

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of

*

WEXFORD HEALTH SOURCES, INC.

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Docket No. MSBCA 3066, 3081, & 3086
(Consolidated)

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**DEPARTMENT OF PUBLIC
SAFETY AND CORRECTIONAL
SERVICES
RFP No. Q00177058**

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OPINION AND ORDER BY CHAIRMAN BEAM

Having read and considered Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Decision filed on May 31, 2018 in Appeal No. 3086; Appellant, Wexford Health Sources, Inc.'s Response thereto; and after a hearing thereon on June 27, 2018, the Board finds as follows:

Respondent first contends that Appellant's appeal of the Procurement Officer's decision to deny Appellant's Fourth Supplemental Protest (the "Protest") filed on March 29, 2018 should be dismissed or, alternatively, that judgment should be entered in favor of Respondent, because the Protest was untimely filed. We previously considered this issue in the context of a Motion to Dismiss, or in the Alternative, for Summary Decision filed by the Interested Party, Corizon Health, Inc. on May 22, 2018 and rendered our decision in an Opinion and Order issued simultaneously herewith.

Respondent next contends that the appeal should be dismissed because Wexford has failed to state a claim of actual bias. We recognize the heavy burden placed upon a protestor who alleges that procurement officials or participants exhibited bias either in favor of another offeror/bidder or against the protestor, which affected the outcome of the procurement process.

Respondent correctly asserts our long-held position as set forth in *Kennedy Personnel Services*, MSBCA No. 2415, 6 MICPEL ¶553, 2004):

A protestor alleging bias bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with specific and malicious intent to injure the protestor. “Bias must be demonstrated to exist by substantive hard facts or evidence.”

Id. at 9-10; 6 (internal citations omitted). “Bias will not be attributed to procurement officials or those engaged in a procurement process based on inference or supposition.” *Yellow*

Transportation, Inc., MSBCA Nos. 2374, 2380, 2381, 2382 & 2389 (2004) at 17 (citing *W. M. Schlosser Company, Inc.*, MSBCA No. 2126 at 5, 5 MICPEL ¶465 (1995).

Although COMAR 21.10.05.03.03A.1 mandates that evaluation of proposals “shall be based on the evaluation factors set forth in the request for proposals,” in *AGS Genasys Corp.*, MSBCA 1362, 2 MICPEL ¶158 (1987), the Board explained that:

[e]valuation of technical proposals based on the evaluation factors developed from a solicitation’s requirements is necessarily a subjective process. Such evaluations involve a large degree of discretion, although proposals submitted in response to an RFP in a competitive negotiation are required to be fairly and equally evaluated. **If the evaluation method used employs a technical evaluation panel...the evaluators are required to act impartially and not in an arbitrary or unreasonable manner.**

Id. at 10 (internal citations omitted)(emphasis added). Thus, while the evaluators are afforded a certain amount of discretion in the subjective process of evaluating proposals, they must evaluate the proposals in a fair and impartial manner to preserve and protect the integrity of the process.

Respondent argues that the March 22, 2018 and March 24, 2018 emails sent by Mr. Leon King, one of the members of the RFP evaluation committee, to Wexford personnel and to members of the evaluation committee (and numerous other non-Wexford personnel) “do not show bias, but simply express the level of mounting frustration Mr. King (and other Department

officials) were experiencing in the context of Wexford's ongoing performance issues under its current contract." While this may or may not be true, our inquiry at this juncture is not whether these two pieces of evidence are sufficient to actually prove bias—that is for the merits hearing. At this juncture of the appeal process, we must only consider whether the allegations contained in Appellant's Protest are sufficient to state a claim against Respondent and, assuming the truth of those allegations, whether this Board is capable of granting relief to Appellant.

In other words, where a party files a motion to dismiss for failure to state a claim, this Board must conduct a two-fold inquiry. First, the Board must consider whether the allegations in the protest are based in fact and stated with sufficient clarity that a Procurement Officer ("PO") can generally understand the wrongful conduct complained of by the protestor.¹ Second, the Board must determine whether the Board is statutorily authorized to grant relief to the protestor for the type of conduct that is the basis of the protestor's complaint.

