

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
Client Network Services, LLC**

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Docket No. MSBCA 3168

**Under MDOT / SHA
TORFP No. J02B0600061**

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Appearance for Appellant

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Appearance for Respondent

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Appearance for Interested Party

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OPINION AND ORDER BY MEMBER KREIS

The Board conducted a merits hearing on Appeal No. 3168 on February 16, 2022. After considering all witness testimony, the admitted exhibits, and the arguments made by counsel, both at the hearing and in their post-hearing briefs, the Board denies Appellant’s Appeal as untimely on all issues except for the procurement officer’s (“PO”) provision of inaccurate and prohibited information at the debriefing. On this limited issue, the Board finds that Appellant’s Protest was timely filed and that the PO’s actions violated Maryland procurement law.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

Client Network Services, LLC (“Appellant” or “CNSI”) is the incumbent contractor with the Maryland Department of Transportation State Highway Administration (“Respondent” or “SHA”) for the services under the proposed contract that is the subject of this Appeal. Appellant has significant experience in this area and has worked for Respondent in various information technology capacities since 1998.

On March 2, 2020, Respondent issued a Task Order Request for Proposals (“TORFP”), under Solicitation No. J02B0600061. The work to be performed for Respondent under the proposed contract was the procurement of highly qualified technical resources to augment the SHA Database Portfolio Business Services.

TORFP §6.1 required the creation of an Evaluation Committee (“EC”) to initially review the proposals and make an award recommendation to the PO. A three member EC was created.

The TORFP required the submission of two proposals in separate volumes – a technical proposal and a financial proposal – which were to be evaluated independently of each other.

TORFP §6.2 set forth four different technical factors for evaluation that would be considered in descending order of importance. Technical proposals were to be evaluated for technical merit and ranked. TORFP §6.4.F provides:

The Procurement Officer shall make a determination recommending award of the TO to the responsible Offeror who has the TO Proposal determined to be most advantageous to the State, considering price and evaluation criteria set forth above. In making this selection, **the TO Technical Proposal will be given greater weight than the TO Financial Proposal.**

(emphasis added).

Appellant initially submitted its Technical and Financial Proposals on May 14, 2020. At the request of the Respondent, it later submitted a Financial Proposal, Best and Final Offer (“BAFO”) on November 20, 2020.

On December 21, 2020, Appellant received an email from the Respondent stating, in part, “After careful consideration intent for contract award has been made to another firm.” As it had not been selected for award, Appellant was also advised of its right to a debriefing under COMAR 21.05.03.06. Appellant was further told that a debriefing is limited to a discussion of an offeror’s proposal and cannot include any specific discussion of the competing offerors’ proposals. Appellant immediately requested a debriefing.

The video teleconference debriefing took place on January 5, 2021. Ron Eshleman, the PO (“PO Eshelman”) and Scott Banks, the Task Order Manager for SHA (“Mr. Banks”) attended the debriefing on behalf of Respondent. Srikanth Akula, Director of Federal and State Services (“Mr. Akula”), Nilay Patel, Vice President (“Mr. Patel”), and Linda Mras, Vice President for Contracts (“Ms. Mras”) attended the debriefing on behalf of Appellant. Appellant was told that its technical proposal was ranked first, that its financial proposal was ranked fifth (last), and that it was ranked second overall.

Mr. Akula indicated that he was confused, as this was the first time that he was hearing this, and was trying to understand. At the hearing, he explained his confusion: “if we lost it on the price or how much was the disparity, and, you know, is it really that big that we had no chance?” Even though debriefings are required to be limited to discussing an offeror’s proposal, Appellant directly asked how much more its price was than the proposed awardee’s.¹ PO Eshelman had previously calculated the price difference to be 4.5%, yet he responded to this

¹ At this point, CNSI did not know the identity of the proposed awardee. It later discovered the proposed awardee was G.R. Patel & Associates (“GRPA”).

direct inquiry by stating that Appellant's price was 10-15% higher than the successful proposer. He knew this was incorrect. At the hearing, he explained why he provided information that he knew to be incorrect: "I wanted to give them a broad range of what the difference was because we're not allowed to specifically say what the awardee's pricing was." He testified that he just gave a range and that in hindsight he should have said 4.5-15%, but instead said 10-15%.

