BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

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In the Consolidated Appeals of	*	
Qlarant Integrity Solutions, Inc.	*	
	*	**Docket Nos. MSBCA 3157, 3158, 3163 and 3169**
Under MDH RFP	*	
MDH/OPASS 19-18325	*	
Appearance for Appellant		Daniel J. Kelly, Esq.
	*	David Himelfarb, Esq.(*Pro Hoc Vice)*
	*	McCarter & English, LLP
		Boston, MA
	*	
Appearance for Respondent		Francesca Gibbs, Esq.
	*	Stephen M. Legendre, Esq.
		Assistant Attorneys General
	*	Maryland Department of Health
		Office of the Attorney General
	*	Baltimore, MD
Appearance for the Interested Party	*	Philip A. Andrews, Esq.
		Kramon & Graham, P.A.
	*	Baltimore, MD

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ORDER AND OPINION BY CHAIRMAN BEAM

Having read and considered SAS Institute, Inc.'s (the "Interested Party" or "IP") Motion to Dismiss (and Supplement thereto) all of the consolidated Appeals in the above-captioned matter on various grounds; Maryland Department of Health's ("Respondent") Line in support thereof; Qlarant Integrity Solutions, Inc.'s ("Appellant") Response in opposition (and Supplement thereto); and the IP's Reply thereto; and after a hearing thereon, the Board unanimously grants, in part, and denies, in part, the relief requested by the IP.

BACKGROUND

On or about October 18, 2019, Respondent issued a Request for Proposals ("RFP") for a Surveillance and Review System. Respondent conducted a Pre-proposal Conference on November 22, 2019, during which the procurement officer ("PO") answered questions posed by potential offerors. In response to a question regarding how the scores for the technical proposals would be weighted, the PO explained that although the State reserved the right to give a numerical rating, it would not be using numerical scores. Instead, the technical proposals would be rated using "an adjective title rating; excellent, very good, good, fair, poor and we develop our rankings based on those adjectives."[1] None of the attendees sought further clarification of how the proposals would be rated or ranked. The RFP provided that the award would be given to "the responsible Offeror that submitted the Proposal deemed to be the most advantageous to the State" and that in making this "most advantageous determination, technical factors will be given equal weight with financial factors."

On September 3, 2020, Respondent sent a letter to Appellant advising that it had not been selected for award. Included in the letter was the following table reflecting the final rankings of the top five Offerors, together with their technical rankings, their financial rankings, and their overall rankings:

OFFEROR	TECHNICAL RANKING	FINANCIAL RANKING	OVERALL RANKING
SAS	Exceptional	3	1
Health Tech	Good	5	2
Qlarant	Good	2	3
Offeror A	Meets Expectations	4	4
Offeror B	Meets Expectations	1	5

[1] *See* Transcript of Debriefing, p. 40, lines 7-9. In fact, the final rankings reflected only the following three adjectival descriptions associated with each ranking: Exceptional, Good, and Meets Expectations.

Appellant was advised that the IP was being recommended for award and that it could request a debriefing, which it did.

On September 10, 2020, the same day that it received its debriefing, Appellant filed its first protest ("Protest"). Appellant alleged that

> the [Respondent] failed to apply the [RFP's] mandatory evaluation criteria by (1) improperly reweighting the Technical and Financial factors in its evaluation by giving more weight to the Technical factors, and (2) neglecting to apply the [RFP's] reciprocal preference to [Appellant] (a resident Maryland business) when the offeror recommended for award, [the IP] is a resident business of a state that applies a similar preference.

Appellant also reserved its right "to supplement its ground(s) for protest to the extent that the supplemental protest ground(s) relate to new information discovered during the pendency of this protest, including information discovered during its requested Agency debriefing regarding this procurement." On September 24, 2020, the PO issued its final decision denying Appellant's first Protest.

On September 17, 2020, prior to receiving the PO's final decision denying its first Protest, Appellant filed a "Supplemental Protest" asserting that it was "based on information first learned within the last seven days including information supplied at [Appellant's] September 10, 2020 debriefing…." Then on October 5, 2020, Appellant filed its "Second Supplemental Protest" asserting that it was "based on information first learned from [Respondent's] letter, dated September 24, 2020, in which it denied [Appellant's] September 10, 2020 protest…." On October 20, 2020, the PO issued its final decision denying both the Supplemental Protest and the Second Supplemental Protest.

