

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of )  
Medical Management and )  
Rehabilitation Services )  
 )  
 ) Docket No. MSBCA 2856  
Under )  
DHMH RFP - "Rare and )  
Expensive Case Management )  
Services" )

APPEARANCE FOR APPELLANT: Robert Miller  
Bel Air, Maryland

APPEARANCE FOR RESPONDENT: Lydia B. Hoover  
Mark J. Davis  
Assistant Attorneys General  
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Philip M. Andrews  
Kramon & Graham, P.A.  
Coordinating Center for Home Baltimore, Maryland  
and Community Care, Inc.

OPINION BY BOARD MEMBER DEMBROW

This bid protest is dismissed for lack of jurisdiction because the solicitation at issue is not a procurement as defined by Maryland statute and regulation.

Findings of Fact

1. On December 20, 2012, the Department of Health and Mental Hygiene (DHMH) issued a Request for Proposals (RFP) to identify and retain a single vendor to provide case management services for those of its clients requiring rare and expensive medical (REM) treatment. (State's Ex. 1, §1.1.1, p. 5.)
2. Medicaid participants are eligible for participation in the

REM program based upon their having a diagnosis of a qualifying condition as specified by a list set forth in the Code of Maryland Regulations (COMAR) 10.09.69.17. (State's Ex. 1, RFP Appendix A, pp. 96-107.)

3. When a consenting Medicaid participant has one or more of the diagnoses specified by the foregoing regulation, the participant is disenrolled from their ordinary managed care organization and enrolled instead into the specialized REM program. (State's Ex. 1, RFP § 1.1.1, p. 5; COMAR 10.09.63.06B3.)
4. In the past, instead of using a single provider, DHMH has used multiple vendors for the services here solicited, including appellant Medical Management and Rehabilitation Services, Inc. (MMARS), and interested party The Coordinating Center for Home and Community Care, Inc. (TCC).
5. Although past iterations of State solicitations to identify providers of REM services for DHMH were conducted as procurements pursuant to COMAR Title 21, the current RFP that is the subject of the instant appeal was not conducted as a procurement, as that term is defined under Division II of the General Procurement Law governed by COMAR Title 21. (See Md. Code Ann., State Fin. & Proc. § 11-101(n)(2)(iii); COMAR 21.01.02.01B(25)(b)(ii); COMAR 21.01.03.01A(1)).
6. Section 11-101(n) of the State Finance and Procurement Article provides:
  - (2) "Procurement contract" does not include:...
  - (iii) a Medicaid, Judicare, or similar reimbursement contract for which law sets:
    1. user or recipient eligibility; and
    2. price payable by the State; or
  - (iv) a Medicaid contract with a managed care organization, as defined in § 15-101(e) of the Health - General Article as to which regulations adopted by the Department establish:
    1. recipient eligibility;
    2. minimum qualifications for managed care

organizations; and

3. criteria for enrolling recipients in managed care organizations.

7. COMAR 21.01.02.01B(25) provides the following express exclusion to the definition of a procurement contract under Maryland law:

(b) "Contract" does not include:...

(ii) Medicaid, Medicare, Judicare, or similar reimbursement contracts for which user eligibility and cost are set by law or regulation.

8. COMAR 21.01.03.01 further provides:

A. The following are exempt from applicability of this title:

(1) Reimbursement contracts (Judicare, Medicaid, Medicare, or similar reimbursement contracts) for which user eligibility and cost are set by law or by rules and regulations;

9. The contract resulting from this RFP will be a Medicaid contract with a Medicaid provider for which the law sets Medicaid recipient eligibility and the price payable by the State for the services rendered. (See COMAR 10.09.69 and COMAR 10.09.36.)

10. The RFP here at issue expressly informed potential offerors that all protests and disputes would be governed by the provisions of COMAR 10.01.03, which establishes procedures for decisions rendered by DHMH in Medicaid provider determinations, stating:

[a]ny appeal related to this solicitation shall be subject to the provisions of COMAR 10.01.03, except that the Department shall hold a hearing, consider any exceptions and render a final decision within 30 days of the date an appeal is filed. Appeals must be filed with the Contract Monitor within seven (7) calendar days of the date of receipt by the Offeror of a letter of non-award or, if the Offeror requests a debriefing, within seven (7) calendar days of the debriefing.

The Department may make an award of this contract notwithstanding an appeal. Appeal by an unsuccessful offeror of an award of this contract does not stay the start date of the contract as agreed to by the Department and the selected awardee.

State's Ex. 1, RFP § 1.14, p. 10.)

