None	0 - 145
4. Predevelopment Cost Cap	\$100,000,000	None	0 - 100
5. D&C General Conditions Cost Percentage	14.5%	None	0 - 435
6. Contractor Markup Percentage	19.5%	None	0 - 585
7. Renewal Work General Conditions Cost Percentage	14.5%	None	0 - 29
		Total Point Range:	0 – 1,791
*While there was no minimum limit, the RFP noted that only the maximum possible 457 points would be awarded for proposal values less than or equal to 10.0%			

See RFP § 4.7 at pp. 59-62. Questions were asked during the solicitation process regarding various aspects of the financial proposal. See generally Requests for Clarifications. CEMP noted several of these RFCs related to financial evaluation criteria in its protest. Like the RFQ, the RFP emphasized that all work should be performed at no net cost to the State. RFP § 1.6 at p. 9. See RFP § 2.3 at p. 16.

Shortlisted Proposers were informed that final evaluation of technical and financial proposals would be done using a “trade-off” analysis in order to determine which proposal was “most advantageous to the State.” RFP § 4.10(e) at p. 65. Technical and financial proposals were considered to be approximately equal in weight.¹ *Id.*

Shortlisted Proposers were given an opportunity to protest any alleged improprieties in the RFP. RFP § 6. No protests related to the RFP were filed prior to the submission of proposals. *See* RFP § 6.3(a).

C. Proposal Submission and Evaluation.

Technical proposals were due on December 23, 2020 and financial proposals were due on January 8, 2021. Three of the four Shortlisted Proposers submitted proposals for the predevelopment work. MDOT conducted a comprehensive evaluation process on a fair and uniform basis, as described in the RFP. *See* RFP § 4.

Section 4 of the RFP set forth a series of four general steps in the proposal evaluation process: 1) determination of whether a Proposer is responsible; 2) determination of whether a proposal is responsive, based on a review of the pass/fail criteria; 3) evaluations of the technical and financial proposals; and d) a determination of the Selected Proposer based on “technical and financial judgment and discretion to make a final determination of [the proposal] most advantageous to the State considering all factors set forth” in the RFP. RFP § 4 at pp. 54-64.

MDOT determined that all three Proposer teams were responsible and that their proposals were responsive, meeting each of the pass/fail criteria. Each proposal was then evaluated, consistent with the criteria and methodology set forth in the RFP.

MDOT assembled technical evaluation teams and an Evaluation Committee. RFP § 4.4 at p. 56. Each technical evaluation team was assigned a single technical evaluation criterion to review; namely, Delivery Certainty, Minimize Impacts, Maximizing Value to the State, Opportunity MDOT/Community Benefits, or Congestion Relief. Each technical evaluation team was provided a relevant portion of the technical proposals and limited its review to that evaluation criterion (including sub-criteria). Each technical evaluation team reviewed its assigned criterion, including each sub-criterion, and developed a consensus adjectival rating recommendation for the sub-criteria, as well as a consensus adjectival rating recommendation for the overall evaluation criterion assigned to it based on the weighting set forth in the RFP.

¹ CEMP suggests in its protest that comments attributed to the MDOT Secretary in a Washington Post article somehow indicate that the RFP evaluation process was not followed. Protest at p. 2. CEMP is wrong. The ratings, scores, and overall evaluation of Proposers indicate that the RFP process was followed.

The financial proposals were reviewed by a financial evaluation team, which was separate from the technical evaluation teams. None of the financial proposals exceeded the caps for the financial proposal evaluation criteria set forth in the RFP. The financial review team allocated points to each of the financial criteria based on the defined scoring outlined in the RFP to determine the overall financial score of each Proposer.

Following the work of each technical evaluation team, the Evaluation Committee convened. Each technical evaluation team leader presented the evaluation team's recommendation to the Evaluation Committee. The Evaluation Committee reviewed each evaluation criterion and sub-criterion, including the initial adjectival rating recommendations from each technical evaluation team. The Evaluation Committee considered the evaluation criteria and weightings set forth in the RFP in order to reach consensus adjectival ratings for each criterion and its sub-criteria.

Once the Evaluation Committee completed its review and ratings related to the technical proposals, the financial evaluation team leader presented the financial evaluations and scoring related to each Proposer to the Evaluation Committee. The Evaluation Committee reviewed and discussed the financial proposals and scores. After the review of the financial scores was completed, the Evaluation Committee established the Competitive Range. *See* RFP § 4.10(b) at p. 63. The Evaluation Committee then performed a trade-off analysis, considering each technical and financial proposal from each Proposer, in order to determine the most advantageous Proposal to the State or if further discussions would be needed with the Proposers in the Competitive Range. In performing this aspect of the evaluation, the Evaluation Committee considered the technical and financial proposals to be approximately equal in reaching a determination regarding which proposal was most advantageous to the State when both technical and price proposals were considered. *See* RFP § 4.10(e).

The Evaluation Committee decided further discussions were not needed and made a recommendation for the Selected Proposer to the Selection Committee. The technical and financial ratings presented to the Selection Committee were:

Overall Ratings		
Proposer	Technical Rating	Financial Score
Capital Express Mobility Partners	Good+	665
Accelerate Maryland Partners, LLC	Good	1,356
AccelerateMaryland Express Partners	Acceptable	800

The Evaluation Committee determined that CEMP's technical proposal was marginally superior to AMP's technical proposal. However, AMP's financial proposal scored significantly higher than CEMP's financial proposal. The Evaluation Committee determined that AMP's significantly higher financial proposal score outweighed the marginally higher technical rating of CEMP, making the AMP proposal the most advantageous offer to the State and the overall best value. The recommendation was presented to the Selection Committee, which accepted the Evaluation Committee's recommendation of AMP as the most advantageous and overall best value to the State when both technical and price proposals were considered.

