

**BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

**In the Appeal of Conduent  
State & Local Solutions, Inc.**

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\* **Docket No. MSBCA 3071**

**Under Maryland Transportation Authority  
RFP Contract No. MA-2868-0000**

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**OPINION AND ORDER BY CHAIRMAN BEAM**

Respondent and Interested Party TransCore, LP moved to dismiss this protest appeal on three grounds: lack of standing, failure to file a timely protest, and failure to exhaust administrative remedies. The Board holds that Appellant lacks standing to pursue this appeal. Assuming Appellant’s assertions are true—that the procurement officer (“PO”) unfairly and incorrectly evaluated its offer—there is no reasonable possibility that Appellant would receive the contract award because of its pricing.

**FACTUAL BACKGROUND**

On August 1, 2016, Maryland Transportation Authority (“MDTA”) issued two Requests for Proposals for the third generation Electronic Toll Collections System. The Request for Proposal that is the subject of this Appeal was for a Customer Service Center (“CSC”) System & Services contract for toll collection, transaction processing, reconciliation, reporting, operation of the MDTA toll facilities, and communications and related services (RFP Contract No. MA-2868-0000, hereinafter the “RFP”).<sup>1</sup> A Pre-Proposal Conference and Site Visit were conducted on August 15, 2016. The RFP was amended 15 times. Bid opening was December 15, 2016.

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<sup>1</sup> The other Request for Proposal was for a Toll System contract at MDTA Toll Facilities operated at eight different sites throughout Maryland (*i.e.*, RFP Contract No. MA -2257-0000).

### **Bid Evaluation and Protest**

Five offerors submitted proposals. A Management Selection Committee (“MSC”) reviewed the Technical Proposals, clarifications, and questions and answers. All offerors were determined to be reasonably susceptible of being selected for award. Oral Presentations took place from May 10, 2017 to May 17, 2017. The PO determined it to be in the best interest of the State to request two Technical Best and Final Offers (“BAFOs”) from all offerors. First and Second Technical BAFOs were received by all offerors. After evaluating and ranking all the Technical Proposals, the Price Proposals were opened and ranked. Afterwards, Price Proposal BAFOs were requested, and all offerors submitted Price Proposal BAFOs. One offeror increased its pricing; all other offerors reduced their pricing.

As required by the RFP, the MSC gave higher consideration to Technical over Financial factors. The MSC conducted a final review of all submitted documentation, ranked the proposals overall, and made its recommendation to award the CSC Contract to TransCore, LP (“TransCore”), which was determined to be most advantageous to the State because its Technical Proposal ranked first, its Financial Proposal ranked second, and it was ranked first overall with an evaluated bid price of \$272,881,442. The PO reviewed the proposals and recommendation by the MSC and accepted the MSC's recommendation to award the CSC Contract to TransCore.

Appellant, the incumbent, had its Technical Proposal ranked fifth, its Financial Proposal ranked fifth, and was ranked fifth overall, with an evaluated bid price of \$344,538,179. On December 22, 2017, Appellant was advised that it would not be awarded the CSC Contract. Appellant requested a debriefing and filed an Initial Bid Protest with the PO on December 29, 2017. The debriefing was held January 4, 2018. On January 11, 2018, Appellant filed its

Supplemental Bid Protest (the "Protest"). On January 16, 2018, the PO confirmed receipt of Appellant's Supplemental Bid Protest and withdrawal of its Initial Bid Protest.

Appellant protested the proposed award to TransCore on the grounds that (1) Respondent evaluated Appellant's proposal on past performance rather than on its own terms and, therefore, Respondent's evaluation was "unequal, arbitrary, capricious and/or noncompetitive," and (2) Respondent failed to acknowledge that any perceived weakness in Appellant's proposal was attributable to Respondent's failure to correct Appellant's past contractual failures and, therefore, Respondent's evaluation of Appellant's proposal was based on vague, outdated, and unsubstantiated historical examples (*i.e.*, past performance).

On January 24, 2018, the PO issued her final decision denying Appellant's Protest on the grounds that it was untimely per COMAR 21.10.02.03(A), which requires "[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." The PO stated that the RFP informed all potential offerors that (1) Respondent would evaluate and rank all Proposals per RFP Section 4.2, and (2) that "past performance" would be verified and taken into consideration per RFP Section 3.4.6.2.c.(v).

The PO also asserted that Respondent's RFP sought a contractor with a "superior Technical approach," with a "proven track record." The PO further stated that upon submitting a proposal, each offeror, including Appellant, acquiesced to having Respondent (1) possibly find that another offeror provided a proposal with a "superior Technical approach" and (2) validate past performance. The PO contended that it was apparent from the RFP that (1) any Offeror's Proposal could be determined to be "unequaled" (or determined "most advantageous to the State") and (2) consideration of past performance was required.

The PO stated that Appellant was provided an opportunity to ask questions about the RFP at the Pre-Proposal Conference, and that if Appellant objected to any offeror other than Appellant being evaluated as unequalled (or “most advantageous to the State”) and/or being evaluated on past performance, it should have raised these concerns not only at the Pre-Proposal Conference but in a protest filed prior to receipt of the proposals.

