

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

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In the Appeal of
Medical Transportation Management, Inc.

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* Docket No. MSBCA 3151

Under MTA IFB No. MOL-20-001-SR

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OPINION AND ORDER BY CHAIRMAN BEAM

Having read and considered Respondent Maryland Transit Administration’s Motion for Summary Decision, Appellant Medical Transportation Management, Inc.’s Opposition to Motion for Summary Decision, Interested Party IPS Lynx, Inc.’s Response in Support of Respondent’s Motion for Summary Decision, and Respondent’s Reply to Opposition to Motion for Summary Decision, and having heard arguments of Respondent’s and Appellant’s counsel on September 23, 2020, the Board finds as follows:

1. Respondent’s Motion asks the Board to summarily determine that the procurement officer’s (“PO”) final decision, as set forth in her May 28, 2020 letter, to deny Medical Transportation Management, Inc.’s (“MTM”) May 1, 2020 Protest was not arbitrary, capricious, unreasonable, or in violation of the law.
2. A procurement officer’s decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See Montgomery Park, LLC*, MSBCA No. 3133 (2020) at 36-37. *See also Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6.
3. In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2): “[t]he Appeals Board may grant a proposed or final summary decision if the Board finds that (a) [a]fter resolving all inferences in favor of the party against

whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.”

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), *superseded by statute on other grounds*, MD. CODE ANN., STATE GOVT., §12-101(a). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Beatty*, 330 Md. at 737-38.

4. As one of the grounds for its Protest, Appellant asserted that IPS Lynx, Inc. (“IPS”) was not a responsive or responsible bidder because it failed to comply with the Maryland Minority Business Enterprise (“MBE”) requirements. Appellant’s assertion was based on its erroneous assumption that IPS would self-perform, relying on its own certification in the federal Disadvantaged Business Enterprise Program in the State of Florida to satisfy the Maryland MBE contract goal. It is undisputed that IPS was not a certified MBE on March 3, 2020, the date the bid was due.

5. However, it is undisputed that IPS exceeded the MBE goal by committing to provide thirty-four percent (34%) of the work to a Maryland-certified MBE firm, Kennedy Personnel Services, Inc. (“Kennedy”).

6. For the first time in this Appeal, Appellant attempts to create a genuine issue of material fact by asserting a new basis for its Protest: Appellant now asserts that Kennedy is not certified in the correct NAICS Code to perform paratransit certification services.

7. We cannot address this new assertion because it was never raised nor presented for consideration before the PO, and the PO did not have an opportunity to render a decision as to the merits of this assertion. Thus, the issue of whether Kennedy did not, or could not, satisfy the MBE goal has not been preserved for appeal. As a result, the Board lacks jurisdiction to consider Appellant's newly-asserted grounds for its protest. *See Mercier's, Inc.*, MSBCA No. 2629 (2008).

8. Based on the foregoing, we hold that, as to the MBE certification issue, there is no genuine issue of material fact, and Respondent is entitled to prevail as a matter of law.

9. As additional grounds for its Protest, Appellant asserts that IPS is not a responsive or responsible bidder because it did not submit the required references that could attest that IPS met the Minimum Qualifications set forth in the IFB.

10. The Minimum Qualifications section of the IFB required bidders to have at least three (3) years of experience providing ADA Complimentary Paratransit certification services. As proof that a bidder could meet this requirement, a bidder was required to provide with its bid "at least three (3) references from the past five years that can attest to the [b]idder's required years of experience in providing these services." The IFB required nothing more: it did not require that any of these references be from an entity to which a bidder had provided these services, nor did it require that the references be from more than one entity.

11. It is undisputed that IPS listed three (3) references in its bid. Accordingly, the PO's determination that IPS's bid was responsive at bid opening was reasonable.

12. It is also undisputed that the PO attempted to contact all three (3) references listed in IPS's bid by sending an email message to each reference with a request that each reference complete the enclosed reference form.

13. One of those references, Jacksonville Transportation Authority (“JTA”), did not respond. The second of the three references, GE Aviation, did not verify on the reference form that IPS had provided 3-5 years of paratransit services. Thus, it is undisputed that neither of these two references, without additional follow-up, could satisfy the IFB requirement that a reference must be able to attest to the bidder’s required years of experience providing the requisite services.

14. The third reference, however, Broward County Transit (“BCT”), confirmed to the PO’s satisfaction that IPS met the Minimum Qualifications. When asked “[h]ow long have you been working with this vendor,” BCA checked the box indicating “3-5 years.” When asked “[w]hat products/services do you buy from this vendor,” BCA stated “[p]roviding ADA Paratransit Functional Assessments to pending Transportation Options (TOPS) Clients, including transportation to and from Functional Assessments facility.” BCT’s responses to these questions appear to support the PO’s determination.

15. However, when asked “[h]ave there been any issues with delivery or billing,” BCA responded that it

[t]ook over IPS Lynx contract three months after its award. Being this is the first contract of IPS Lynx with Broward County, the Vendor needed to understand expectations of doing business with Broward County (and not as with other entities prior to award in August 2017).

Appellant asserts that BCA’s response to this question raises reasonable doubt as to whether IPS met the Minimum Qualifications because BCA’s response suggests that IPS may not have provided the requisite services for “3-5 years” insofar as BCA “took over the [IPS] contract three months after its award.”

16. The Board was not presented with any additional evidence of what information the PO used, if any, to determine whether IPS had performed the requisite services for BCA for a minimum of three years, as required by the IFB to satisfy the Minimum Qualifications.

17. Appellant argues, and we agree, that it is entitled to the reasonable inference that IPS did not provide the requisite services for BCA for a minimum of three years and thus did not satisfy the IFB's Minimum Requirements. As such, Appellant argues, the PO's responsibility determination was unreasonable.

18. After resolving all reasonable inferences in favor of Appellant, as we are required to do in the context of a motion for summary decision, we hold that there is a genuine issue of material fact regarding whether the PO's responsibility determination, that IPS met the Minimum Qualifications set forth in the IFB, was reasonable.

Accordingly, it is this 30th day of September 2020 hereby:

ORDERED that Respondent's Motion is GRANTED, in part, as to the issue of whether IPS satisfied the MBE requirements set forth in the IFB; and it is further

ORDERED that Respondent's Motion is DENIED, in part, as to the issue of whether the Procurement Officer's determination that IPS satisfied the Minimum Qualifications set forth in the IFB was reasonable.

/s/
Bethamy N. Beam, Esq., Chairman

I concur:

/s/
Michael J. Stewart Jr., Esq., Member

/s/
Lawrence F. Kreis, Jr., Esq, 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 Opinion and Order in MSBCA No. 3151, Appeal of Medical Transportation Management, Inc. under Maryland Transit Administration IFB No. MOL-20-001-SR.

Dated: September 30, 2020

_____/s/
Ruth W. Foy
Deputy Clerk