On February 18, 2021, MDOT informed AMP that MDOT had determined its proposal to be the most advantageous to the State and recommended for award of the Phase P3 Agreement, informed CEMP that MDOT had determined that its proposal was not the most advantageous to the State, and also publicly announced the selection of AMP for the predevelopment work. On February 18, 2021, CEMP requested a debriefing. *See* RFP § 6.3(b). A debriefing was held with representatives of the State and CEMP on February 24, 2021. CEMP filed its protest with the Contracting Officer on March 1, 2021, within five days of the debriefing.

II. BASES OF PROTEST.

CEMP protests award to AMP instead of CEMP. It sets forth four general bases for protest, each of which will be discussed below.

CEMP asserts that MDOT chose the wrong Proposer and that MDOT should: 1) disqualify AMP for reasons set forth in its protest; or 2) re-open the solicitation so that CEMP can submit a revised financial proposal and MDOT can conduct a revised evaluation based upon new financial proposals submitted after all scoring totals have been announced.

For the reasons set forth below, there is no merit to any of CEMP's bases of protest. MDOT will not disqualify AMP or re-open the evaluation. MDOT's determination that AMP presented the proposal that was most advantageous to the State was consistent with the requirements of the RFP, as well as MDOT's technical and business judgment. CEMP has failed to demonstrate that MDOT's determination was arbitrary, capricious, unreasonable, or contrary to law, and its protest is denied.

A. CEMP's Assertion: MDOT's Decision to Approve Transurban and Macquarie as Lead Contractors in AMP's Proposer Team Was Arbitrary, Capricious, and Unsupported by Competent Evidence

In its first basis of protest, CEMP generally alleges that MDOT's approval of a change in AMP's Proposer team was arbitrary, capricious, and unsupported by competent evidence. CEMP's protest on this basis is both untimely and fails on the merits.

1. CEMP's Protest on this Basis Is Untimely.

On July 17, 2020, MDOT announced the Shortlisted Teams, which included Archer Western Construction, LLC ("Archer Western") as the Lead Contractor on the AMP Proposer team. On January 8, 2021, MDOT issued a press release that noted that three of the Shortlisted Proposers submitted proposals. MDOT Press Release dated January 8, 2021 (link found at: <https://mdot.maryland.gov/tso/pages/newsroomdetails.aspx?PageId=38&newsId=529>). CEMP and AMP were both named as Proposers. Those two teams were described, respectively, as:

Accelerate Maryland Partners LLC

Lead Project Developer / Equity: Transurban (USA) Operations Inc. and Macquarie Infrastructure Developments LLC

Lead Contractor: Transurban and Macquarie

Designers: Dewberry Engineers Inc. and Stantec Consulting Services Inc.

Capital Express Mobility Partners

Lead Project Developer / Equity: Cintra Global SE and John Laing Investments Limited

Lead Contractor: Ferrovial Agroman US Corp.

Designers: AECOM Technical Services Inc. and HNTB Corporation

By the time of the press release, MDOT had accepted the change to AMP's Proposer team to have Transurban (USA) Operations Inc. ("Transurban") and Macquarie Infrastructure Developments LLC ("Macquarie") act in dual roles as Lead Project Developer/Equity and Lead Contractor. In other words, Transurban and Macquarie replaced Archer Western as the AMP team's Lead Contractor. As of January 8, 2021, MDOT had likewise accepted changes to CEMP's Proposer team to remove one of the originally-named Lead Project Developer/Equity team members (Meridiam Capital Express LLC) and to add HNTB Corporation as a Designer.

Pursuant to the terms of the RFP, a protest objecting to something other than improprieties in the final RFP were required to be "filed not later than five (5) days after the basis for Protest is known or should have been known, whichever is earlier." RFP § 6.3(d). The RFP also required that "a Protest received by the Contracting Officer after the time limits prescribed in this Section 6.3 may not be considered." RFP § 6.3(e).

On January 13, 2021, five days after the January 8, 2021 press release, CEMP sent a letter of inquiry to the Solicitation Manager noting that “[i]n the MDOT press release issued on January 8, 2021, we noticed the change in the composition of the Transurban-Macquarie team, in particular, the removal of Archer-Western Construction as the Lead Contractor. We assume this change was requested and approved as required by the terms of the ITP (including applicable timing requirements for such request).” CEMP requested confirmation that the changed team still complied with the requirements of the RFQ and the RFP. On January 20, 2021, MDOT issued Notice 24 to all Shortlisted Proposers, including CEMP, that, among other things, changes in Proposer team composition “have been, and will continue to be reviewed in compliance with the solicitation documents.”

If CEMP objected to the change in Proposer team members of AMP, it should have filed a protest after learning of the replacement to AMP’s Proposer team, or by no later than January 13, 2021, which was five days after the January 8 press release. Even if CEMP’s protest basis was not known until MDOT issued Notice 24 to all Shortlisted Proposers, its protest should have been filed by no later than January 25, five days after the Notice’s issuance. It failed to do so. Instead, CEMP waited until March 1 to protest the issue of AMP’s Lead Contractor change. CEMP’s March 1 protest on this issue, therefore, is untimely and may not be considered by the Contracting Officer.

2. MDOT Determined, in its Sole Judgment, that Changes to AMP’s Project Team Were Acceptable.

Even if the protest were timely, it would fail on the merits. While under no obligation to consider the merits of an untimely protest, and without waiving any rights of MDOT, the substantive aspect of this basis of protest is addressed below.

As mentioned above, the RFP contemplated that changes to a Proposer’s team and/or key personnel could occur after SOQ submission and shortlisting. *See* RFP § 1.18. The RFP set forth a process by which Proposer team members and individual key personnel could be changed following a written request to make such changes. The RFP provided that to make such changes, the Proposer needed to submit such information as required by MDOT to demonstrate that “the changed *team* is just as or better qualified than the *team* being replaced, as determined in MDOT’s sole judgment.” RFP § 1.18(a) at p. 21 (emphasis added). The emphasis was on the Proposer *team* and not an individual member of the team.

In October 2020, AMP submitted a request to remove Archer Western from its Project team and to substitute Transurban and Macquarie in its place as Lead Contractor. It submitted various documents to support this change request. MDOT, in its sole judgment, determined that the changed AMP Proposer team was as qualified as the original Proposer team and approved of that change in November 2020.