On December 8, 2020, Appellant filed its "Third Supplemental Protest" asserting that it was based on "information first learned from [the IP's] Technical Proposal in response to the [RFP], which was provided to [Appellant] as part of the Agency Report on November 30, 2020,

but which was not accessible by [Appellant] until December 1, 2020." On January 20, 2021, the PO issued its final decision denying Appellant's Third Supplemental Protest.

In the PO's October 20, 2020 final decision letter, and again in its January 20, 2021 final decision letter, the PO asserted that Appellant lacked standing to file a protest and that the first ground of Appellant's Supplemental Protest, its Second Supplemental Protest, and its Third Supplemental Protest were all untimely filed.

On October 8, 2020, Appellant filed a Notice of Appeal of the denial of its first Protest, which was docketed as MSBCA No. 3157. On October 30, 2020, Appellant filed a Notice of Appeal of the denial of its Supplemental Protest and its Second Supplemental Protest, which was docketed as MSBCA No. 3158. On November 19, 2020, the Board issued an Order consolidating the first two Appeals.

On January 5, 2021, the IP filed a Motion to Dismiss the consolidated Appeals. On January 27, 2021, Appellant filed its Response in opposition to the Motion. On February 3, 2021, the IP filed its Reply.

On January 29, 2021, Appellant filed a Notice of Appeal of the denial of its Third Supplemental Protest. On February 5, 2021, the Board issued an Order consolidating this third Appeal with the previously consolidated Appeals.

On February 9, 2021, the Board issued a Consent Order allowing the parties to supplement their previously-filed Motion and Response. On February 12, 2021, the IP filed its Supplement to its Motion. On February 18, 2021, Appellant filed its Response to the IP's Supplement. On March 12, 2021, Respondent filed a Line in support of and in agreement with the IP's arguments for dismissal. On March 17, 2020, the Board held a virtual hearing via Zoom on the IP's Motion and Supplement thereto.

STANDARD OF REVIEW

In the context of a motion to dismiss, we must assume the truth of all well-pleaded facts and all reasonable inferences that may be drawn therefrom. *See e.g.*, *U.K. Constr. & Mgmt., LLC*, MSBCA No. 2773 (2011). "A Motion to Dismiss may be granted only in the event of a failure to state a legally sufficient cause of action. At the early stage of the litigation, ambiguities are resolved in favor of the appellant and the Board examines the claim from the perspective of assuming the truth of all facts alleged by appellant." *Id*. at 2.

DECISION

The IP has asked the Board to dismiss the consolidated Appeals on various grounds: the IP asserts that (i) Appellant lacks standing to file any of the protests, (ii) the first ground of the Supplemental Protest, the Second Supplemental Protest, and the Third Supplemental Protest were untimely filed, (iii) Appellant was not entitled to a reciprocal preference, (iv) Appellant failed to state a claim for relief in its Third Supplemental Protest, and (v) the IP fully satisfied the RFP experience requirements. We address each of these in turn.

I. Standing

As we recently stated in *MGT Consulting Group, LLC*, MSBCA No. 3148 (2020), in the context of procurement law, standing relates to who has the right to protest an agency's actions. We explained that the Board's analysis of whether a party has standing to protest has evolved over time. *Id*. at 9. Initially, the Board generally focused its analysis on whether a party met the statutory and regulatory definitions of an "interested party." *Id*. In our recent cases, the Board has focused more specifically on what factors should be considered in determining whether a party is "aggrieved," which is a regulatory requirement for being an "interested party." *See id*.

"In considering whether a party is or may be aggrieved, our cases have historically and generally concluded that if there is no reasonable possibility of being awarded the contract if successful on its protest, the party is not aggrieved, and thus does not have standing." *Id.* at 10. *See also*, *e.g.*, *Wexford Health Serv., Inc.*, MSBCA Nos. 3066 & 3081 at 17-18 (2018); *Conduent State & Local Solutions, Inc*., MSBCA No. 3071 at 6-7 (2018); *Active Network, LLC*, MSBCA No. 2920 at 8-9 (2015); *Devaney & Assocs., Inc.,* MSBCA No. 2477 at 9-10 (2005)(concluding that an offeror that is not eligible for award of the contract is not an "interested party" and lacks standing to protest).