11. In order to be eligible for contract award, each offeror is required to be approved as a Medicaid provider. (State's Ex. 1, RFP § 3.4.2.3 & 3.4.2.4; COMAR 10.09.36.)
12. The offeror selected for contract award is paid pursuant to a case rate prescribed in COMAR 10.09.69.14E and F. (State's Ex. 1, RFP § 3.4.2.2, p. 35; RFP Attachment A ¶ 3.1, p. 51; RFP Attachment A ¶ 4, p. 51; RFP Attachment K, p. 127; State's Ex. 2.)
13. Prior to certain regulatory amendments adopted in 2009 establishing by COMAR 10.09.69.14 the price payable to case management service providers, solicitation of REM service providers was conducted as a procurement contract; but the 2012 RFP was not a procurement contract because in 2009 the price payable became fixed by the aforesaid COMAR regulation.
14. Pre-proposal conference was conducted by DHMH on January 16, 2013. (State's Ex. 1, § 1.5, p. 7.)
15. No prospective offeror objected to the specifications set forth in the RFP as initially issued on December 20, 2012 and amended on the same date as the pre-proposal conference.
16. Technical proposals were due January 24, 2013. (State's Ex. 1, RFP § 1.7, p. 8.)
17. No financial proposal was requested by this solicitation, because the selected contractor is paid at the known rates prescribed in advance by regulation. (COMAR 10.09.69.14E & F.)
18. DHMH received proposals from five (5) offerors, namely, Community Health Solutions of America ("CHS"), Integra

Health Management ("Integra"), Integrated Healthcare and Auditing Services, Inc. ("IHAS"), appellant MMARS, and interested party TCC.

19. After review and consideration by its Evaluation Committee, DHMH determined to award the contract to TCC and by correspondence dated April 12, 2013, notified the unsuccessful proposers, CHS, Integra, IHAS, and MMARS, that they had not been recommended for award. (State's Ex. 3, 4, 5, & 6.)
20. By e-mail and by letter also dated April 12, 2013, DHMH notified TCC that it had been recommended for contract award. (State's Ex. 7.)
21. By email dated April 15, 2013, MMARS objected to DHMH award of the contract to TCC on the general basis that "DHMH should have selected MMARS, which offered the most advantageous proposal considering the criteria set forth in the RFP." (State's Ex. 8.)
22. By letter dated April 25, 2013, MMARS supplemented its objection to award of the contract to TCC on two grounds, claiming, 1) "MMARS is the responsible offeror that submitted the most advantageous proposal to the State under the evaluation criteria set forth in the RFP;" and 2) "DHMH's evaluations were tainted by bias in favor of a proposer" other than MMARS. (State's Ex. 9.)
23. Neither of the foregoing objections stated by MMARS to DHMS includes the word, "protest," which is the ordinary term of art used by an aggrieved bidder requesting review of a State agency's proposed contract award in the context of procurements conducted pursuant to COMAR Title 21.
24. DHMH provided to MMARS a debriefing on May 8, 2013. (State's Ex. 10, p. 1.)
25. By letter dated May 15, 2013, MMARS again supplemented its objection to contract award to TCC, repeating its prior

- grounds and complaining also about the scope of the debriefing conference. (State's Ex. 10.)
26. On request of MMARS, DHMH delegated to the Office of Administrative Hearings (OAH) the authority to issue a proposed decision regarding the three (3) claims submitted to DHMH by appellant MMARS. (See *In the Matter of Medical Management and Rehabilitation Services*, Case No. DHMH-MCP-15-13-18911, docketed at OAH on May 15, 2013.)
  27. On June 14, 2013, DHMH filed a Pre-Hearing Conference Statement in the OAH appeal before OAH and on June 18, 2013, MMARS filed its Pre-Hearing Conference Statement in that case. (State's Ex. 11 & 12.)
  28. On June 21, 2013, OAH Administrative Law Judge (ALJ) Judith Jacobson conducted a pre-hearing conference in the MMARS appeal and on June 25, 2013, the ALJ mailed a copy of the Pre-Hearing Conference Order to all parties, which reflected the orders and determinations made at the June 21 pre-hearing conference. (State's Ex. 13.)
  29. Pursuant to COMAR 10.01.03.21A the OAH Order dated June 25, 2013 provided that "[t]he applicable regulation provides that discovery may be taken only in accordance with the stipulation of the parties. The parties have not reached any stipulation, and there is no basis for issuing any order on discovery." (State's Ex. 13 at p. 2.)
  30. The same OAH Order also informed the parties that, separate from the proceedings in the OAH appeal, MMARS could request information from DHMH pursuant to the Maryland Public Information Act. (State's Ex. 13, p.2.)
  31. On June 24, 2013, three days after the ALJ's issuance of a decision limiting the scope of discovery in the OAH Matter, MMARS filed the instant Appeal before the Maryland State Board of Contract Appeals (Board) which was docketed as MSBCA 2856.

32. Pursuant to COMAR 21.10.05.06, a Motion for Summary Decision was filed with the Board by interested party TCC on July 5, 2013 and a similar Motion was filed by the State on July 18, 2013.
33. Appellant opposed the granting of the Motions for Summary Decision by Answer filed August 9, 2013 and hearing on the Motions was conducted on August 27, 2013.