As to the merits of Appellant’s Protest, the PO stated that Appellant’s experience and proposal were not unequalled; Respondent’s evaluation of Appellant’s proposal was proper and in accordance with the terms of the RFP; Respondent appropriately determined Appellant’s proposal did not provide a superior Technical approach; and the PO had final discretion to award the Contract to TransCore. The PO concluded that Respondent’s evaluation of Appellant’s proposal was proper and in accordance with the terms of the RFP.

#### **Procedural History**

Appellant filed its Notice of Appeal with this Board on February 5, 2018. On February 28, 2018, Respondent filed a Motion to Dismiss Appeal, asserting three separate grounds for dismissal: (1) that the Protest was untimely, (2) that the Board lacks jurisdiction because Appellant lacks standing to file a protest, and (3) that Appellant failed to exhaust its administrative remedies.<sup>2</sup> On March 1, 2018, Interested Party TransCore filed its Motion to Dismiss, which incorporated all of the grounds set forth in Respondent’s Motion. On March 28, 2018, Appellant filed a timely Opposition to Respondent’s Motion. On April 5, 2018, the Interested Party filed its Reply to Appellant’s Opposition, which incorporated Respondent’s Reply.

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<sup>2</sup> Respondent also asserted a fourth ground for dismissal—that the Board lacks authority to stay further proceedings in connection with the award of the Contract, but the parties concede that this issue is now moot.

## STANDARD OF REVIEW FOR MOTION TO DISMISS

COMAR 21.10.05.06C provides that the Board may dismiss “an initial pleading which fails to state a claim upon which relief may be granted.” In the context of a motion to dismiss, we assume the truth of all well-pleaded facts and all reasonable inferences that may be drawn therefrom. *Business Interface of Maryland, LLC*, MSBCA No. 3065 at 1 (2018); *see also, U.K. Constr. & Mgmt., LLC*, MSBCA No. 2773 (2011). Dismissal is appropriate only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff (*i.e.*, the allegations do not state a cause of action for which relief may be granted). “At this 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.” *U.K. Constr.*, at 2.

## DECISION

We begin our analysis with the parties’ dispute regarding whether the protest was timely filed. Respondent argues that the Protest was untimely because the RFP clearly stated that Respondent was seeking to award the contract to an offeror with a “proven track record,” therefore, Appellant’s complaint that it was judged based on its past performance was a protest of an alleged impropriety in the solicitation and should have been filed before the deadline for submitting proposals in accordance with COMAR 21.10.02.03A.<sup>3</sup> Appellant counters by asserting that Respondent has misconstrued the basis of its protest because it does not allege that there were any improprieties in the solicitation; hence, COMAR 21.10.02.03A does not apply. Appellant argues

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<sup>3</sup> 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. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation. COMAR 21.10.02.03B.

instead that under COMAR 21.10.02.03B,<sup>4</sup> its Protest filed on January 11, 2018, was timely because it did not learn about the pretextual nature of Respondent's evaluation until after the debriefings on January 4, 2018.

In the context of a motion to dismiss, we must assume the truth of the facts pled by Appellant. Given that Appellant does not contend that there were any improprieties in the solicitation, asserting instead that it learned the basis of its protest at the debriefing on January 4, 2018, we must conclude at this juncture that the January 11, 2018 protest was timely filed. *See, Business Interface of Maryland, LLC*, MSBCA No. 3065 (2018).

Respondent next asserts that the Board lacks jurisdiction over the Appeal because Appellant lacks standing to protest the PO's decision. Relying on this Board's decision in *Active Network, LLC*, MSBCA No. 2920 (2015), Respondent asserts that Appellant's "fifth place ranking does not allow it to claim the possibility of award and it did not seek to disqualify the four proposers receiving higher rankings." Motion, at 4. Citing *Active Network*, Respondent concludes that allowing the Appeal "to proceed to a hearing on the merits would 'constitute a costly waste and disservice to the [MSBCA]' and ultimately the taxpayers to the State of Maryland." *Id.* (quoting *Active Network*, at 9).<sup>5</sup>

In *Active Network*, the protestor's technical proposal was ranked seventh (7<sup>th</sup>) out of seven (7) total proposals, its financial proposal was ranked seventh (7<sup>th</sup>), and its overall ranking was seventh (i.e., last place), with an evaluated bid price of \$25,725,366. *Id.* at 2. The technical proposal of the proposed awardee was ranked first (1<sup>st</sup>), its financial proposal was ranked third

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<sup>4</sup> COMAR 21.10.02.03B provides that in cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

<sup>5</sup> We pause here to note that the PO did not raise this issue in her final decision denying the Protest.

(3<sup>rd</sup>), and its overall ranking was first (1<sup>st</sup>) place, with an evaluated bid price of \$19,987,617.<sup>6</sup> *Id.* The RFP in that solicitation provided that technical and financial proposals would be evaluated and weighted equally. *Id.* at 4.

