BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
WEXFORD HEALTH SOURCES, INC.	*	
	*	Docket No. MSBCA 3066, 3081, & 3086 (Consolidated)
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES	*	
RFP No. Q00177058		

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OPINION AND ORDER BY CHAIRMAN BEAM

Having read and considered Appellant, Wexford Health Sources, Inc.'s Motion for Summary Decision in Appeal No. 3081, the Interested Party Corizon Health Inc.'s ("Corizon") Response thereto; the Respondent, Department of Public Safety and Correctional Services' Response thereto; the Appellant's Reply thereto; as well as Respondent's Cross-Motion for Summary Decision; and after a hearing thereon on June 27, 2018, the Board finds as follows:

FINDINGS OF FACT

On December 29, 2016, Respondent issued Request for Proposals No. Q0017058 (the "RFP") seeking a contractor to provide inmate medical services and utilization management at Respondent's facilities. The RFP required offerors to submit a Technical Proposal and a Financial Proposal, which would be evaluated separately. Offerors were instructed to include in the Executive Summary of their technical proposals a statement as to whether the offeror had any exceptions to any of the requirements, terms, or conditions of the RFP.

In the Executive Summary of Corizon's Technical Proposal, dated May 10, 2017, Corizon stated that it "takes no exceptions to the requirements of the RFP, the Contract (Attachment A), or any other attachments provided by the [Respondent] as part of this

procurement process." Immediately following this statement, Corison stated that "[w]e desire to meet with [Respondent] upon contract award to clarify and memorialize certain RFP language prior to contract execution." Corizon did not elaborate any further on its request.

During the evaluation of Technical Proposals, Respondent issued a Cure Letter to Corizon in which Respondent asked, among other things:

> *Clarification:* The transmittal letter states that Corizon takes no exceptions to the terms of the RFP and its Attachments including the Contract.
>
> *Cure*: Please confirm that the proposal includes no exceptions to the terms of the RFP or the Contract Terms.

On July 20, 2017, Corizon sent a letter to Respondent that responded, in part, as follows: "Corizon Health confirms that the proposal includes no exceptions to the terms of the RFP or the Contract terms."

Also in the Cure Letter, Respondent asked:

> *Deficiency*: Section 4.4.2.3 of the RFP requires that any exceptions to the terms and conditions be identified in the Executive Summary. The Executive [sic] does not include any exceptions but page 432 of the Proposal includes time in the implementation plan for contract development and execution and includes a line item for contract negotiations.
>
> *Cure*: Please confirm that Corizon has taken no exceptions to any aspect of the RFP, including Attachment A, the Contract to be executed upon award.

In its July 20, 2017 letter, Corizon responded again that "Corizon Health confirms we are taking no exceptions to any aspect of the RFP, including Attachment A, the Contract to be executed upon award."

Respondent did not explicitly ask Corizon about its desire to meet, clarify, and memorialize certain RFP language upon contract execution (hereinafter the "Disputed Language"), but, as set forth above, did request that Corizon confirm that it was not taking any

exceptions to any of the RFP or Contract terms and conditions. Corizon confirmed this twice in its July 20, 2017 response letter. There is no evidence that the parties ever discussed Corizon's request prior to contract execution or at any other time. The Contract was ultimately executed by Corizon on September 15, 2017, and by Respondent on September 27, 2017.

On February 1, 2018, Appellant filed its Second Supplemental Protest (the "Protest"), asserting six (6) separate grounds in protest of the proposed contract award to Corizon. The second basis of its Protest stated that "Corizon's proposal cannot be the basis for award because it is, at best, ambiguous regarding whether Corizon took exception to, or accepted, the requirements of the RFP."

On March 15, 2018, the Procurement Officer ("PO") for Respondent denied Wexford's Protest. On March 23, 2018, Wexford filed this Appeal, which was docketed as Appeal No. 3081.

On May 18, 2018, Wexford filed a Motion for Summary Decision. On June 11, 2018, Corizon filed an Opposition to Wexford's Motion, and Respondent filed a Response and a Cross-Motion for Summary Decision. On June 26, 2018, Wexford filed a Reply to Respondent's and Corizon's Responses to its Motion. At the time of the hearing of all dispositive motions on June 27, 2018, the Cross-Motion was not ripe for review because the non-moving parties had not had an opportunity to file a written response within the allowable time limits. At the hearing, Wexford was given the option to respond orally to the Cross-Motion at the hearing or to submit a written response within the time allowed. Wexford chose to respond to the Cross-Motion orally at the hearing.

At the hearing on June 27, 2018, all parties agreed on the record that there was no patent or latent ambiguity as it related to the Disputed Language in the Executive Summary of Corizon's Proposal. Rather, all parties agreed that interpretation of the Disputed Language and its legal effect was purely a question of law, specifically, a matter of contract interpretation and construction, to be determined by the Board.

STANDARD OF REVIEW FOR SUMMARY DECISION MOTIONS

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2):

> The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See*, *Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993).