### Decision

It is axiomatic that the Board cannot assert or create jurisdiction over matters for which the Board's jurisdiction is not conferred by statutory authority. The Board's lawful jurisdiction over bid protests is plainly established by Md. Code Ann., State Fin. & Proc. § 15.211(a), which permits recourse to the Board only for matters arising from state activity surrounding "procurement contracts." In the instant appeal, applicable law expressly exempts from Board review this protest which does not involve a procurement contract as defined by statute, specifically Md. Code Ann., State Fin. & Proc. § 11-101(n)(2)(iii).

Consistent with statute, Maryland regulation similarly bars the Board's review of the solicitation here in dispute. COMAR 21.01.02.01B(25)(b)(ii) excludes from the reach of the word, "contract," "Medicaid, Medicare, Judicare, or similar reimbursement contracts for which user eligibility and cost are set by law or regulation." And COMAR 21.01.03.01A(1) also exempts from Board review "reimbursement contracts (Judicare, Medicaid, Medicare, or similar reimbursement contracts) for which user eligibility and cost are set by law or by rules and regulations."

Not only statutory law and regulation, but the RFP itself further states that any appeal related to this solicitation is subject not to COMAR Title 21, which usually governs the Board's

responsibilities, but instead, to COMAR 10.01.03.02B(6), which provides for an entirely different remedy, namely, a hearing before DHMH. Because the Board enjoys jurisdiction only over protests related to the formation of a "procurement contract" and Medicaid provider agreements are not classified as procurement contracts, the Board lacks fundamental jurisdiction to hear the instant appeal.

It is immaterial that appellant was not aware that this solicitation is not governed by COMAR Title 21, as was the case with respect to previous efforts on the part of DHMH to select a number of providers of past REM services. The avenue of recourse available to unsuccessful bidders to pursue an objection to a proposed contract award was set forth in the RFP and neither an entity seeking contract award nor even the State itself is permitted to depart from the remedy specified in the RFP.

Indeed, at least by implication, appellant seems to have earlier recognized that the Board does not have jurisdiction over this complaint when it submitted its initial objections to DHMH by e-mail not even using the word, "protest," and furthermore, when appellant subsequently appealed to DHMH, which delegated hearing authority to OAH. Counsel for the interested party emphasizes that appellant failed to file a formal protest at any time, at least any complaint or objection using the word, "protest," as often repeated in bid protests concerning procurement contract brought before the Board pursuant to COMAR Title 21.

If appellant objected to the Department's transition to a single REM service provider, it should have expressed that objection in timely fashion. While it is pure speculation by the Board, it is entirely possible that DHMH might have rigorously reviewed such an objection, given the possibility of public complaint over choice and continuity of service providers. But the Board is without information regarding whether such an



evaluation was conducted, because no objection was raised by appellant or anyone else.

Similarly, if appellant sought to file a complaint over the method of appellate resolution of bid protest disputes as prescribed in the RFP, it should have expressed such objection prior to the due date for submitting proposals. COMAR 21.10.02.03A provides that a "protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals..." No objection to the form of the solicitation was raised by appellant in timely fashion or otherwise. The deadline for stating such an objection having passed on January 24, 2013, appellant is unable at this late date to assert any objection to the form of the solicitation.

In reviewing the legal sufficiency of agency procurement determinations, the Board is conscious that its duty is not to act as a super-procurement entity, displacing the legitimate discretion and authority on the part of the agency of state government that must later live with the consequences of purchasing decisions. The Board's essential function is much more limited, namely, to review the lawfulness and reasonableness of final determinations made by state agencies as reflected by agencies' denial of bid protests brought by an aggrieved party first to the agency for evaluation and consideration. Here, there is no denial of a bid protest, nor even a protest at all. So there is nothing for the Board to review.

Appellant should be gratified that it does have legal recourse to pursue its various complaints arising from the decision by DHMH to select a competitor for future REM service delivery. However, that recourse is permitted not before this Board, but by the appeal now pending before OAH.

Upon careful consideration of the factual assertions and legal arguments adduced herein, and viewing the evidence in the light most favorable to appellant, resolving all inferences in favor of MMARS, it is clear that the Board lacks jurisdiction to entertain this appeal. As a result, the Motions filed by the State and the interested party must be and are hereby granted.

Wherefore it is Ordered this \_\_\_\_\_ day of September, 2013 that this appeal be and hereby is DENIED.

Dated:

\_\_\_\_\_  
Dana Lee Dembrow  
Board Member

I Concur:

\_\_\_\_\_  
Michael J. Collins  
Chairman

\_\_\_\_\_  
Ann Marie Doory  
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 2856, appeal of Medical Management and Rehabilitation Services Under DHMH RFP - "Rare and Expensive Case Management Services".

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk