

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
Home Paramount Pest Control Company**

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Docket No. MSBCA 3173

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**Under MAA
Contract No. MAA-MC-22-002**

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Appearance for Appellant

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Amy K. Finneran, Esq.
Joppa, Maryland 21085

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Appearance for Respondent

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Mary Cina Chalawsky, Esq.
Assistant Attorney General
Office of the Attorney General
Contract Litigation Unit
Baltimore, Maryland 21202

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OPINION AND ORDER BY MEMBER KREIS

Upon consideration of Respondent, Maryland Department of Transportation Maryland Aviation Administration’s (“MAA”) Motion to Dismiss or, in the Alternative, for Summary Decision, Appellant Home Paramount Pest Control Company’s (“Home Paramount”) Response, and Respondent’s Reply, the Board finds that it lacks jurisdiction to address some of the grounds of Appellant’s protest and, therefore, grants Respondent’s Motion to Dismiss, in part. As to the remaining grounds of Appellant’s protest, the Board holds that there are no genuine issues of material fact and that Respondent is entitled to prevail as a matter of law.¹

¹ COMAR 21.10.05.06B(5) provides that “[u]pon notice to all parties, the Appeals Board may schedule a hearing to consider a written motion.” Because neither party requested a hearing, the Board elected to move forward without one.

UNDISPUTED FACTS

On January 21, 2021, MAA issued an Invitation for Bids to procure insect and pest control services at Baltimore/Washington International Thurgood Marshall (“BWI Marshall”) and Martin State (“Martin”) airports under Contract No. MAA-MC-22-002 (the “IFB”). Pursuant to Technical Provision (“TP”) 1.02, the contract was to be awarded “to the responsible bidder that submits the lowest responsive bid based upon the specifications and the amount found in Section P [of the IFB].”

The procurement was further designated for a Small Business Preference under COMAR 21.11.01.05. *See* IFB at i-1. The small business preference program “specifically authorizes . . . the Department of Transportation . . . to apply certain percentage price preferences in favor of certified small businesses when evaluating and awarding bids” COMAR 21.11.01.02B.

The procuring agency was required to accept the most favorable responsive bid from a responsible small business if

the bid of the small business does not exceed the most favorable responsive bid received from a responsible bidder who is not a small business by: (1) more than 5 percent; (2) more than 7% for a veteran-owned small business; (3) more than 8% for a disabled-veteran-owned small business. Only businesses that meet the statutory requirements set forth in State Finance and Procurement Article §§14-501 – 14-505, Annotated Code of Maryland, and that are certified by the Governor’s Office of Small, Minority, and Women Business Affairs Small Business Reserve Program at the time of bid opening are eligible for award of a contract.

IFB at i-1 and Special Provision (“SP”) 1.02.A-B.

TP-1.28 required all bidders to include a mandatory extra work, materials, and labor allowance (“Extra Work Allowance”) in their bids. Section P of the IFB mandated a \$700,000 Extra Work Allowance (\$600,000 for BWI Marshall and \$100,000 for Martin).

On February 4, 2021, a pre-bid meeting was conducted via Microsoft Teams. Nineteen people attended, including two representatives from Home Paramount. MAA issued an

addendum to the IFB on February 16, 2021 that included responses to prospective bidders' questions, the February 4th pre-bid meeting attendance sheet, and a script read by the MAA Procurement Officer ("PO") at the pre-bid meeting.

On behalf of Home Paramount, John Pica, Jr., Esq. emailed a February 26, 2021 letter to Ellington Churchill, Jr., Secretary of the Maryland Department of General Services ("DGS").² The letter requested that Secretary Churchill consider removing the Small Business Preference from the IFB, contending that the contract was not suitable for a small business because of the expansive scope of work, labor requirements, and materials needed.

The MAA Executive Director emailed Mr. Pica a response on March 1, 2021 in which he stated that MAA did not agree with Home Paramount's assessment that the contract was not suitable for a Small Business Preference. He further stated that COMAR did not limit the size of a procurement a small business can bid on. He discussed the contractor qualifications set forth in TP-1.03 and stated that MAA research located 18 small businesses that perform this type of work and that it believed at least six of them were qualified. Finally, he pointed out that the procurement for the current contract had also been designated a Small Business Preference procurement for which three bids had been received, including one from a small business. However, the incumbent (*i.e.*, Home Paramount) won the bid and was awarded the contract.

A public bid opening was held via Microsoft Teams on March 4, 2021. Home Paramount was the initial apparent low bidder at \$2,266,063.20. Regional Pest Management ("Regional") bid \$2,367,800.00. However, in an affidavit included with its bid, Regional identified itself as a certified small business eligible for a Small Business Preference under COMAR 21.11.01.05.

² Although the letter was specifically addressed to Secretary Churchill, a courtesy copy was emailed to Nelson Reichart, DGS Deputy Secretary; Robert Gleason, Chief Procurement Officer of the Office of State Procurement; Ricky Smith, MAA Executive Director; and Dale Hilliard, MAA Senior Advisor to the Executive Director. It was also copied to three representatives at Home Paramount. It was not sent or copied to the PO on this IFB.

Accordingly, a five percent (5%) preference was added to Home Paramount's bid, which changed the bid order as follows:

Regional	\$2,367,800.00
Home Paramount	\$2,379,366.36

After verifying Regional's small business certification, the PO confirmed Regional as the apparent low bidder pursuant to COMAR 21.11.01.05. A March 9, 2021 Notification of Bid Results letter was sent via email to Home Paramount confirming Regional as the apparent low bidder.

Home Paramount filed a March 15, 2021 bid protest challenging the MAA's decision to award the contract to Regional ("Protest"). The Protest asserted one very specific issue:

Home Paramount bid \$2,226,063.20 on the 5 year BWI contract. Regional Pest Control Bid \$2,367,800. Home Paramount was \$101,736.80 lower or 4.49%. In reviewing the detail of the bid both parties were required to bid \$700,000 for 'extra work.' The 'extra work' was a requirement with no option to change the amount for either party.

It must be noted that once you remove the \$700,000.00 to determine controllable bid pricing, Home Paramount's bid was \$1,556,063.20 and Regional Pest Control was \$1,667,800 which produced the same difference of \$101,736.80, this difference is 6.5% not 4.49%.

Conclusion: Home Paramount[']s bid saves the State of Maryland \$101,736.80 and the difference in terms of actual controllable prices is 6.5%. It is incorrect to hold Home Paramount accountable for uncontrollable bid/budgeting items. [The] Home Paramount bid was 6.5% lower than Regional Pest Control.

The Protest specifically requested that the Contract be awarded to Home Paramount.

The PO denied Home Paramount's Protest on April 23, 2021 ("PO Final Decision") on the grounds that the Protest was untimely. COMAR 21.10.02.03A requires 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. . . ." She stated:

[T]he determination to make this solicitation subject to the Maryland Small Business Preference is one for MDOT MAA to make and any challenge to this determination should have been made prior to bid opening. . . . Additionally, Home Paramount's protests regarding the basis of the award being based upon extra work allowances established in the Solicitation is untimely because the extra work allowances and how they would be part of the basis for award were always part of the Solicitation.

Finally, the PO determined that Home Paramount's Protest did not challenge the actual *application* of the Small Business Preference. Home Paramount's own calculations confirmed that Regional's bid did not exceed Home Paramount's bid by more than five percent (5%).

Home Paramount appealed the PO's Final Decision to the Board on April 29, 2021. As grounds for the Appeal, Home Paramount argues that the February 26, 2021 letter objecting to the Small Business Preference was a timely objection (*i.e.*, a "protest") submitted prior to bid opening on March 4, 2021. It further contends that Regional does not meet the qualifications of a Small Business per the requirements set forth in COMAR 21.11.01.04, including, but not limited to, the requirements regarding gross sales, and that Regional should be required to submit proof of how it meets the requirements. Finally, it requests that the PO's Final Decision be overturned or dismissed and that the Contract be awarded to Home Paramount.

STANDARD OF REVIEW

Motion to Dismiss

In the context of a motion to dismiss, we must assume the truth of all well-pleaded facts and all reasonable inferences that may be drawn therefrom. *See e.g., U.K. Constr. & Mgmt., LLC*, MSBCA No. 2773 (2011). "A Motion to Dismiss may be granted only in the event of a failure to state a legally sufficient cause of action. At the 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." *Id.* at 2.

Motion for Summary Decision

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals 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, Betty 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 GOV'T., §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. *Betty*, 330 Md. at 737-38.

DECISION

The Board Lacks Jurisdiction to Consider Issues Raised for the First Time on Appeal.

The Board only has jurisdiction “to hear and decide . . . appeals arising from the final action of a unit.” MD. CODE ANN., STATE FIN. & PROC. §15-211(a). If an issue is not raised in the protest filed with the procurement officer and is not considered in the Final Decision issued by the procurement officer that is subject to appeal, this Board does not have jurisdiction to consider it. *Associated Building Maintenance Co., Inc.*, MSBCA No. 3130 at 14 (FN 18) (2019); *See also Mercier’s, Inc.*, MSBCA No. 2629 (2008).

Home Paramount only protested the mandatory inclusion of the \$700,000 Extra Work Allowance in all bids. It correctly pointed out that if it were removed from the two bids that its

bid would be 6.5% less than Regional's, not 4.49%, and that even applying the Small Business Preference, it would have been the low bidder.

In its Appeal, however, Home Paramount raised, for the first time, issues that were not part of its Protest and, therefore, were never considered by the PO and were not part of the PO's Final Decision. Specifically, Home Paramount raised the following new issues:

1. The contents of the February 26th letter sent to DGS were an official objection/protest³; and
2. Regional is not a qualified Small Business and that it should be required to submit proof of how it met the Small Business Preference requirements in COMAR 21.11.01.04.

Since the Board lacks jurisdiction to consider issues raised for the first time in an Appeal, MAA's Motion to Dismiss for failure to state a claim is granted as to these limited issues.

The Relief Requested Exceeds the Boards Jurisdiction.

Home Paramount specifically requests that the PO's Final Decision denying the Protest "be overturned or otherwise dismissed **and that the award of Bid No.: MAA-MC-22-002 be awarded to Home Paramount Pest Control Company.**" (emphasis added). The Board's jurisdiction is statutorily limited. *See Kennedy Services, LLC*, MSBCA No. 3064 at 2 (January 5, 2018).

The General Assembly has not authorized this Board to direct award of a contract to a particular party upon determination that an appeal be sustained because of a violation of a statute or regulation during the procurement process.

³ The February 26, 2021 letter is not a valid protest. It was a letter sent to the Secretary of DGS and copied to many other people, but not to the PO as required by COMAR 21.10.02.02B. It merely requested Secretary Churchill **consider** removing the Small Business Preference from the IFB. It also promoted Home Paramount's position as the incumbent. It was never treated as a protest, but was instead responded to in a March 1, 2021 email. In fact, the PO never saw the letter until it was attached to the Notice of Appeal to the Board.

Even if it were a valid protest, and the March 1, 2021 email in response was deemed to be a final agency decision, the Appeal filed with the Board on April 29, 2021 would be untimely pursuant to COMAR 21.10.02.10A, which requires appeals to be filed within 10 days of receipt of the final procurement agency decision.

Substation Test Co., MSBCA 2016 & 2023 at 10 (1997). Accordingly, even if the Board were to find in favor of Home Paramount on this Appeal, the Board lacks jurisdiction to direct MAA to award the contract to Home Paramount. Therefore, MAA's Motion to Dismiss is also granted on this additional limited ground.

Home Paramount's March 15, 2021 Protest Was Untimely.

As set forth in detail *supra*, Home Paramount asserted only one ground in its Protest, which was the only issue considered and addressed in the PO's Final Decision: there were improprieties in the institution and application of the IFB's Small Business Preference and the mandatory \$700,000 Extra Work Allowance. More specifically, it asserted that

once you remove the \$700,000.00 to determine controllable bid pricing, home Paramount's bid was \$1,556,063.20 and Regional Pest Control was \$1,667,800 which produced the same difference of \$101,736.80, this difference is 6.5% not 4.49%.

In other words, Home Paramount asserts that it overcame the five percent (5%) Small Business Preference on all items over which it had control in bidding. It was only when the mandatory (and uncontrollable) \$700,000 Extra Work Allowance was added to all bids that its lower bid fell below the five percent (5%) threshold, thereby mandating award to Regional, the *higher* bidding certified small business.⁴

Although we acknowledge that Home Paramount raises a good point, we cannot ignore the requirement that alleged improprieties in a solicitation must be raised prior to bid opening.

COMAR 21.10.02.03A provides, in pertinent part, that a protest based upon alleged

⁴ While this Board recognizes both the present and future benefits of small business incentives, it also recognizes the need for fundamental fairness to all parties in procurements. If Home Paramount were able to use its economies of scale to submit a bid that was \$101,736.80, or 6.5%, less expensive than Regional on bid items over which it had control, it seems plausible that, if given a chance, it might also be more competitive on any extra work items. However, since MAA required everyone to include a set amount to cover all extra work, it would be interesting to hear from MAA as to why it wanted the Extra Work Allowance included in the Small Business Preference percentage calculation. Notwithstanding, because Home Paramount's Protest was not timely filed, the Board cannot reach the merits of this issue.

improprieties in the solicitation **that are apparent before bid opening** . . . shall be filed before bid opening *Id.* (emphasis added). In addition, the Board has previously held that an argument that an IFB should not be subject to a small business preference must be made prior to bid opening. *See Gillis Gilkerson*, MSBCA 2791 at 4 (2012).

Home Paramount's argument that it first became aware of the basis for the Protest when it was notified of the award to Regional on March 9, 2021 lacks merit. The basis for the Protest is the imposition of the Small Business Preference and the potential adverse impact of including the Extra Work Allowance in the calculation, which was known at IFB issuance. If Home Paramount found the calculation methodology to be objectionable, it should have protested it prior to bid opening. Home Paramount does not get to wait and see if it is adversely impacted before deciding to protest.⁵

In this instance, Home Paramount should have raised the issue regarding application of the mandatory Extra Work Allowance and calculation of the Small Business Preference with the PO prior to bid opening because it was apparent in the IFB that the Extra Work Allowance would be required in all bids, and that this could have an adverse impact on Home Paramount's overall ranking, if it were included in the Small Business Preference calculation.

The undisputed facts support this conclusion. Each volume of the IFB identified the procurement as having a Small Business Preference. It is further identified as such in numerous other places throughout the IFB. *See* IFB at i-1 and GC-1.47. Also, the Small Business Preference percentages and the mandatory \$700,000 Extra Work Allowance are clearly set forth

⁵ Home Paramount also alleges that COMAR 21.10.02.03C vests the Board with discretion to consider protests even if they are filed beyond the stated timeframes. This is an incorrect statement of the applicable law. This section specifically speaks to the authority of the procurement officer, not the Board, to consider protests received after the prescribed time and it says the procurement officer may not consider them. *See also FMC Technologies, Inc.*, MSBCA 2312 at 3 (2003), *citing Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984). As there is no authority for the Board to extend the deadline for filing a protest, this argument also fails.

in the IFB. Finally, it is undisputed that a public bid opening was held on March 4, 2021, and that Home Paramount did not file its Protest until 11 days later, on March 15, 2021.

Resolving all reasonable inferences in favor of Home Paramount, the Board concludes that there are no genuine issues of material fact concerning whether Home Paramount's Protest was timely filed pursuant to COMAR 21.10.02.03A. It was not. Accordingly, the Board grants summary decision in favor of MAA on this issue.

For the specific reasons set forth above, the Board grants Respondent's Motion to Dismiss or, in the Alternative, for Summary Decision.

ORDER

Accordingly, it is this 13th day of July, 2021 hereby:

ORDERED that Respondent's Motion to Dismiss is GRANTED, in part, for lack of jurisdiction, and it is further

ORDERED that Respondent's Motion for Summary Decision on the grounds of timeliness is GRANTED.

/s/
Lawrence F. Kreis, Esq.
Board Member

I concur:

/s/
Bethamy N. Beam, Esq.
Chairman

/s/
Michael J. Stewart, Esq.
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 Order and Opinion in MSBCA No. 3173, Appeal of Home Paramount Pest Control Company, under Maryland Aviation Administration Contract No. MAA-MC-22-002.

Dated: July 13, 2021

/s/
Ruth W. Foy
Deputy Clerk