CEMP asserts, without evidence or basis, that MDOT failed to follow the requirements of law, regulations, and the RFP because Transurban and Macquarie could not, in CEMP's view as a disappointed proposer, have been "just as or better qualified" as road infrastructure contractor Archer Western. CEMP suggests that MDOT did not conduct any responsibility determination based upon AMP's substitution of Lead Contractor. CEMP is wrong. CEMP references sections of law and the RFP in making its argument, but it misreads and misunderstands the language in the RFQ, the language in the RFP, and the nature of predevelopment work.

The RFQ made clear that the Proposer team needed to have experience with predevelopment work. RFQ §§ 8, 15, & 15.2 (requiring "Experience with Predevelopment Work"). According to the RFQ, Proposer team members needed experience with, among other things, Comparable P3 and/or Design Build Projects and Toll Road Operations, including the "construction *and/or management* of construction of civil and infrastructure aspects." RFQ § 15.1(b) at p. 55 (emphasis added with italics). Team members also needed experience with Congestion Management Delivery, including "construction *and/or management* of construction approach." RFQ § 15.3(c) at p. 56 (emphasis added with italics). RFQ § 15 "Relevant Development Experience" was consistent with RFQ § 8 "Evaluation Process and Criteria." See RFQ § 8.3-8.5 at pp. 38-40. The RFQ provided that *management* and not just direct construction self-performance was acceptable experience. The relevant experience in RFQ § 15 did not require self-performance of construction work, either directly or indirectly, as evidenced by allowing for "construction *and/or management*" experience. (Emphasis added with italics).

Further, RFQ § 14.1 indicated that the Lead Contractor did not need to have "sufficient capacity or appetite" to perform future Section Work without forming a joint venture, subcontracting, or similar arrangement. The RFQ language is consistent with MDOT's seeking a Proposer *team* to perform *predevelopment* work for a future capital construction project. See, e.g., RFP Appendix 1 "Definitions" at p. 81 (defining Lead Contractor as "the member of the Proposer Team with primary responsibility for work related to design and construction, and other technical development work with respect to the Predevelopment Work, including design management").

CEMP's basis of protest appears to be grounded in its mistaken belief that the Lead Contractor must be responsible for self-performing construction work, either immediately or under a future Section P3 Agreement for the capital construction project that will occur after the predevelopment work and after the capital project is deemed financially viable to move forward. However, the definition of Lead Contractor requires that the designated member of the Proposer Team have "primary responsibility for work related to design and construction, and other technical development work with respect to the Predevelopment Work, including design management." RFP Appendix 1 at p. 81. There are no requirements in the RFP for self-performance by the Lead Contractor of any construction work. See RFQ § 14.1 at p. 51 (noting that the "Lead Contractor, the Designer, and the Lead Project Developer are not required to have sufficient capacity or appetite to perform all of the Section Work for each section of Phase 1 without forming joint ventures or subcontracting or otherwise teaming with other firms.").

Further, the definition makes clear that the Lead Contractor's work is "with respect to the Predevelopment Work" and the RFP indicates that construction is neither permitted nor anticipated during the predevelopment work phase and prior to execution of a Section P3 Agreement. *See, e.g.*, Phase P3 Agreement § 9.1 at p. 14 (setting forth only limited reasons for the Phase Developer to even enter the Phase 1 Site, with construction not among the reasons).

After shortlisting and prior to proposal submission, MDOT reviewed the change in the AMP Proposer team for the predevelopment work. AMP described its requested changes in writing and provided supporting documentation for all changes, including supporting team and personnel information. Taken as a whole, MDOT approved the new AMP Proposer team prior to the submission of proposals for the predevelopment work and consistent with the terms of the RFQ and the RFP. *See* RFQ §§ 8 & 15; RFP § 1.18. Based on the information submitted, MDOT determined, in its sole judgment, that the AMP Proposer team changes were acceptable and the changed team was just as qualified as the original AMP Proposer team.

In addition, MDOT conducted the responsibility analysis required in § 4.2 of the RFP after the submission of proposals and determined that all three Proposers, including AMP, were responsible. As noted above, this RFP is for predevelopment work, which may eventually result in final design and construction work on a capital project, after various milestones are achieved with the predevelopment work and the capital project is determined to be financially viable. MDOT reviewed the AMP Proposal and determined that the AMP Proposer team, based on their experience with similar projects, their financial integrity, and other relevant factors, had the capacity in all respects to ensure good faith performance of the work, consistent with the RFP and applicable law.

MDOT followed the requirements of the law and solicitation documents in approving the change in Lead Contractor for AMP and determined that the AMP team was responsible. CEMP's protest on this basis is denied.

B. CEMP's Assertion: MDOT's Acceptance of Margins That it Knew Were Commercially Unrealistic and that Violate the Requirements of the RFP Was Arbitrary, Capricious, and Unsupported by Competent Evidence

In its second basis of protest, CEMP generally alleges that MDOT's acceptance of a financial proposal consistent with the requirements of the RFP was arbitrary, capricious, and unsupported by competent evidence. More specifically, CEMP alleges that, according to its calculations based on the released financial scores and certain information disclosed by MDOT, AMP failed to propose "realistic margins" and MDOT's acceptance of AMP's financial proposal was, therefore, arbitrary, capricious, and unsupported by competent evidence. CEMP's protest on this basis is both untimely and fails on the merits.

1. CEMP's Protest on this Basis Is Untimely.

In this basis of protest, CEMP essentially objects to the known and transparent pricing structure set forth in the RFP. *See* RFP § 4.7. *See also*, RFP Pricing Structure Summary Table, above. Based on the mathematical calculations and allocation of points that were disclosed in the RFP, every Proposer knew what its point allocation would be at time of proposal submission. Each Proposer team had to determine how to fund the project and allocate risks among the seven categories of pricing that were scored in the financial proposal. While several questions were asked during the RFP process, no Proposer protested the financial form, the calculations, the points, or the lack of a floor for any of the financial proposal criteria. The financial form and point allocations were all known upon issuance of the final RFP. CEMP now seeks to have MDOT re-open a solicitation after points and some pricing of AMP have been revealed, revise the RFP to comport with the pricing structure that CEMP desires to have in an effort to give its pricing methodology a competitive advantage, and establish a floor for certain financial proposal criteria. Protest at pp. 24-25.