Three days later, on January 8, 2021, Melissa Phillips, Appellant's Contract and Procurement Advisor, sent an email to PO Eshleman to confirm that Appellant's price was 10-15% higher than the proposed awardee, and that Appellant was ranked first in technical and second overall. PO Eshleman responded: "Yes, that is correct. For the exact award amount, the information will be available on eMMA by the end of March, 2021."

On February 28, 2021, Mr. Akula, who was responsible for overseeing the transition to the proposed awardee, examined the Board of Public Works ("BPW") Action Agenda ("Agenda") to see if the proposed new contract was on the Agenda for approval. Not only did Mr. Akula discover that it was on the Agenda, but he also learned, for the first time, that the actual amount of the contract to be awarded to the successful bidder, GRPA, was \$15,575,040. Mr. Akula then compared Appellant's bid price of \$16,275,147.20 to GRPA's bid price and determined that the disparity between the bid prices was not 10-15%, as had been twice represented by PO Eshleman, but rather only 4.5%.

On March 5, 2021, Appellant filed a Notice of Protest ("Protest") with PO Eshleman. In the first paragraph, Appellant set forth two general bases for its Protest:

MDOT/SHA failed to follow the evaluation scheme in the RFP, contrary to COMAR 21.05.03.03. In addition, MDOT/SHA stated factual information to CNSI at the debriefing that was later discovered to be incorrect, contrary to COMAR 21.05.03.06.

The Protest was five single-spaced pages long and contained both a “Background” section with information Appellant contended had led to the filing of the Protest, as well as an “Analysis” section that discussed the above issues.

The Analysis section was broken down into two subparts: 1) This Protest is Timely Made; and 2) MDOT Failed to Follow the Evaluation Scheme in the TORFP. In the first section, Appellant asserted that its Protest was timely filed because PO Eshleman’s “debriefing was deficient.” Appellant contended that PO Eshleman provided an inflated and incorrect 10-15% price disparity which Appellant claimed convinced it that it lacked a sufficient basis to file a protest. It was not until February 28, 2021, when the proposed awardee’s actual price was published on the Agenda, that Appellant learned the actual disparity was a much lower 4.5%. Appellant contended that this new information now provided it a sufficient basis to file its Protest.

In the second section, Appellant argued that Respondent failed to follow the evaluation scheme in the TORFP, citing §6.4.F, which required technical proposals to get more weight, and COMAR 21.05.03.06, which required evaluations to be based on the evaluation factors set forth in the TORFP. Although Appellant was unaware of how PO Eshleman determined the overall rankings or, more specifically, why Appellant was ranked second overall when it had been ranked first on its technical proposal, Appellant posited an example of one way that Respondent failed to comply with the TORFP and COMAR requirements: in deciding to rank Appellant second overall, the PO applied the incorrect 10-15% price disparity, instead of applying the correct 4.5% price disparity.²

² Although not known by Appellant at the time it filed its Protest, it is an undisputed fact that the incorrect 10-15% price disparity was never considered by either the EC or PO Eshleman. In fact, the 10-15% price disparity issue did not arise until the debriefing, which was after the proposed awardee had already been selected.

PO Eshleman issued his PO's Final Decision on March 11, 2021.³ In reading the grounds asserted in the Protest broadly, he addressed four separate issues he believed had been raised by Appellant⁴:

1. Respondent failed to follow the evaluation scheme by considering the 10-15% price disparity, instead of the correct 4.5% price disparity, and had the correct disparity been considered, Appellant would have been awarded the contract.
2. Contrary to COMAR 21.05.03.06, Respondent stated information to Appellant at the debriefing that Appellant later discovered was incorrect.
3. Based on PO Eshleman's incorrect statement concerning the 10-15% price disparity, Appellant reasonably understood that it was the magnitude of this disparity that resulted in Respondent selecting the proposed awardee.
4. Section 6.4 of the TORFP required that the technical proposal was to be given greater weight than the financial proposal.