Here, Appellant's Protest is sufficiently clear in setting forth its allegations of bias and proffering evidence thereof: Appellant has alleged that Mr. King's statements in these two emails are evidence of his long-held bias against Appellant and his belief that Appellant is not capable of performing the contract. Appellant further alleges that Mr. King admitted that he had breached his own commitment to both Appellant and Respondent to keep his disparaging communications private. Appellant concludes that the evaluation process was tainted by a bias held by Mr. King against Appellant.

¹ Maryland Rule 2-303(b) governs the sufficiency of pleading in the Circuit Courts, which, in part, we find instructive: "A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense." Maryland courts have held that pleadings need not contain unnecessary evidence, but should contain "such statements of fact as may be necessary to show the pleader's entitlement to relief." *Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc.*, 165 Md. App. 262, 275 (2005) (quoting *Fischer v. Longest*, 99 Md. App. 368, 380 (1994)). The pleadings should state the subject matter of the claim "with such reasonable accuracy as will show what is at issue between the parties, so that, among other things, the defendant may be apprised of the nature of the complaint he is required to answer and defend." *Fletcher v. Havre De Grace Co.*, 229 Md. 196, 200 (1962); *See Gent v. Cole*, 38 Md. 110 (1873).

Whether Appellant can actually prove these allegations of bias is an inquiry for another day. Appellant is not required to prove its claim of bias in its Protest or in its Notice of Appeal. The Board has no doubt that the PO understood the basis of Appellant's complaint: that Mr. King, a member of the evaluation committee, inappropriately expressed his frustration regarding Appellant's poor performance and his skepticism as to whether Appellant was capable of performing the proposed contract, not only to other members of the evaluation committee, but also to third parties, and that his attitude toward Appellant, as evidenced by these two emails, influenced the other members of the evaluation committee thereby tainting the evaluation process.²

For purposes of this motion, we must assume that these allegations are true. We must wait until the merits hearing, however, to see whether Appellant can satisfy its heavy burden of producing "virtually irrefutable proof" of these allegations, specifically, that Mr. King's personal animus against Appellant arising from Appellant's performance on the current contract negatively influenced the evaluators and their evaluation of Appellant's proposal.

With regard to the second prong of our inquiry, this Board is statutorily authorized to hear and decide all appeals arising from a final action of a unit or agency on a protest relating to the formation of a procurement contract. MD. CODE ANN., STATE FIN. & PROC., §15-211(a). This appeal involves the protest of the PO's decision to select another contractor as the proposed awardee of a procurement contract, a decision that was reviewed and approved by Respondent's Deputy Secretary of Administration as set forth in a letter dated May 1, 2018. This letter clearly

² We acknowledge that these two emails were sent long after the evaluation process was concluded and may not provide direct evidence that Mr. King's attitude toward Appellant negatively affected the evaluation process. The emails do, however, clearly demonstrate that Mr. King did not have a favorable opinion of Appellant and that he expressed reservations about whether Appellant could properly perform its obligations under the proposed contract. It will be Appellant's burden to prove, at a hearing on the merits, that Mr. King expressed these feelings to the other evaluators during the evaluation process and that his attitude toward Appellant affected the outcome of the evaluation process.

stated that the decision was the final action of Respondent and was, therefore, subject to appeal to this Board. Assuming Appellant can satisfy its burden of proof as set forth above, this Board is empowered by statute to grant, in part, the relief requested by Appellant, which is to affirm the appeal and render our decision that the PO's denial of the appeal was in error.

The Board concludes that Appellant has alleged sufficient facts to state a claim of bias by Respondent's representative, Mr. Leon King, against Appellant in the evaluation of Appellant's proposal.

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

ORDERED that Respondent's Motion to Dismiss, or in the Alternative, Motion for Summary Decision is denied.

_____/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.

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

Dated: July 5, 2018

/s/
Ruth W. Foy
Deputy Clerk