

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
6 St. Paul Street
Suite 601
Baltimore, Maryland 21202-1608
Telephone: (410) 767-8228
Toll Free Telephone: 1-800-827-1135

SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2514	Date of Decision: 03/24/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DHMH RFP No. DHMH-OCPMP-8679-05	
Appellant/Respondent: First Health Services Corporation DHMH OCPMP 06-8871	

Decision Summary:

Protest requirements - Required minimum requirements which must be included in a protest - Certain requirements must be included in a protest, and the failure to include those requirements renders a protest legally insufficient.

Protest requirements - Failure to include required statement of reasons for protest - The failure to include the required statement of reasons for the protest (per COMAR 21.10.02.04) renders protest legally insufficient.

Protest requirement - Timeliness - Failure to list reasons for protest in timely manner - The failure to file reasons for an appeal with a procurement officer within seven days of when reasons for protest were known resulted in an untimely protest.

Timeliness of filing of Protest - Failure to file protest with procurement officer within seven days is mandatory jurisdictional requirement for legal protest - Filing a proper protest with a procurement officer within seven days after the basis for a protest is known or should have been known (COMAR 21.10.02.3B) is a mandatory jurisdictional requirement for a legal protest. Failure to do so results in a protest which may not be considered.

THESE HEADNOTES ARE PRODUCED FOR ADMINISTRATIVE REFERENCE AND OPERATIONAL USE ONLY AND SHOULD NOT BE CONSIDERED "OFFICIAL TEXT" OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS, NOR SHOULD IT BE REFERENCED OR GIVEN ANY LEGAL STATUS. A COPY OF THE FULL AND COMPLETE DECISION SHOULD BE CONSULTED AND REFERENCED. FOR FURTHER INFORMATION, CONTACT THE BOARD OF CONTRACT APPEALS.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of First Health)
Services Corporation)
) Docket No. MSBCA 2514
)
Under DHMH OCPMP 06-8871)

APPEARANCE FOR APPELLANT: Lewis J. Baker, Esq.
 Todd R. Metz, Esq.
 Timothy E. Heffernan, Esq.
 Kirk J. McCormick, Esq.
 Watt, Tieder, Hoffar &
 Fitzgerald, L.L.P.
 McLean, VA

APPEARANCE FOR RESPONDENT: Joel Tornari
 Assistant Attorney General
 Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Stephen M. Sorett, Esq.
(ACS State Healthcare, LLC) Thomas C. Papson, Esq.
 Kara M. Klaas, Esq.
 McKenna Long & Aldridge LLP
 Washington, DC

OPINION BY BOARD MEMBER BURNS

Interested Party ACS State Healthcare, LLC (ACS) has filed a Motion to Dismiss the Appeal of First Health Services Corporation (First Health) in the above captioned matter. ACS claims that the protest filed by First Health with the Department of Health and Mental Hygiene (Department) failed to meet the requirements of COMAR 21.10.02.04 C. For the reasons that follow the Board finds that the protest filed by First Health failed to comply with COMAR, that a timely protest was not filed by First Health and that the Board will, consequently, dismiss this appeal because of a lack of jurisdiction over this matter.

Findings of Fact

1. Respondent, the Maryland Department of Health and Mental Hygiene (Department) is a State agency which deals with the physical, mental and social health of Marylanders.
2. On May 31, 2005, the Department issued a Request for Proposals (RFP) entitled Maryland Medicaid Point-of-Sale Electronic Claims Management Systems, RFP Number DHMH-OCPPM-06-8871. Agency Report Exhibit 1.
3. Two proposals were timely submitted. One proposal was submitted by ACS State Healthcare, LLC (ACS) and one was submitted by the incumbent, First Health Services Corporation (First Health).
4. Best and Final Offers were submitted by both offerors in September, 2005.
5. On October 13, 2005, the Evaluation Committee forwarded a recommendation to the Procurement Officer, Ms. Sharon R. Gambrill, recommending that ACS be awarded the contract.
6. The Procurement Officer subsequently performed a review of the Evaluation Committee's recommendation and concurred with the recommendation, finding that ACS's proposal was the most advantageous to the State.
7. On November 2, 2005, the Procurement Officer notified the two offerors by way of a letter (sent by facsimile) that ACS had been selected for award of the contract. Agency Report Exhibits 28 and 29.
8. On November 3, 2005, First Health submitted a "Public Information Act" request for documents relating to the RFP. Agency Report Exhibit 30.

9. On November 7, 2005, First Health filed a "protest" of the Award of the contract with the Procurement Officer. Agency Report Exhibit 31.
10. In the November 7, 2005, letter of First Health to the Procurement Officer, First Health stated that it was submitting "its timely protest. . . to the proposed award of a contract under the RFP" to ACS. Agency Report Exhibit 31.
11. In the November 7, 2005, letter, First Health noted that it had made the Public Information Act request on November 3, 2005, and that a debriefing had been scheduled (at First Health's request) for November 10, 2005.
12. First Health claimed, therefore, that:

FHS submits that the mere knowledge that the State intends to make an award to another vendor is not sufficient information to form the basis of a protest under COMAR §21.10.02.03.B. To the contrary FHS will not possess the requisite knowledge to form the basis of a protest, if in fact one exists, until the debriefing has taken place and the requested procurement materials have been received from the State and reviewed by FHS. Thus, FHS hereby reserves the right to amend this Protest to include any bases thereof that are determined to exist from the debriefing and procurement document review.

Agency Report Exhibit 31.

13. First Health further claimed that:

[I]t is patently clear that the protest period allowed by MCA (sic) and COMAR does not commence with the receipt of a notice of award. Alternatively, it does begin at the time the aggrieved party knows or should have known the basis for a protest. As evidenced by the Award letter itself, the specific rationale for the award determination will not be known, at the earliest, until a debriefing is held. Even then, the vendor may be without sufficient information to know if the procurement, in all respects, was conducted properly with respect to, for example, the awardee's compliance with all solicitation

requirements and the state's informed, fair and accurate evaluation process, until essential procurement documents are made available for review.

Agency Report Exhibit 31.

13. On November 10, 2005, the Procurement Officer and representatives from both the Department and the Attorney General's Office conducted the debriefing requested by First Health. At the debriefing, the Procurement Officer indicated that she had determined that both proposals were technically acceptable and comparable, and that she had determined that award of the contract should be made to ACS based on its significantly lower price. The Procurement Officer supplied blank technical and financial evaluation documents which had been used during the procurement process to rate all proposals, and which corresponded to the evaluation factors and weights listed in the RFP.
14. First Health did not submit an "amendment" to its November 7, 2005, "protest" after the November 10, 2005, debriefing was held.
15. On November 17, 2005, the Procurement Officer denied First Health's "protest" by way of a letter. Agency Report Exhibit 33.
16. In the November 17, 2005, denial letter, the Procurement Officer pointed out that if First Health had learned any information during the debriefing that gave rise to a protest, such a protest should be filed within 7 days of the date of the debriefing.
17. First Health did not attempt to "amend" its November 7, 2005, "protest" or file a new protest with the Procurement Officer subsequent to the debriefing - and has, in fact, never done so.

18. First Health filed the instant appeal with the Maryland State Board of Contract Appeals (Board) on November 28, 2005. Agency Report Exhibit 35.
19. The bases for the instant appeal were that the Department failed to follow the stated evaluation criteria set forth in the RFP (and utilized cost as the primary determinant of award) and that the evaluation of proposals and selection of ACS as awardee was arbitrary. Agency Report Exhibit 35.
20. ACS filed a Motion to Dismiss the Appeal of First Health Services Corporation on February 24, 2006. ACS asserts that the Board lacks jurisdiction to consider First Health's Appeal because First Health has failed to comply with COMAR requirements which has resulted in an untimely appeal being filed by First Health with the Board in this matter.
21. First Health responded with an Opposition to Motion to Dismiss which was filed on March 6, 2006.
22. A hearing was held on ACS's Motion to Dismiss on March 10, 2006.

DECISION

ACS has filed a Motion to Dismiss the Appeal of First Health based on First Health's failure to meet the requirements of COMAR 21.10.02.04 C. For the reasons given on the record at the hearing on this Motion which was held on March 10, 2006, and for the reasons that follow, ACS's Motion to Dismiss will be granted by the Board.

COMAR 21.10.02 deals with the filing of protests in a State procurement. A protest may be filed by an interested party with the appropriate procurement officer against an award or proposed award of a contract. COMAR 21.10.02.02 A. Such a protest "shall be in writing and addressed to the procurement officer." COMAR 21.10.02.02 B. Except in circumstances not relevant to the case

at issue, "protests shall be filed not later than 7 days after the basis of a protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03 B. "Filed" means receipt by the procurement officer (and a protest received by the procurement officer after the time limits established by regulation may not be considered). COMAR 21.10.02.03 C.

The Board has jurisdiction to hear and decide all appeals arising from the final action of a unit on a protest relating to the formation of a procurement contract. *State Finance and Procurement Article §15-211(a), Annotated Code of Maryland*. In order for the Board to have jurisdiction over a protest, however, the protestor must first present the issue(s) to be protested to the procurement officer for review and decision as per the requirements of COMAR. The requirements for filing a protest are jurisdictional and are strictly construed. NumbersOnly-NuSource JV Maryland Institute for Emergency Medical Services Systems, MSBCA 2303, 5 MSBCA ¶521 (2002).

In sum, a protest must first be presented in a timely fashion to a procurement officer for consideration before it can be filed as an appeal with the Board.

COMAR 21.10.02.04 lists certain "minimum" requirements which must be included in a protest, including "[A] a statement of reasons for the protest". COMAR 21.10.02.04 C.; see also *NumbersOnly-Nusource JV, supra*.

First Health's November 7, 2005, "protest" contains no such statement of reasons for the protest.

In fact, as First Health goes to great lengths to illustrate in its own "protest" letter of November 7, 2005, it was the clear position of First Health on November 7, 2005, that First Health did "not possess the requisite knowledge to form the basis of a protest" as of November 7, 2005. Agency Report Exhibit 31.

Significantly, First Health noted in making that statement that it did not have the requisite knowledge to form the basis of a protest, **"if in fact one exists"** (emphasis added), Agency Report Exhibit 31, and would have no such knowledge until after the debriefing (which was scheduled for November 10, 2005) was held and "the requested procurement materials have been received and reviewed by" First Health. Agency Report Exhibit 31.

Later in that same November 7, 2005, letter First Health reiterated its position by stating that:

Based on the facts and applicable law, it is patently clear that the protest period allowed by MCA (sic) and COMAR does not commence with the receipt of a notice of award. Alternatively, it does begin at the time the aggrieved party knows or should have known the basis for a protest. As evidenced by the Award letter itself, the specific rationale for the award determination will not be known, at the earliest, until a debriefing is held. Even then, the vendor may be without sufficient information to know if the procurement, in all respects, was conducted properly with respect to, **for example, the awardee's compliance with all solicitation requirements and the state's informed, fair and accurate evaluation process,** until essential procurement documents are made available for review. (emphasis added).

Agency Report Exhibit 31.

The Board finds that it is abundantly clear that First Health itself recognized in its November 7, 2005, letter of "protest" that First Health did not have, on November 7, 2005, sufficient knowledge in order to state the basis or bases for protesting the award of the contract to ACS and would not have such knowledge until the debriefing on November 10, 2005, at the earliest.

The Board further finds that is also clear that the "protest" letter of November 7, 2005, does not constitute a valid protest under COMAR 21.10.02.04 C. because it fails to include any "statement of reasons for the protest." Indeed, First Health

made very clear that it had no reasons for protest of the award as of November 7, 2005, and would not have any such reasons until the debriefing on November 10, 2005, at the earliest.

A protestor may properly delay filing its protest until after a debriefing where information provided to the protestor earlier left uncertain whether there was any basis for protest. Eisner Communications, Inc., MSBCA 2438, 2442 and 2445, ___ MSBCA ___ (2005); United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 (1989) at p.16.

As we have noted, however, a protestor must file its protest no later than seven days after the basis of the protest is known or should have been known. A protestor must comply with this requirement and the other requirements of COMAR 21.10.02 in order to file a valid protest.¹

The only "protest" filed by First Health with the procurement officer before the filing of the November 28, 2005, appeal with the Board was the letter of November 7, 2005. As explained, that "protest" was defective since it failed to supply a statement of reasons for the protest as required by COMAR 21.10.02.04 C.

Whatever the letter of November 7, 2005, was, it was not a legally sufficient protest under COMAR.

¹ A comparison of the facts here and the facts in *Eisner Communications, Inc.*, *supra*, illustrate the process of how a protestor can eventually "know" of facts that provide reasons for a protest. A long recitation of the Eisner facts was given by the Board at the Hearing held in the instant case, but, in summary, in Eisner, on July 23, 2004, Eisner was advised that it was not the recommended awardee of the contract at issue in that case. Eisner requested a debriefing which was conducted on August 17, 2004. As a result of the information furnished, and not furnished, at the August 17, 2004, meeting, Eisner believed that the debriefing process was not complete on August 17, 2004, and requested additional information. What followed were several communications between Eisner and various procurement representatives, culminating in a telephone conversation on September 15, 2004. As a result of information received during that September 15, 2004 telephone conference, Eisner filed its first protest on September 20, 2004.

Eisner Communication, Inc., therefore, provides an illuminating illustration of how the debriefing process can result in information being obtained by an offeror that gives rise to a protest when a protestor is not satisfied with an initial debriefing and continues to seek information as part of an on-going debriefing process. Clearly, First Health, for whatever reason(s), did not choose to challenge the ending of the debriefing process on November 10, 2005, and failed to follow up the November 10, 2005 debriefing meeting with further discussions.

The Procurement Officer responded to First Health's November 7, 2005, letter by way of a letter dated November 17, 2005. Agency Report Exhibit 33. In that letter, the Procurement Officer found First Health's "protest" of November 7, 2005 to be without merit and denied the "protest" Subsequently, First Health appealed the Procurement Officer's November 17, 2005, denial to the Board. The grounds for the appeal were that the Department failed to follow the stated evaluation criteria set forth in the RFP (and utilized cost as the primary determinant of award) and that the evaluation of proposals and selection of ACS as awardee was arbitrary. Agency Report Exhibit 35.

Unfortunately for First Health, neither of those grounds was ever raised by way of a protest filed with the Procurement Officer. Neither ground appears in the November 7, 2005 letter of First Health to the Procurement Officer.

The Board specifically rejects the notion that either appeal ground was presented to the Procurement Officer in the November 7, 2005, letter. The text of that letter offered in support of this position by First Health states:

Even then, the vendor may be without sufficient information to know if the procurement, in all respects, was conducted properly with respect to, **for example, the awardee's compliance with all solicitation requirements and the state's informed, fair and accurate evaluation process,** until essential procurement documents are made available for review. (emphasis added).

The highlighted text was clearly not meant to serve as the reasons for a protest on November 7, 2005. In fact, the highlighted text merely provides clearly hypothetical examples of reasons that might be available to First Health for a protest (1) after the debriefing was held and (2) subsequent documents regarding the RFP process were made available to First Health.

As the Board noted in *NumbersOnly-NuSource JV, supra*, the requirement that a protest include a statement of reasons for the protest prevents a situation from occurring where a party can file a protest without setting forth reasons for the protest and supply the reasons days, weeks, or months later, potentially delaying the procurement and making it impossible for the procurement officer to render a decision as to the merits of a protest. *Id.* at p.3.

That is exactly what First Health has attempted to do in this matter. The November 7, 2005, letter of "protest" contained no reasons for protesting the award, and indeed pointed out that exact fact itself in very clear language. No further "protests" were filed by First Health between the November 7, 2005, letter and the November 28, 2005 appeal to the Board.

That November 28, 2005, appeal contains reasons for protesting the award of the contract to ACS that were never submitted to the procurement officer for determination, as is mandated by COMAR. This appeal with the Board is, in reality, a new protest which should have been filed with the Procurement Officer. Bid protests must be filed initially with the appropriate procurement officer. See, COMAR 21.10.02.; *State Finance and Procurement Article §15-211(a), Annotated Code of Maryland*. First Health's failure to raise these protest grounds with the Procurement Officer preclude the Board's consideration of this appeal.

In addition the Board finds that (even when giving First Health the benefit of the doubt as to when First Health knew or should have known the reasons for a protest of the award of the contract to ACS) First Health had actual knowledge of the reasons for protest - as these reasons were filed with the Board - no later than the date of the filing of the appeal with the Board on November 28, 2005. First Health failed to present these reasons,

as listed in the appeal to this Board, to the Procurement Officer within seven days of when it knew that these reasons for protest existed (November 28, 2005 for purposes of this decision) and any such protest at this time would be untimely.

In fact, First Health has never presented the reasons listed in the appeal to the Board to the Procurement Officer for review and determination.

A protest that is not timely may not be considered by the Board and the failure to file a timely protest is jurisdictional, requiring that an appeal involving a late protest be dismissed. *NumbersOnly-NuSource JV, supra*, at p.4.

Neither a protestor nor a procurement officer nor the Board has the power to waive the clear mandatory requirements of the Code and COMAR regarding the procedures that must be followed when protesting the award of a State contract in Maryland.

The November 28, 2005, appeal of First Health (regarding the awarding of the subject contract to ACS) to this Board was and is untimely and must be dismissed.

Wherefore, it is Ordered this day of March, 2006 that the Motion to Dismiss the Appeal of First Health Services Corporation in the above captioned matter is granted.

Dated:

Michael W. Burns
Board Member

I Concur:

Robert B. Harrison III
Chairman

Michael J. Collins
Board 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 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 decision in MSBCA 2514, appeal of First Health Services Corporation under DHMH OCPMP 06-8871.

Dated:

Michael L. Carnahan
Deputy Recorder