

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of Lorenz, Inc.
Under UMBC RFP No. BC-21217-M**

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Docket No. MSBCA 3172

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Appearance for Appellant

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Appearance for Respondent

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ORDER AND OPINION BY MEMBER STEWART

Upon consideration of Respondent University of Maryland Baltimore County’s (“UMBC”) Motion to Dismiss Or, In The Alternative, Motion for Summary Decision, Appellant Lorenz, Inc.’s (“Lorenz”) Opposition, Respondent’s Reply, and counsels’ arguments at the July 21, 2021 hearing, the Board has determined that it lacks jurisdiction to consider Appellant’s Appeal. Pursuant to COMAR 21.10.05.06C, the Board unanimously grants Respondent’s Motion.

BACKGROUND

On February 1, 2021, UMBC issued Request for Proposals No. BC-21217-M for landscape services (“RFP”). The contract was to be awarded via a three-phase process: Phase 1 – a review of written technical proposals, Phase 2 – a technical evaluation incorporating information from an oral interview and a review of references, and Phase 3 – a review of price proposals.

Lorenz submitted a proposal on February 25, 2021 and, after UMBC’s review of its written technical proposal, Lorenz was selected, along with three other offerors, to proceed to Phase 2. The Evaluation Committee interviewed Lorenz on March 23, 2021. After the interview, the

Evaluation Committee concluded that Lorenz was not susceptible for award and that Lorenz would not advance to Phase 3.

The Procurement Officer (“PO”) for the solicitation, Elizabeth Moss, Executive Director of Procurement and Strategic Sourcing for UMBC, informed Lorenz of the Evaluation Committee’s decision on March 26, 2021 and gave Lorenz a requested debriefing on April 1, 2021. At the debriefing, Lorenz questioned why the PO had not contacted its references. The PO admitted that she had not contacted references for any of the offerors interviewed in Phase 2.

Upon learning that the PO had not contacted its references, Lorenz filed a protest on April 5, 2021 (“the Protest”). The Basis for the Protest was set forth on pages 2-3:

Contrary to the terms of the RFP, the evaluation committee did not include a review of the references submitted by Lorenz in conducting its second technical evaluation. As shown above, that omission was in direct contravention of the express terms of the RFP. One of the consequences of that undisputable violation of the terms of the RFP, is that Lorenz was denied the benefit of the higher consideration due to proposers whose references were from institutions of higher learning which in this case included Towson University and the Baltimore City campuses of the University of Maryland itself. Ms. Moss stated that her failure to contact Lorenz references was due to her lack of time. Even had that oversight been excusable before the interview, it certainly was not afterwards. The Lorenz interview [w]as on March 23, 2021, a Tuesday; calls could have been made on Wednesday or Thursday before the Friday call to advise Lorenz of its disqualification. Candidly, it appears that anger over what she considered Lorenz’s presumptiveness kept her from properly completing the evaluation process, thereby depriving Lorenz of the consideration it was due.

In response to the Protest, the PO contacted all references for Lorenz and the other offerors. The Evaluation Committee then conducted a second technical evaluation, which included considering the references of all offerors. On April 9, 2021, Lorenz was informed that its Protest was sustained but that its references did not enhance its technical proposal and, therefore, its proposal was still not susceptible for award and could not proceed to Phase 3.

On April 14, 2021, the PO issued her final written decision sustaining the Protest. On April 19, 2021, Lorenz filed a timely Notice of Appeal of the PO's final decision.

STANDARD OF REVIEW

In the context of a motion to dismiss, the Board 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 Board only has "jurisdiction to hear and decide all appeals arising from the final action of a unit." *See* MD CODE ANN., STATE FIN. & PROC. §15-211(a).¹ The Board does not have jurisdiction to hear and decide this Appeal because the PO sustained the Protest and provided Appellant with all of the relief it requested therein. There is nothing left for the Board to consider.

Appellant nevertheless asserts that the PO's anger (or "bias," as was alleged in the Notice of Appeal but not included in the Protest) figured into her determination that Appellant's proposal was not susceptible for award and could not progress to Phase 3. Whether the PO's failure to

¹ Respondent, as part of the University System of Maryland ("USM"), is required to comply with policies and procedures it develops and as approved by the Board of Public Works and the Administrative, Executive, and Legislative Review Committee of the General Assembly in accordance with MD. CODE ANN., EDUC. §12-112. Section X.B.8 of the *USM Procurement Policies and Procedure* (Revised – July 1, 2016) provides that

- (a) Protestors are required to seek resolution of their complaints with the Procurement Officer.
- (b) A subsequent appeal by a protestor shall be to the Appeals Board and shall be filed within 10 days of receipt of the Procurement Officer's decision. All costs associated with filing and prosecuting an appeal shall be borne by the Protestor.
- (c) Protests shall be handled by the Appeals Board in accordance with the Code of Maryland Regulations, Title 21, Subtitle 10 Administrative and Civil Remedies, Chapters 02, 03, 05, and 07 as they may be amended from time to time.

contact references was due to any anger on her part is an issue that was resolved when the PO sustained the Protest and took appropriate curative action to comply with the RFP requirements (*i.e.*, the PO contacted all of the offerors’ references). Once the Evaluation Committee performed a second Phase 2 technical evaluation, which considered all of the offerors’ references, the first Phase 2 technical evaluation became moot.

At this point, if Appellant still believed that the PO’s ultimate determination to exclude Appellant from further competition and prohibit it from progressing to Phase 3 was due to her anger or some sort of perceived bias, Appellant was required to file a new protest challenging the propriety of the second and final Phase 2 technical evaluation. But that protest, to the extent that it may exist, is not before us in this Appeal. Accordingly, the Board does not have jurisdiction to consider that issue in this Appeal.²

ORDER

Based on the foregoing, it is this 26th day of July 2021 hereby:

ORDERED that Respondent’s Motion to Dismiss is GRANTED.

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

² At the hearing, Appellant argued that its Protest contained two separate and distinct issues: (i) that the PO failed to review its references, and (ii) that the PO was generally biased or had an improper motive for evaluating it poorly. Appellant asserted that the PO never addressed the second issue in her decision and, therefore, the issue survived the PO’s sustaining of what Appellant contended was a decision on only the references issue. The Board disagrees. The only issue properly raised in the Protest that violated the Procurement Law was the PO’s failure to review references. The PO’s anger and Appellant’s presumptiveness mentioned in the last sentence of the “Basis for Protest” was simply the reason the PO failed to contact references. Even if the PO’s motives for failing to contact references was a valid second and separate issue, and even if it did not require a new protest (which the Board unequivocally concludes herein that it does), the Board would still not have jurisdiction to hear it because it was never expressly addressed in the PO’s final decision.

I concur:

/s/
Bethamy N. Beam, Esq, Chairman

/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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Order in MSBCA No. 3172, the Appeal of Lorenz, Inc., under University of Maryland Baltimore County RFP No. BC-21217-M.

Dated: July 26, 2021

_____/s/
Ruth W. Foy
Deputy Clerk