The protestor's dispute in *Active Network* was that its technical proposal had not been evaluated in accordance with the evaluation criteria set forth in the RFP and/or that the evaluation criteria had not been properly applied. *Id.* at 5. It did not seek to disqualify the other bidders, nor did it compare its proposal to the others. In essence, Active Network did not agree with its last place ranking, contending that it should have been ranked first instead of last. *Id.*

The Board disagreed, stating that “[i]n order to have standing sufficient to pursue a bid protest, an appellant must not only allege that the State did something improper; it must also be able to demonstrate that, had the impropriety not occurred, that that particular offeror would have been awarded the contract.” *Id.* at 6. The Board reasoned that:

because of the price disparity alone, Active cannot make a *bona fide* contention that it would have been recommended for contract award in the absence of the errors allegedly committed by the State in its technical evaluation of Active's proposal. How much better equipment and staffing could appellant possibly offer to the State to justify the expenditure of the substantial extra monies it seeks to be paid by DHR as compared to all of the other offerors?

*Id.* The Board concluded that where there is no reasonable possibility of an appellant receiving contract award even if successful in its protest appeal, an appellant lacks standing to pursue the appeal. *Id.* at 9. The Board explained that “even if Active were to prevail on all of the facts and claims set forth in its appeal of [the respondent's] technical evaluation, it is extremely unlikely, if not impossible, that appellant could achieve contract award because of its price. That is why Active lacks standing.” *Id.*

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<sup>6</sup> The disparity in price amounted to \$5,737,749, or 29% more than the proposed awardee's price.

In this Appeal, Appellant acknowledges the rule established in *Active Network*, that a bidder must allege a reasonable possibility that, but for the agency's actions, it would have had a substantial chance of receiving the award, but asserts that *Active Network* nevertheless recognized that "a bidder might still have standing by alleging systematic and fundamental errors in the evaluation affecting all bidders." Opp., at 4. Citing *Baltimore Motor Coach Co.*, 1 MSBCA ¶94, MSBCA 1216 (1985), Appellant argues that a bidder that has been ranked below second place may have standing if it alleges that "the entire evaluation process was patently unfair, affecting the State's evaluation of all five (5) of the competing vendors." *Id.*

In *Baltimore Motor Coach*, the Board concluded that a fourth (4<sup>th</sup>) ranked appellant claiming that it was unfairly treated did indeed have standing because it would potentially be in line for contract award if it succeeded in proving that the entire evaluation process was patently unfair, affecting the State's evaluation of all five (5) of the competing vendors. *Id.* Although that appeal was ultimately denied on the merits, the Board ruled that appellant had standing because "Appellant's competitive position and perhaps its right to an award will have been affected. We cannot say, therefore, that Appellant was not aggrieved by the [State's] evaluation methods, or that it is not an interested party." *Baltimore Motor Coach*, at 7.

The problem here is that Appellant has not alleged that the entire evaluation process was biased as to all offerors—only as to Appellant, which was treated unfairly and prejudged due to its alleged past performance. In fact, Appellant states quite clearly that Respondent's "decision demonstrated [Respondent's] impermissible prejudgment of [Appellant]—and only [Appellant]—that resulted in a wholly unequal, arbitrary, capricious, and non-competitive process where [Appellant] was held to a standard to which [Respondent] could not—and did not—hold any other bidder." (emphasis added). Opp. at 5. Here, unlike in *Baltimore Motor Coach*,



wherein the protestor contended that the overall evaluation process was unfair and affected all bidders, Appellant claims that it was prejudged because of its past performance and thus received a poor evaluation, which was unfounded and incorrect, without regard to the correctness of the evaluation of its competitors. In its own words, Appellant states that “the contention on appeal is that [Appellant’s] bid was evaluated by standards that were not applied to other bidders....” Opp. at 5-6. As such, *Baltimore Motor Coach* is inapposite.

Even if we assume the truth of Appellant’s allegations that the PO was biased in her evaluation of Appellant’s Technical Proposal and that Appellant’s Technical Proposal should have been ranked first place rather than last (an assumption we are required to make in the context of a motion to dismiss), the Board finds that it is unreasonable to conclude that Appellant would have any possibility of receiving contract award because the superiority of its technical approach was not worth spending an additional \$71,656,737 of limited State funds (i.e., 26% more than the proposed awardee’s price).<sup>7</sup>

Finally, having determined that Appellant lacks standing to pursue this appeal, we need not reach the issue of whether Appellant exhausted its administrative remedies.

### **ORDER**

Based on the foregoing, it is this 23<sup>rd</sup> day of May, 2018, hereby:

ORDERED that Respondent’s Motion to Dismiss Appeal is GRANTED, and it is further

ORDERED that the Interested Party TransCore, LP’s Motion to Dismiss Appeal is GRANTED.

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/s/  
Bethamy N. Beam, Esq.  
Chairman

<sup>7</sup> Appellant does not contend that there were any improprieties in the evaluation of bid prices.



**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 Order and Opinion in MSBCA No. 3071, Appeal of Conduent State & Local Solutions, Inc., under Maryland Transportation Authority RFP Contract No. MA-2868-0000.

Date: May 23, 2018

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/s/  
Ruth Foy  
Deputy Clerk