DECISION

Wexford asserts that there is no genuine dispute of fact that Corizon's offer was not "certain and definite," as required by Maryland law, and that "material terms cannot be left for future settlement or negotiation." Wexford argues that Corizon's express "desire to meet with [Respondent] upon contract award to clarify and memorialize certain RFP language prior to contract execution" was an "escape clause" that gave Corizon a "second bite at the apple" and which amounted to a "reservation of rights." In short, Corizon argues that "[g]iven the express language of Corizon's proposal, which we have referred to as a reservation of rights, Corizon's offer was not 'certain and definite'; rather, 'material terms [were] left for future settlement.'"

By contrast, Corizon contends that the expression of a "'desire…to clarify certain RFP language' was not a 'reservation of rights' when it was coupled with Corizon's repeated statement that it accepted and took no exceptions to the terms of the Contract, RFP, and all attachments." Corizon likens this dispute to the dispute in *TransCore, LP*, MSBCA No. 2485, 6 MICPEL ¶567 (2005), in which the proposed awardee requested in its BAFO that portions of the RFP be rewritten for clarification, while also including a blanket statement that it accepted all of the terms and conditions of the RFP without exception. TransCore protested, but the Board affirmed the PO's denial of TransCore's Protest. *Id.* at 8-9. Corizon argues it did nothing more than what the proposed awardee did in *TransCore*—it took no exceptions, but expressed a desire to clarify.

Respondent argues that "[a] general statement of 'desire to meet to clarify and memorialize certain RFP language prior to contract execution' does not constitute an exception of any term or condition of the RFP, and when read in the context of the entirety of Corizon's proposal, is not a material term that negates contract formation." Respondent relies on general principles of contract interpretation to support its position, asserting that "courts should 'avoid interpreting contracts so as to nullify their express terms' and that Wexford's interpretation would render meaningless Section 1.24 of the RFP, which provides that if an Offeror does not take exception, it is deemed to have accepted the terms and conditions of the RFP. *See, Calomiris v. Wood*, 353 Md. 425, 441 (1999).

We are not persuaded by Wexford's argument that the Disputed Language constituted a reservation of rights to negotiate material terms further, particularly in light of the numerous express statements by Corizon that it did not take any exceptions to the terms of the RFP or the Contract, some of which occurred after the Executive Summary was submitted and after

Respondent requested confirmation that Corizon was not taking any exceptions to any of the RFP terms and conditions. In responding to the Cure Letter, Corizon did not renew its request to meet to clarify any RFP language; rather, Corizon reaffirmed that it was not taking any exceptions to any terms or conditions of the RFP or Contract. Its previous request was just that—a request, an expression of desire, and nothing more. Respondent was under no obligation to respond to this request, and certainly under no obligation to negotiate any terms any further.

Moreover, Corizon's request was to *clarify* and *memorialize* certain language. The plain meaning of the word "clarify" is to make an existing statement less confused and more clearly comprehensible. It does not mean to negotiate, modify, or otherwise amend. The plain meaning of the word "memorialize" is to preserve the memory of something which, in this case, was the clarification of certain language in the RFP.

In construing the language of a contract, we must follow certain rules of construction. For example:

> where two provisions of a contract are seemingly in conflict, they must, if possible, be construed to effectuate the intention of the parties as collected from the whole instrument, the subject matter of the agreement, the circumstances surrounding its execution, and its purpose and design. And, if a reconciliation can be effected by a reasonable interpretation, such interpretation should be given to the apparently repugnant provisions, rather than nullify any.

Heist v. Eastern Sav. Bank, FSB, 165 Md. App. 144, 151 (2005)(quoting *Chew v. DeVries*, 240 Md. 216, 220-21 (1965)). We do not find Appellant's argument to be a reasonable interpretation of Corizon's Proposal because the lone inclusion of the Disputed Language in the Executive Summary is easily reconciled when considering the instrument as a whole; specifically, the repeated unequivocal assertions in the Executive Summary and the subsequent July 20, 2017 Response to Respondent's Cure Letter, in which Corizon confirmed that it did not take any

exceptions to any of the terms of the RFP or Contract. To accept Wexford's interpretation as reasonable would require that we ignore, or "nullify" Corizon's repeated unequivocal and specific assertions, which would be contrary to Maryland law, and that we ignore the plain meaning of the word "clarify."

In addition, "[w]here two clauses or parts of a written agreement are apparently in conflict, and one is general in character and the other is specific, the specific stipulation will take precedence over the general, and control it." *Lumber Co. v. Bldg. & Savings Assn.*, 176 Md. 403, 408 (1939). In this case, the general statement of a desire to meet to clarify and memorialize "certain" unspecified language of the RPF must yield to the numerous specific assertions that Corizon did not take any exceptions to any of the terms of the RFP or Contract.

ACCORDINGLY, based on the foregoing, it is this 5th day of July, 2018, hereby:

ORDERED that Appellant's Motion for Summary Decision is denied; and it is further

ORDERED that Respondent's Cross-Motion for Summary Decision is granted.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Ann Marie Doory, Esq.

/s/
Michael J. Stewart, Esq.

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

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

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

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in MSBCA Nos. 3066, 3081 and 3086 (Consolidated), Appeals of Wexford Health Sources, Inc., under Maryland Department of Public Safety and Correctional Services RFP No. Q00177058.

Dated: July 5, 2018

/s/
Ruth W. Foy
Deputy Clerk