In further clarifying the requirement that a party must be aggrieved in order to be an interested party (and thus have standing to protest), the Board also explained that whether a party has been, or may be, aggrieved, depends not only on clear indicators such as whether a party is next in line for award or whether a party has a reasonable possibility of receiving the award—it also depends on other factors, such as whether a party has been affected competitively by the actions of a procurement officer. *Id*. at 11. We have further explained that whether a party is affected competitively involves consideration of the party's status or relation to the procurement and the nature of the issues involved. *See Erik K. Straub, Inc*., MSBCA No. 1193 (1984); *Adell Food Serv. Co., Inc.*, MSBCA No. 1802 (1994) at 2 (citing *RGS Enterprises, Inc.*, MSBCA 1106 (1983)). *See also Delmarva Drilling Co.,* MSBCA No. 1096 (1983) at 4; *RGS Enterprises, Inc.,* MSBCA No. 1106 (1983) at 5; *The Chesapeake & Potomac Telephone Co. of MD,* MSBCA No. 1194 (1984) at 21; *Baltimore Motor Coach Co.,* MSBCA 1216 (1985) at 7; *Chesapeake Bus & Equipment Co.,* MSBCA No. 1347 (1987) at 6.

Finally, we have held that whether a party is aggrieved (*e.g*., whether a party's competitive position has been negatively affected by an agency's actions) is a question of fact,

which, when disputed, requires a hearing on the merits. *See MGT Consulting Group, LLC*, MSBCA No. 3148 (2020) at 9.

In this case, the IP contends that there is no reasonable possibility that Appellant would be awarded the contract if it were to prevail on its protests because Appellant was not in line for award, as it was ranked third overall, not second. Appellant, however, contends that if it were to prevail on its protest(s), it would not only be next in line for award, but could possibly be first in line for award because, as Appellant asserted in its initial Protest, Respondent "improperly reweight[ed] the Technical and Financial factors in its evaluation by giving more weight to the Technical factors."

At this juncture, and in the context of a motion to dismiss, we must assume that Appellant's allegations are true and give Appellant the benefit of all reasonable inferences that can be drawn therefrom. Assuming the truth of the allegations that Respondent improperly weighted Technical over Financial, and that not only Appellant's ranking but *all* the rankings were affected, it is reasonable to infer that Appellant would have a reasonable possibility of being next in line for award or, indeed, awarded the contract. At this juncture, we cannot say that Appellant's competitive position was not affected by Respondent's actions or that Appellant is not aggrieved. Therefore, we must deny the motion to dismiss, in part, on these grounds.

II. Timeliness

In its Motion, the IP asserts that some of the grounds for Appellant's protests were untimely filed, namely: (i) the first ground of Appellant's September 17, 2020 Supplemental Protest, (ii) all of the grounds of Appellant's October 5, 2020 Second Supplemental Protest, and (iii) all of the grounds of Appellant's Third Supplemental Protest. Although the IP has alleged that there are no genuine disputes of material facts and that the IP is entitled to prevail as a

matter of law, we disagree and find that many of the facts regarding what Appellant knew, and when it knew or should have known, are, at this juncture, genuinely in dispute.

We have previously held that in the context of a motion to dismiss, when facts regarding the timeliness of a claim or bid protest are in dispute (*i.e.*, when a contractor knew or should have known that it had a basis for a bid protest or claim), and where we are required to assume the truth of the facts pled by Appellant (and give Appellant the benefit of all reasonable inferences that can be drawn therefrom), we cannot make findings of fact regarding the timeliness of a bid protest. *Harbel, Inc*., MSBCA No. 3135, (2019); *see also*, *Business Interface of Maryland*, *LLC*, MSBCA No. 3065 (2018). It is only in the context of a motion for summary decision, where there is no genuine dispute of material fact that a bid protest was untimely filed, that the Board may dispose of an appeal at this juncture.[2] But that is not what was filed here: the IP filed only a Motion to Dismiss.

Accordingly, at this juncture we must deny the Motion to Dismiss on these grounds.

III. Reciprocal Preference

Appellant alleged in its first Protest that the PO's failure to apply a reciprocal preference "as mandated by the Solicitation" was arbitrary and capricious. The IP asks that we dismiss this ground of the Protest as a matter of law because Appellant "was not eligible to receive" a reciprocal preference for two reasons: (i) the reciprocal preference provision contained in the RFP was permissive, not mandatory, and (ii) even if it were mandatory, the reciprocal preference may only be applied if it is identical to the preference the other state gives to its residents, which, in this case, it is not.

[2] Unlike with Maryland Rule 2-322(c), which provides that a Circuit Court can treat a motion to dismiss for failure to state a claim as a motion for summary judgment if matters outside the pleadings are presented to and not excluded by the Court, the Board does not have an analogous statute or regulation that allows for alternative treatment of a motion to dismiss.

Section 6.4 of the RFP cites COMAR 21.05.01.04 and states that the regulation "permits" the application of a reciprocal preference under the RFP: "A procurement agency may give a preference to a resident business if [certain conditions are met]." The reciprocal preference is not an evaluation criterion. It is a wholly separate provision in the RFP, and we have found nothing in the RFP stating that the PO is required to apply, or even consider applying, the reciprocal preference. The RFP merely makes the option available to the PO if he elects to use it and sets forth the conditions under which it can be applied.

In this case, the PO opted not to apply the reciprocal preference. He was under no obligation to do so. His election not to exercise his discretion to do so is not, and cannot be, an abuse of his discretion, nor can it be arbitrary or capricious. Accordingly, this ground of the initial Protest will be dismissed as a matter of law.[3]

IV. Failure to State a Claim

In its Third Supplemental Protest, Appellant asserted as its first ground that the IP "failed to disclose highly relevant negative past performance to [Respondent], which resulted in [Respondent] misevaluating the strengths of [the IP's] proposed solution and giving [the IP] higher adjectival ratings than what it would otherwise be entitled to receive." In its Supplement to Motion to Dismiss, the IP advances several arguments for why this ground should be dismissed, including timeliness, failure to state a claim, and as a matter of law.

The IP argues that this ground of the Third Supplemental Protest should be dismissed for failure to state a claim for two reasons. First, the IP argues that it is redundant and seeks to re-litigate a protest ground previously raised in Appellant's Supplemental Protest, which was

[3] Although we have not yet made a final determination as to whether Appellant has standing to protest, we may nevertheless dispose of certain issues as a matter of law to the extent that they would otherwise be subject to disposition even if it were later to be determined that Appellant has standing.

untimely filed.[4] Although these two protest grounds are clearly related, we cannot say that this ground of the Third Supplemental Protest is redundant. The Supplemental Protest alleged improper conduct by Respondent, while the Third Supplemental Protest alleged improper conduct by the IP (which allegedly led to or contributed to the improper conduct by Respondent). These are two separate claims of improper conduct by two separate parties.

Second, the IP argued that this ground of the Third Supplemental Protest also failed to state a claim because (i) the RFP did not require the IP to include in its Technical Proposal all of its past experience or any of its negative past experience, and (ii) even if it was required by the RFP, its Technical Proposal disclosed that it had previous experience on the Florida contract. We need look no further than the language of the RFP to determine what offerors were required to provide in the way of their past experience.

Appellant relies on Section 5.3, which "identifies items [that] must be included in an offeror's proposal," and specifically Section 5.3.2.H, which "addresses what must be disclosed by way of an offeror's 'Qualifications and Capabilities'":

> H. Offeror Qualifications and Capabilities (Submit under TAB G)
>
> The Offeror shall include information on **past experience with similar projects and services** including information **in support of** the Offeror Experience criteria in Section 3.10.1. The Offeror shall describe how its organization can meet the requirements of this RFP and shall also include the following information…. (emphasis added).

This Section refers to Section 3.10.1 (which sets forth the "Offeror Experience criteria" referred to in Section 5.3.2.H), which in turn refers to Section 6.2 ("Technical Proposal Evaluation Criteria").

[4] Appellant's first ground of its Supplemental Protest asserted that Respondent "ignored relevant information regarding [the IP's] negative past performance experience on similar contracts."

Appellant argues that "if an offeror claims that its staff has experience based on certain past performance, Section 5.3.2.H. expressly requires that this past performance be identified *in Tab G* ("Offeror Qualifications and Capabilities")" (emphasis in original). We see nothing in our review of the RFP that requires an offeror to list *all* of its past experience on "similar projects and services" or that requires an offeror to include any negative past experience whatsoever (even if one of its staff has experience on an offeror's previous project that the offeror has elected not to include in its proposal). On the contrary, the language of the provision relied on by Appellant specifically provides that an offeror "shall include information on past experience with similar projects and services including information **in support of** the Offeror Experience criteria in Section 3.10.1." (emphasis added).

In short, we believe the objective of this provision is to require an offeror to provide sufficient information in its proposal to demonstrate that both the offeror and its proposed project manager have sufficient experience working on similar projects, and that, because of this experience, they are qualified to do the work required under the RFP. Absent an express requirement that an offeror identify any negative past experience on a similar project, it is Respondent's obligation to do its own due diligence (*e.g.*, checking references, etc.) to uncover any negative information that might affect the evaluation of an offeror's proposal as part of Respondent's evaluation process.

Because there was no express requirement to include any negative past experience working on similar projects, we need not consider whether the IP actually disclosed such information in its Technical Proposal. We agree with the IP that Appellant has failed to state a claim as it relates to the first ground of the Third Supplemental Protest regarding any

requirement that negative past performance be disclosed. Accordingly, this ground will be dismissed as a matter of law.[5]

V. Minimum Qualifications

As the second ground of Appellant's Third Supplemental Protest, Appellant asserted that the IP "failed to meet the [RFP's] offeror and personnel experience minimum qualifications." The IP argues that this ground should be dismissed as a matter of law because Section 1.1 of the RFP did not include any "Offeror Minimum Qualifications" and that the IP fully satisfied all its offeror and personnel experience requirements.

Here, Appellant relies on Section 3.10.1 and cites the specific "Offeror and Personnel Minimum Qualifications" that an offeror was required to meet. While the IP's assertion is true, that Section 1.1 of the RFP provided that "[t]here are no Offeror Minimum Qualifications for this procurement," Section 3.10.1 nevertheless required that an offeror have certain specific experience and that the project manager for the project have certain specific experience.[6]

Whether the experience identified in the IP's Technical Proposal satisfied the minimum experience requirements for an offeror and its project manager are facts that are in dispute. In ruling on a Motion to Dismiss, we are required to assume the truth of the facts alleged by Appellant and give Appellant all reasonable inferences that may be drawn therefrom. Therefore, we must at this juncture deny the Motion to Dismiss on these grounds.

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[5] *See supra* at n.4.

[6] We pause here to note the distinction between "minimum qualifications" of an offeror and the "experience" that an offeror and its key personnel are required to have. Just because an offeror and/or its key personnel have sufficient experience to perform the project does not necessarily mean they can meet any "minimum qualifications" that might be required. Absent a requirement that an offeror satisfy certain "minimum qualifications," an offeror need only provide evidence of its experience related to the proposed project as the solicitation might require. The procurement officer and/or the evaluation committee would then determine whether the offeror is qualified based on the experience identified in the proposal.

We note that the heading for Section 3.10.1 uses the phrase "Offeror and Personnel Minimum Qualifications" to describe what is clearly a requirement that an offeror and its project manager demonstrate that they have certain minimum *experience*, as the language of the provision makes clear.

Accordingly, it is this 2nd day of April 2021 hereby:

ORDERED that the Motion to Dismiss shall be denied, in part, on the asserted grounds that Appellant lacks standing to protest; and it is further

ORDERED that the Motion to Dismiss shall be denied, in part, on the asserted grounds that the first ground of the Supplemental Protest, the Second Supplemental Protest, and the Third Supplemental Protest were untimely filed; and it is further

ORDERED that the Motion to Dismiss shall be granted, in part, on the grounds that the RFP did not require Respondent to apply or consider applying a reciprocal preference; and it is further

ORDERED that the Motion to Dismiss shall be granted, in part, on the grounds that Appellant failed to state a claim regarding the alleged requirement that offerors must disclose all past experience and any negative experience; and it is further

ORDERED that the Motion to Dismiss shall be denied, in part, on the asserted grounds that the IP satisfied, as a matter of law, the "Offeror Experience" and the "Personnel Experience" requirements set forth in the RFP.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Michael J. Stewart, Jr., Esq.
Member

/s/
Lawrence F. Kreis, Jr., Esq.
Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

Md. Rule 7-203 **Time for Filing Action.**

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

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

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Order in MSBCA Nos. 3157, 3158, 3163 and 3169, the Consolidated Appeals of Qlarant Integrity Solutions, Inc., under Maryland Department of Health RFP MDH/OPASS 19-18325.

Dated: April 2, 2021

/s/
Ruth W. Foy
Deputy Clerk