



## FINDINGS OF FACT

1. On November 6, 2009, DHR issued a certain Request for Proposals (RFP) to solicit and identify qualified providers of child care services used and relied upon by DHR's Social Services Administration (SSA) in administering its foster care program.
2. The deadline for submission of technical proposals was 4:00 p.m. on January 19, 2010.
3. Section 1.5 of the subject RFP stated specifically in bold print: "**Proposals or unsolicited amendments to Proposals arriving after the closing time and date will not be considered.**"
4. Mumsey anticipated hand-delivery of its proposal to DHR by about 2:00 p.m. on January 19, 2010, but encountered a terrible traffic delay because a portion of the Baltimore beltway (I-695) was flooded and closed due to a burst 12-inch water main at Wilkens Avenue that occurred at 1:25 p.m. that day and as a result, Mumsey did not arrive at DHR to tender its proposal until 4:08 p.m., eight (8) minutes after the deadline for submission.
5. DHR refused to allow Mumsey to submit its proposal after the stated deadline of 4:00 p.m. on January 19, 2010.
6. By letter dated January 26, 2010, Mumsey requested that DHR receive, accept and consider its proposal due to the extraordinary unforeseen extenuating circumstances described above and because Mumsey had successfully and usefully operated its program for the previous ten (10) years.
7. By certified mail dated February 26, 2010 and faxed to Mumsey on March 8, 2010, DHR reiterated its position and notified Mumsey that because its proposal had not been

submitted in timely fashion as required, it could not and would not be considered.

8. By correspondence dated March 15, 2010 and received by the Maryland State Board of Contract Appeals (Board) on March 19, 2010, Mumsey filed the instant appeal with the Board which was docketed as MSBCA No. 2702.
9. No attorney has entered an appearance in this appeal on behalf of Mumsey.
10. On April 9, 2010, DHR filed a Motion to Dismiss the instant appeal, to which Mumsey filed no Opposition or other response; and neither party requested a hearing.

#### Decision

Despite the meritorious service to the State that Mumsey has undeniably performed during the past decade, the Board does not have discretion to exempt appellant from the application of § 21.05.02.10 of the Code of Maryland Regulations (COMAR), which states in pertinent part as follows:

**"Late Bids, Late Withdrawals, and Late Modifications.**

A. Policy. Any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late...

B. Treatment. A late bid...may not be considered. Upon the written approval of the Office of the Attorney General, exceptions may be made when a late bid...is received before contract award, and the bid...would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees..."

As expressly provided above, late bids are strictly barred from consideration. The only exception permitted is when the Office of the Attorney General elects to grant an exemption from the application of this rigid rule because the State itself caused the late submission. No such right exists for

the Board *sua sponte* to exempt bidders from the requirement of timely submission of their proposals. Despite the Board's sympathy with Mumsey's predicament here, the Board is without authority to ignore or modify stringent State regulation. The Board must therefore concur with DHR's determination that a bid due at 4:00 p.m. but not submitted until 4:08 p.m. is indeed late and cannot be considered, even though the cause of the delay cannot be fairly attributed to the bidder.

Only in cases where the State causes delay may a late bid be received and accepted, and even then, only with the approval of the Office of the Attorney General. To carve out an equitable exception might be warranted under the circumstances presented here, but doing so would upset a long history of strict enforcement of bid submission obligations and open the door to potentially devastating impacts upon fundamental bidding requirements. Moreover, the Board is without equitable powers in any event. The Board is authorized only as defined by the statutes and regulations in force and cannot turn a blind eye to them.

When Mumsey realized that the blocked traffic it encountered on January 19, 2010 jeopardized its ability to deliver its bid on time, a Mumsey representative could and should have telephoned DHR and advised the agency of the nature and extent of the delay. Given such notice of highly unusual circumstances obstructing timely delivery of bids on the due date, it is entirely possible that the procurement officer handling bids may have extended the deadline for bid submission not only for Mumsey but for all bidders. This practice is routine for other exceptional events causing potential delay of bid delivery, such as the road closures caused by the extraordinary snowfall experienced in the Baltimore region this past winter. In this procurement, for

example, electronic notice might have been sent to all known bidders that because of the ruptured water main causing afternoon traffic closure on the Baltimore beltway, the deadline for bid submission was being extended for an hour, or possibly until the following morning, or 4:00 p.m. on the day following the initially established deadline. Especially in a procurement such as this one, where many bidders may be deemed acceptable and awarded contracts rather than a single bidder to the exclusion of all the others, it would not have been surprising for the procurement officer reasonably to act in that fashion and uniform treatment of all bidders in that manner would not have been objectionable, even if most bidders did not actually receive notice of the deadline extension and therefore tendered their bids before the initially set cut-off time. But allowing Mumsey and Mumsey alone to submit its bid after the deadline for bid submission surely would have been objectionable and in violation of law and regulation.

Furthermore, the Board notes that COMAR § 21.10.02.10(A) provides:

“appeal by an interested party to the Appeals Board shall be filed within 10 days of receipt of notice of the final procurement agency action.”

It appears undisputed that the ten (10) day period of limitations for filing appeals with the Board commenced here no later than March 8, 2010, when Mumsey had actual notice of DHR's final determination not to accept its proposal. Therefore its appeal was required to be filed on or before March 18, 2010, but it was not actually filed until March 19, 2010. COMAR § 21.10.02.10 further states as follows:

“An appeal received by the Appeals Board after the time prescribed in §A of this regulation [recited above] may not be considered...”

The foregoing regulation governing appellate rights expressly terminates all right to appeal after ten (10) days. Indeed, this limitation is established not only by regulation but also by statute. (See §15-220(b) (1) of the State Finance and Procurement Article of the Maryland Annotated Code.) Thus this appeal must be dismissed not only on the basis of the substantive deficiency described above, but also because the appeal itself was filed a day after it was due.

That Mumsey dated its appeal to the Board March 15, 2010 is irrelevant. It was not received by the Board until March 19, 2010 and was therefore filed and file-stamped the same date. Because the instant appeal is not timely filed, it must be dismissed in accordance state statute and regulation.

Finally, this appeal must be dismissed because Mumsey is not represented by properly qualified counsel. According to its letterhead, it appears to be undisputed that Mumsey is a corporation. COMAR § 21.10.05.03(A) states specifically:

“Corporations, partnerships, and joints ventures shall be represented by an attorney at law licensed in Maryland.”

The Board's March 19, 2010 correspondence to Mumsey acknowledging the filing of its appeal concluded with actual notice of its obligation to retain counsel, but no counsel has entered an appearance in this proceeding on behalf of Mumsey and Mumsey has filed no Opposition to the State's Motion to Dismiss.

Wherefore, it is Ordered this                    day of June, 2010, that the appeal of Mumsey Residential Care, Inc. be and hereby is dismissed with prejudice.

Dated:

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Dana Lee Dembrow  
Board Member

I Concur:

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Michael W. Burns  
Chairman

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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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2702, appeal of Mumsey's Residential Care, Inc. under DHR RFP SSA/RCC-11-001-S.

Dated:

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Michael L. Carnahan  
Deputy Clerk