Pursuant to the terms of the RFP, a protest “based upon alleged improprieties in the Final RFP shall be filed no later than ten (10) days prior to the Financial Proposal Due Date” RFP § 6.3(a). The RFP also indicates that “a Protest received by the Contracting Officer after the time limits prescribed in this Section 6.3 may not be considered.” RFP § 6.3(e).

If CEMP sought to object to the RFP pricing and scoring methodology, it was required to file a protest based upon an alleged impropriety in the final RFP and was required to do so no later than 10 days prior to the financial proposal due date of January 8, 2021. It failed to do so. CEMP waited until March 1 to file its protest, making it over two months late and untimely. As a result, the protest may not be considered by the Contracting Officer.

2. AMP's Financial Proposal Complied with the Terms of the RFP.

Even if the protest were timely, it would fail on the merits. While under no obligation to consider the merits of an untimely protest, and without waiving any rights of MDOT, the substantive aspect of this basis of protest is addressed below.

The RFP, including Form G – Financial Proposal Form, set forth seven financial proposal criteria for which a Proposer had to submit an offer, in terms of a percentage or dollars. The RFP set forth the mathematical calculations for point values for all financial criteria. Every Proposer knew in advance of financial proposal submission how to calculate the minimum and maximum scores, as well as its own financial proposal score. Each of the financial criteria had a ceiling. None of the financial criteria had a floor. The criteria, limitations, if any, and points are summarized in the RFP Pricing Structure Summary Table, above.

The financial proposal was created, in part, to allow for the Proposers to have flexibility in managing financial risks and structuring their approach while also including private financing from a variety of sources, including private debt and private equity investments, to meet the goal of no net cost to the State. *See* RFP § 1.6. In the financial proposal, MDOT sought to allocate certain risks to the Proposer team and to know, in advance, what costs would be incurred, including those on an open book basis. For instance, MDOT sought to remove from future negotiation for the fixed price Section P3 Agreement for design and construction, the percentages that formed the D&C General Conditions Cost Percentage and the Contractor Markup Percentage to be used in the D&C Cost Model. The RFP provided flexibility to the Proposer teams to structure funding based upon their various members, investors, and access to capital, while operating within the confines of MDOT's financial proposal methodology.

In speculating about AMP's financial proposal, CEMP focuses on two of the financial criteria; namely, 5 - D&C General Conditions Cost Percentage and 6 - Contractor Markup Percentage. CEMP states that AMP must have set forth percentages below "market rate" percentages and AMP may have even set forth 0% for each of those criteria. *See* Protest at pp. 10-11. In this decision, MDOT confirms that AMP submitted percentages at or below the cap/maximum for each of the referenced criteria and that was acceptable based on the requirements set forth in the RFP. MDOT further confirms that even if all percentages had been 0%, those percentages would likewise have been acceptable based on the clear language of the RFP.

CEMP asserts that it was under the impression that its financial proposal for the D&C General Conditions Cost Percentage and the Contractor Markup Percentage were required to reflect future "real market conditions" related to future capital design and construction work. *See* Protest at p. 17. CEMP further asserts that Proposers were somehow not permitted to potentially lower D&C General Conditions Cost Percentage and Contractor Markup Percentage and, in turn, raise the Proposal Equity IRR to cover the differences actually encountered. Protest at p. 21. CEMP quotes the various mathematical calculations and definitions for the D&C General Conditions Cost Percentage and Contractor Markup Percentage set forth in the RFP to support its post-Proposal argument and post-hoc rationalizations that these criteria were required to reflect "real market conditions." These contentions are mere assumptions by CEMP that proved false.

CEMP also asserts that because RFP Appendix 5, § 2.2 requires that the D&C General Conditions Cost Percentage must cover all items within the D&C General Conditions Cost definition, such as bonds, insurance, mobilization, license, permits, fees, the RFP therefore requires that a percentage value for D&C General Conditions Cost Percentage that is not "market realistic," *i.e.*, one lower than what the market will support, is prohibited. CEMP argues that AMP's Financial Proposal, which must have included values not "market realistic" for D&C General Conditions Cost Percentage and the Contractor Markup Percentage, cannot be in compliance with the RFP. CEMP is wrong.

CEMP points to several RFCs that it contends support its position. One RFC CEMP relies on is RFC #458. The question within RFC #458 requested clarification specifically around two elements within the RFP; the D&C General Conditions Cost Percentage at § 4.7(e), and the Contractor Markup Percentage at § 4.7(f). The Question and Response are as follows:

[Q:] Can you please confirm how Proposers should approach these two elements of the evaluation criteria in the Financial Proposal in the context of a competitive design-build procurement? Specifically, would the Proposer bear all the risk in the event the market comes back with percentages which are higher than those submitted as part of the Financial Proposal?

In addition, how will the potential for upside be assessed as part of the evaluation criteria given the higher likelihood that a design-build procurement process could result in lower percentages than those proposed as part of the Financial Proposal? Will this be upside for the Phase / Section Developer?

[R:] MDOT confirms that the Proposer would bear the risk of D&C general conditions and contractor markup being higher than the amount in the Proposer's Financial Proposal in the context of a competitive D&C contractor procurement. Any cost savings would return to MDOT or be shared with the Phase Developer. The Proposer is being evaluated on this basis as part of the Financial Proposal Evaluation Criteria, so MDOT expects the Proposer's Financial Proposals to assume risk appropriately.

This RFC confirmed that the Proposer would assume any risk associated with market percentages higher than the amount proposed. This made clear, consistent with the RFP, that a financial proposal offering below CEMP's characterization of "free market conditions" or "market realistic" percentages was allowed, acceptable to MDOT, and a risk to be allocated by the Proposer. With this understanding, CEMP – and all Proposers – submitted financial proposals presumably based upon their own pricing methodology plans and their own willingness to assume and allocate risk.

Another RFC CEMP relies on is RFC #939. The Question and Response were as follows:

[Q:] In the process of obtaining competitive market pricing to calculate the Design Build Price, it is stated that “MDOT will have oversight over all competitive solicitations, which may include MDOT's applicable solicitation rules (and any applicable FHWA rules).” In the case of the Phase Developer obtaining market pricing via multiple subcontractor bids or competitive solicitations, what process will MDOT put in place to ensure that the prior fixed Financial Criteria (D&C General Conditions Cost Percentage and Contractor Markup Percentage) flow down and accurately account for the subcontractors’ bids so that the outcome is consistent with what would have been obtained had the Open Book Basis process been used?

[R:] MDOT will review proposals received from a competitive market pricing solicitation for compliance with MDOT's applicable solicitation rules (and any applicable FHWA rules) which compose the “terms and conditions that will apply to the market pricing process” as defined in Exhibit 6 Section 1.20.6. The D&C General Conditions Cost Percentage and Contractor Markup Percentage should flow down to subcontractors’ bids in the aggregate. MDOT will be looking for evidence that these flow downs are correctly reflected in the subcontractors’ bids.

This RFC is consistent with the RFP language and the transparent pricing methodology set forth in the RFP and the financial proposal form. Subcontractor bids that form part of the D&C Cost Model for the future fixed price design and construction work must comply with the D&C General Conditions Cost Percentage and the Contractor Markup Percentage set forth in the Selected Proposer’s financial proposal. This RFC has no effect on subcontract terms between the Selected Proposer and the subcontractor, which may reflect whatever percentages for those items that the private parties negotiate and that the Selected Proposer agrees to pay. The Selected Proposer assumes the risk of variances as an equity risk for any percentages it agrees to pay to a subcontractor that exceeds what was proposed in its financial proposal.

CEMP also relies on RFC #1149, which requested an increase the Contractor Percentage Markup to 25%. MDOT declined that increase and did not change the financial proposal form.

In addition, CEMP relies on RFC #1408. The Question and Response were as follows:

[Q:] If the Phase Developer intends to use the Open Book Basis to support the Design-Build Price, how will MDOT confirm that the Contractor Markups and D&C General Conditions Costs for subcontractors of all tiers are aggregated to ensure that they do not exceed the amounts included in the Phase Developer's proposal? What supporting documentation will be required? If it is discovered that a subcontractor shifted costs to another line-item that should have been properly considered as part of the Contractor Markup or D&C General Conditions Cost, who will bear that risk and extra cost (as between the Phase Developer and MDOT)?

[R:] The D&C General Conditions percentage and the Contractor markup Percentage from the Phase Developer's Financial Proposal will be carried forward and used in the Cost Model for the Section Committed Proposal for each Section of Phase 1. It will be the Phase Developer's responsibility to ensure that these percentages include all relevant costs for the Contractor and all subcontractors.

This RFC again explained that the D&C General Conditions Cost Percentage and the Contractor Markup Percentage set forth in the financial proposal would be used in the D&C Cost Model for fixed price design and construction work. Amounts above the percentages set forth in the financial proposal for the D&C General Conditions Cost Percentage and the Contractor Markup Percentage would be the responsibility of the Proposer.

Finally, CEMP relies on RFC #1532. The Question and Response were as follows:

[Q:] Responses to MDOT RFC ID #939 and #1408 mention that both the D&C General Conditions Cost Percentage and Markup Percentage shall flow down to "all subcontractors' bids" and "all subcontractors" [.] Proposer is concerned with these statements, as our expectation was that both percentages were to be applied over the D&C Cost, and that D&C Cost would include the prices from subcontractors at all further down tiers, other than the Contractor, as quoted by the market at the time of the Committed Section Proposal.

We can understand that the requirement to flow down these percentages to lower tier subcontractors other than the Contractor be applied only to Affiliates to the Contractor, Phase Developer or Section Developer.

1) Please confirm that prices from all the subcontractors and suppliers, but Affiliates, will be considered in the D&C Costing Model as part of the D&C Cost, and therefore the D&C General Conditions Costs Percentage and Markup Percentage will be applied on top of these amounts, deducting the subcontractor mobilization that shall be included in the D&C General Conditions Cost.

If for subcontractors that are Affiliates the requirement is to flow down both percentages, please confirm if these amounts will still be part of the D&C Cost or these amounts will be deducted from their price in the D&C Cost and shall be included into the amounts obtained by applying the percentages to this reduced D&C Cost.

[R:] The Phase Developer shall include all D&C Costs for all self-performed and subcontracted work in the D&C Costing Model. The Phase Developer shall carry forward from its proposal and apply the D&C General Conditions Costs Percentage and Contractor Markup Percentage to the D&C Costs in the D&C Costing Model, and the aggregate D&C General Conditions Costs and Contractor Markup Costs included in the D&C Costing Model (whether incurred by the Section Developer or any subcontractor) may not exceed the D&C General Conditions Costs Percentage and Contractor Markup Percentage, respectively. The next version of the RFP Documents will be amended to clarify this in the definition of D&C General Conditions Costs. The Phase Developer shall be responsible for ensuring the percentages, in part or in whole, are properly carried in its D&C Costing Model. Accordingly, all requirements for participation in the Open Book Basis review shall flow down to subcontractors and major suppliers.

Again, it was explained to Shortlisted Proposers that the D&C General Conditions Cost Percentage and the Contractor Markup Percentage set forth in the financial proposal would be used in the D&C Cost Model for fixed price design and construction work.

Nothing in the RFP or the RFCs prevented any Proposer from using a pricing approach like CEMP suggested in its Protest, which included proposing a Proposal Equity IRR different from that otherwise required to cover differences actually encountered in the future, regardless of whether a financial proposal set forth 0% for the D&C General Conditions Cost Percentage and the Contractor Markup Percentage. MDOT is satisfied that an approach in which any variance above the percentages in the financial proposal would effectively be paid by equity funding that is not repaid by the Project does not erode value to the State nor result in the State subsidizing a Proposer and was not prohibited by the terms of the RFP. MDOT's decision to allow such a financial proposal pricing methodology was reasonable and consistent with the clear language of the RFP.

The RFP, financial proposal form, and allocation of financial points were consistent with the referenced RFCs. CEMP now seeks to have MDOT ignore the financial evaluation scoring system that was at the heart of the RFP and substitute CEMP's chosen scoring methodology, forcing CEMP's preferred methodology on MDOT and all other Proposers. CEMP wants a "re-do" on its financial proposal since it knows it was not the Selected Proposer and it knows the scores of other Proposers, including the amount proposed for certain financial criteria set forth in AMP's winning proposal. Essentially, CEMP disagrees with the transparent and known financial evaluation scoring methodology set forth in the RFP now that it knows it was unsuccessful in the competitive solicitation process. What CEMP desires is inconsistent with MDOT's RFP, the terms of which were not protested, and would be unfair and prejudicial to all other Proposers.

MDOT evaluated proposals according to the evaluation criteria and scoring methodology set forth in the RFP. These actions were reasonable and rational. CEMP's protest on this basis is denied.

3. CEMP's Financial Proposal Contains at Least One Percentage that Is [REDACTED]

CEMP's own financial proposal indicates that its argument regarding "market realistic" percentages must fail. CEMP could not have believed the argument it now makes regarding an alleged RFP requirement of "market realistic" pricing when it submitted its own financial proposal. For financial criterion 7 - Renewal Work General Conditions Cost Percentage, CEMP proposed [REDACTED]. The Renewal Work Conditions General Conditions Percentage criterion is described in RFP § 4.7(e). It contains costs for operations and maintenance work similar to the D&C General Conditions Costs Percentage costs for design and construction work, which CEMP now disingenuously asserts required a "market realistic" percentage to be proposed.

Just like for the D&C General Conditions Percentage, the RFP required that "Proposals shall confirm that the Renewal Work General Conditions Costs Percentage shall cover all items outlined within the definition of Renewal Work General Conditions Costs." Just like the D&C General Conditions Cost Percentage, the Renewal Work General Conditions Cost Percentage was set at a cap/maximum of 14.5%, with no floor. This allowed any Proposer, including CEMP, to submit a percentage of 0% and be compliant with the terms of the RFP.

The Renewal Work General Conditions Costs definition lists a number of items that are included in this criterion. RFP Appendix 1 "Definitions" at p. 85. That definition provides:

"Renewal Work General Conditions Costs" means direct project overhead costs incurred for any subcontract for Renewal Work. For the avoidance of doubt, Renewal Work General Conditions Costs shall include the following items required for subcontracted Renewal Work for each section:


- bonds, all types;
- non-payroll insurance;
- mobilization/demobilization including all O&M preparatory/dissolution operations that include the movement of personnel and equipment to/from the Phase 1 site;
- subsistence (covers any expenses for staff outside of the travel, lodging, relocation, per diem);
- travel;
- lodging;
- per diem;
- project oversight, supervision, and administration;
- vehicles for project oversight, supervision, administration, and management including, but not limited to, registrations, fuel, maintenance, and insurance;
- technology and communications, including, but not limited to, phones, computers, internet connections, radios, and tablets;
- temporary facilities including, but not limited to, rent, security and access control, utilities, office equipment, office expenses, furniture, insurance, and taxes;
- temporary staging areas, fuel depots, laydown areas, and storage yards; and
- miscellaneous including escalations, certifications for staff required for the work, and incidentals.

Considering that the Renewal Work General Conditions Costs Percentage contains similar items as the D&C General Conditions Cost Percentage, under the rationale CEMP posits on p. 17 of its Protest, one would expect that CEMP would find itself compelled to propose a “market realistic” percentage for its Renewal Work General Conditions Costs Percentage. [REDACTED]

On January 13, 2021, MDOT asked CEMP about its [REDACTED] Renewal Work General Conditions Cost Percentage. On January 15, 2021, CEMP clarified that it had proposed a percentage [REDACTED] for that criterion and that those costs were to be paid out of funds that would otherwise be distributed to Equity Members. CEMP stated:

We confirm that the Renewal Work General Conditions Cost Percentage covers all items outlined within the definition of Renewal Works General Conditions Costs.

...



An approach to fund these costs directly by the Equity Member at no cost to the Project or the State was not prohibited by the RFP and was available to all Proposers, including CEMP and AMP, on financial proposal criteria 5, 6, and 7. To the extent that it needed to do so, MDOT sought clarifications from AMP on percentages for financial criteria 5, 6, and 7 that were proposed below the cap/maximum. Based on the clarifications provided and MDOT's review, MDOT is satisfied that this approach ensures that the Proposer team, not the Project or the State, would be responsible for actual cost differences and does not result in the State subsidizing AMP. These determinations were reasonable and rational. CEMP's protest on this basis is denied.

C. CEMP's Assertion: MDOT's Acceptance of AMP's Unrealistic Margins Will Undermine Delivery Certainty and MDOT's Trade-Off Analysis Was Flawed.

In its third basis of protest, CEMP generally, again, alleges that MDOT's acceptance of a financial proposal consistent with the requirements of the RFP was arbitrary, capricious, and unsupported by competent evidence. More specifically, CEMP alleges that AMP's pricing structure will negatively affect the predevelopment work and undermine one of the technical evaluation criteria, Delivery Certainty.

This assertion is again based on the flawed assumption that the amount proposed for financial criteria numbers 5, 6, and 7 must be "market realistic" and reflect the actual future amounts to be paid to subcontractors, including local firms, labor, and DBEs. Protest at p. 22. This is merely a reiteration of CEMP's second basis of protest related to the RFP, financial proposal form, and the allowed pricing structure. For the reasons already stated in this letter related to the second basis of protest, this repeated basis of protest is untimely and fails on the merits.

CEMP's protest also expresses general, unsubstantiated concerns about the trade-off analysis performed by MDOT in making the determination of which Proposer submitted proposals most advantageous to the State. CEMP asserts that, somehow, the trade-off analysis was performed incorrectly. CEMP's assertion is incorrect.


Section 4.10(e) of the RFP "Determination of Selected Proposer" provides, in part:

[O]nce the evaluation of the Predevelopment Work Proposal and the Financial Proposal has been completed, the evaluation committee, using a trade-off analysis between the Predevelopment Work Proposal evaluation and the Financial proposal evaluation, will determine which Proposer's submittal is most advantageous to the State. **When determining which Proposal's submittal is most advantageous to the State, the relative importance of the Predevelopment Work Proposal and the Financial Proposal will be considered approximately equal.** *Award may be made to the Proposer with the higher Financial Proposal score even if its Predevelopment Work Proposal is not the highest rated or to the Proposer with the higher Predevelopment Work Proposal rating even if its Financial Proposal score is not the highest. In performing this trade-off analysis, the evaluation committee will consider the facts and circumstances of the solicitation and utilize its technical and financial judgment and discretion in considering strengths, weaknesses, and deficiencies of each Proposal to determine a recommendation of the Proposal that is most advantageous to the State.* This recommendation will then be presented to the selection committee, who will utilize their technical and financial judgment and discretion to make a final determination of most advantageous to the State considering all factors set forth in this RFP.

(Bold in original. Emphasis added in italics).

MDOT adhered to the terms of the RFP regarding the evaluation of technical proposals and financial proposals, as well as the final determination regarding which Proposer submitted the most advantageous offer to the State when both technical and financial proposals were considered. CEMP had a marginally higher overall predevelopment work technical proposal rating of Good+ compared to AMP's rating of Good. CEMP's financial proposal score was the lowest with 665 out of 1,791 points (approximately 37% of available points) compared to AMP's score of 1,356 out of 1,791 points (approximately 76% of available points). Stated another way, AMP's financial score was 204% higher than CEMP's financial score.

The Evaluation Committee performed a trade-off analysis between the technical proposal evaluation and the financial proposal evaluation of all Proposers, including CEMP and AMP. In performing the trade-off analysis, the Committee recognized that the technical proposals of both CEMP and AMP demonstrated a nearly complete understanding of the P3 Program goals and objectives and that the overall strengths of both technical proposals outweighed any weaknesses.



As required by the RFP, the Evaluation Committee also considered the financial proposals of both CEMP and AMP. Both financial proposals were compliant with the pricing methodology and requirements set forth in the RFP. The Committee was satisfied with all clarifications provided by CEMP and AMP related to their respective proposals, including CEMP's clarification related to its pricing [REDACTED] for Renewal Work General Conditions Cost Percentage. The Evaluation Committee considered each Proposer's approach to its financial proposal. Each Proposer's financial proposal was found to set forth reasonable approaches and to be consistent with the RFP. The Committee concluded that AMP's significantly higher financial proposal score would be expected to provide significantly more financial value for the State in AMP's committed section proposals.

The RFP required that technical and financial proposals were to be given "approximately equal" weight in the final determination regarding which Proposer provided the most advantageous offer to the State. RFP § 4.10(e). The Evaluation Committee considered CEMP's marginally higher-rated technical proposal (Good+) with its much lower-scored financial proposal (665 of out 1,791 points), as well as AMP's marginally lower-rated technical proposal (Good) with its much higher-scored financial proposal (1,356 out of 1,791 points). In giving approximately equal weight to the technical and financial proposals of each Proposer and based upon its business and technical judgment, the Evaluation Committee determined that AMP provided the best value to the State. The Committee did not believe that CEMP's marginally higher technical rating outweighed its much lower financial score and rightfully did not determine CEMP as the best value to the State.

CEMP challenges the trade-off analysis and business and technical judgment utilized by the Evaluation Committee, suggesting that MDOT did not follow the evaluation process in the RFP. MDOT followed the evaluation process in the RFP, performed a reasonable review of the proposals, and performed a reasonable trade-off analysis. CEMP has not produced any evidence to suggest otherwise. CEMP's protest on this basis is denied.

**D. CEMP's Assertion: MDOT's Rating of CEMP's Proposal as Good+ [REDACTED]
[REDACTED] Was Arbitrary, Capricious, and
Unsupported by Competent Evidence.**

CEMP alleges that MDOT's evaluation of CEMP's technical proposal was arbitrary and capricious because CEMP's technical proposal plan [REDACTED]

[REDACTED] was identified as a weakness. CEMP contends that this plan should not have been downgraded on this basis and that its proposal should have received an overall rating of Exceptional instead of Good+. CEMP blames its lack of an Exceptional rating, at least in part, on the lack of a known "preferred alternative" for Phase 1 South until January 27, 2021 due to the timing of the NEPA process. In making its argument, CEMP misunderstands clear language of the RFP and ignores information provided at its debriefing. CEMP's protest on this basis is untimely, at least in part, and fails on the merits.

1. CEMP's Protest on this Basis Is, in part, Untimely.

In this basis of protest, CEMP complains that its proposal was submitted prior to decision regarding which of six known project alternatives was designated as the "preferred alternative" based upon the ongoing National Environmental Policy Act ("NEPA") process being advanced by the State and the Federal Highway Administration. Protest at pp. 23-24. The RFP informed all Shortlisted Proposers that the preferred alternative had not been chosen and the decision was expected by the end of 2020 or early 2021. RFP § 1.12(a) at pp. 12-13. Several RFC questions and responses addressed this issue. *See, e.g.*, RFC # 160, 196, 910, & 913. Each Shortlisted Proposer knew that a preferred alternative might not be named until after the submission of proposals and that the entire limits of Phase South is subject to the same NEPA Record of Decision; therefore, each proposal needed to account for this risk [REDACTED]

Pursuant to the terms of the RFP, a protest "based upon alleged improprieties in the Final RFP shall be filed no later than ten (10) days prior to the Financial Proposal Due Date" RFP § 6.3(a). The RFP also indicates that "a Protest received by the Contracting Officer after the time limits prescribed in this Section 6.3 may not be considered." RFP § 6.3(e). If CEMP sought to object to the lack of a chosen preferred alternative to Phase South, it was required to file a protest based upon an alleged impropriety in the final RFP and was required to do so no later than 10 days prior to the financial proposal due date of January 8, 2021, or by December 29, 2020. It failed to do so. CEMP waited until March 1 to file its protest, making it over two months late and untimely. As a result, the protest may not be considered by the Contracting Officer.

2. CEMP's Protest Expresses Mere Disagreement with MDOT's Technical and Business Judgment.

Even if the protest were timely, it would fail on the merits. While under no obligation to consider the merits of an untimely protest, and without waiving any rights of MDOT, the substantive aspect of this basis of protest is addressed below.

CEMP asserts that MDOT's evaluation of CEMP's technical proposal was arbitrary and capricious because CEMP's technical proposal [REDACTED] [REDACTED] should not have been identified as a weakness for any of the RFP criteria or sub-criteria. Further, CEMP asserts that it should have received a rating of Exceptional instead of Good+ for its proposal. CEMP ignores the plain language of the RFP and ignores (and does not protest) other weaknesses that contributed to its ratings. CEMP's objection that it provided a proposal that is "Exceptional" and not "Good+" constitutes nothing more than disagreement with the technical and business judgment of the MDOT evaluators.

Focusing on the first evaluation criterion, Delivery Certainty, CEMP's rating of [REDACTED] was appropriate based on the definitions of the adjectival ratings defined in RFP § 4.6 and consistently applied by the Evaluation Committee. As CEMP was informed at the debriefing, and as the rating reflects, the Evaluation Committee noted many strengths related to the Delivery Certainty evaluation criterion. [REDACTED]

[REDACTED] See RFP § 3.2(a) at pp. 43-44. [REDACTED] Multiple weaknesses were identified for CEMP's Delivery Certainty criterion and for its sub-criteria.

RFP § 3.2(a) provided, in part:

Delivery Certainty - CRITICAL

MDOT is seeking a long-term, collaborative partner with an approach to Predevelopment Work that ensures certainty and efficiency in the delivery of improvements for travelers using Phase 1, *including by maximizing the limits of Phase South to be delivered with the first section.*

(emphasis added with italics). In the RFP, MDOT emphasized the importance of the delivery of Phase South. CEMP made a business decision to propose [REDACTED] [REDACTED] and explained its plan for doing so. The Evaluation Committee did not view CEMP's plan, as set forth in CEMP's technical proposal, as [REDACTED]

For Section Sequencing and Scheduling for Predevelopment Work (sub-criterion iii), specifically referenced in CEMP's protest, the Evaluation Committee determined, and CEMP was informed at its debriefing, that its technical proposal contained weaknesses in this sub-criterion because it [REDACTED]

[REDACTED]
[REDACTED] Due to weaknesses in its technical proposal, the Committee gave CEMP a rating [REDACTED] for this sub-criterion.

For Organizational Structure (sub-criterion vi), the Evaluation Committee determined, and CEMP was informed at its debriefing, that its technical proposal contained weaknesses in this sub-criterion because [REDACTED]

[REDACTED] Due to weaknesses in its technical proposal, the Evaluation Committee gave CEMP a rating [REDACTED] for this sub-criterion.

With regard to the third evaluation criterion, Maximizing Value to the State, CEMP's rating [REDACTED] was appropriate based on the definitions of the adjectival ratings defined in RFP § 4.6 and consistently applied by the Evaluation Committee. [REDACTED]

[REDACTED]
Multiple additional weaknesses were identified for Maximizing Value to the State criterion and for the other sub-criteria, which CEMP does not object to in its protest.

With respect to the fifth evaluation criterion, Congestion Relief, CEMP's rating [REDACTED] was appropriate based on the definitions of the adjectival ratings defined in RFP § 4.6 and consistently applied by the Evaluation Committee. [REDACTED]

[REDACTED] Multiple additional weaknesses were identified for the Congestion Relief criterion and for the other sub-criteria, which CEMP does not object to in its protest.

In its protest, CEMP cherry-picks certain evaluation criteria and sub-criteria ratings in an effort to support an untimely protest purported to be based upon the lack of a known “preferred alternative” prior to proposal submission, but which is really based upon CEMP’s refusal to accept that MDOT determined its proposal to be Good+, but not Exceptional. In so doing, CEMP refused to acknowledge, omitted reference to, and did not object to other weaknesses in its technical proposal [REDACTED]

[REDACTED] All strengths and weaknesses were taken into account by the Evaluation Committee in determining the technical proposal ratings.

CEMP received an appropriate rating for all criteria and sub-criteria, including the overall rating of its technical proposal of Good+. The process of weighing the technical merits of any proposal is a subjective one which relies on the business discretion and technical judgment of MDOT, including input received from members of the evaluation teams and the Evaluation Committee. This process and MDOT’s determinations were rational and reasonable. Mere disagreement with ratings, without evidence of more than disagreement, is not a reason to disregard language in the RFP, change a rating, overrule the technical and business judgment of the agency, or overturn a competitive solicitation process. CEMP’s protest on this basis is denied.

Douglas F. Gansler, Esq.
Ms. Rebecca Brooks
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III. CONCLUSION.

For the reasons set forth in this letter, CEMP's protest is denied. This is the final decision of the Contracting Officer. The decision may be appealed to the MDOT Secretary or his designee. If you decide to take such an appeal, you must file written notice of appeal to the Secretary within five days from the date you receive this decision. The name and address of the Secretary's designee for protest appeals is:

R. Earl Lewis, Jr.
Deputy Secretary for Policy, Planning, and Enterprise Services
Maryland Department of Transportation
Harry R. Hughes Department of Transportation Building
7201 Corporate Center Drive
Hanover, MD 21076

Sincerely,



Jeffrey T. Folden, P.E., DBIA
Contracting Officer

cc: Mr. Gregory Slater, Secretary, MDOT
Tim Smith, P.E., Administrator, MDOT State Highway Administration