PO Eshleman stated that the EC and PO made their decisions based on an evaluation of all the technical and financial data, including oral presentations, and that the actual 4.5% price disparity did not change the award recommendation. PO Eshleman cited §6.4.F of the TORFP and acknowledged that the PO was required to make the award recommendation to the responsible offeror with the proposal determined to be most advantageous to the State, considering price and the evaluation criteria, and that in making this determination technical proposals were to be given more weight than financial proposals. He acknowledged that Appellant was ranked first technically and that the proposed awardee was ranked second, separated by only 2.37 points out of a total of 50 points.⁵ He stated:

Both firms were deemed well qualified by both the Evaluation Committee and the Procurement Officer. Based on the 4.5% increase or \$700,107.20 difference in BAFO pricing from CNSI over the intended awardee, the Evaluation Committee

³ The PO's Final Decision does not actually state that the Protest is denied. However, it does contain the appeal language from COMAR 21.10.02.09(C)(3) that is required whenever a protest is not sustained.

⁴ The Board has restated the four issues identified in the PO's Final Decision.

⁵ The PO's Final Decision is the first time that any details concerning the numerical scoring of the technical proposals was provided to Appellant.

and the Procurement Officer found the intended awardee the most Advantageous offer to the State, considering both the technical and financial criteria.

Finally, PO Eshleman explained that the broad 10-15% range was provided to Appellant to prevent giving away the specific amount of the proposed awardee's price.

On March 19, 2021, Appellant appealed PO Eshleman's denial of its Protest to the Board. In the Notice of Appeal at ¶¶15-31, Appellant specifically addresses all four issues discussed by PO Eshelman in the PO's Final Decision and concludes by stating that the Agency failed to follow the evaluation factors in the TORFP in violation of COMAR 21.05.03.03.⁶

Appellant, Respondent, and the Interested Party ("IP") all filed Motions (or Cross Motions) to Dismiss and/or for Summary Decision, which were all heard on October 6, 2021. All Motions were denied in two October 18, 2021 Orders.

The Board held a hearing on the merits on February 16, 2022. PO Eshleman, Mr. Banks, and Mr. Akula appeared and testified. In lieu of closing arguments, all parties submitted post-hearing briefs.

STANDARD OF REVIEW

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 Hunt Reporting*, MSBCA No. 2783 (2012).

DISCUSSION

I. Appellant's Appeal Does Not Contain New Issues Beyond the Scope of its Protest.

The Board has repeatedly held that protest grounds must be specifically raised to preserve the issue for appeal. *See Mercier's, Inc.*, MSBCA No. 2629 at 4 (2008). An appeal ground that

⁶ COMAR 21.05.03.03 deals with the "Evaluation of Proposals, Negotiations, and Award." More specifically, COMAR 21.05.03.03A(1) requires that "[t]he evaluation shall be based on the evaluation factors set forth in the request for proposals and developed from both the work statement and price."

was not included in a protest and not decided by the PO may not be considered for the first time on appeal. *See Ace Uniform Services, Inc.*, MSBCA No. 3027 at 23 (2019).

COMAR 21.10.02.04 lists certain minimum requirements which must be included in a protest, including “[a] statement of reasons for the protest.” Requiring a protest to provide a statement of reasons, or a basis for the protest, purportedly prevents “placeholder protests” in which no specific reasons for a protest are provided at the time the protest is filed to ensure that a protest is timely filed, but are then provided days, weeks, or months later. Placeholder protests make it impossible for a PO to render a final decision on the merits. *First Health Services Corporation*, MSBCA No. 2514 at 10 (2006), *citing NumbersOnly-NuSource JV*, MSBCA No. 2302 at 3 (2002).

This Board is regularly faced with the difficult balancing act of discouraging “placeholder protests” that are overly broad and filed for the purpose of tolling COMAR’s timeliness regulation (yet make it nearly impossible for a PO to render a decision on the merits of the protest), while at the same time trying to protect against the need for bidders/offerors to continually file supplemental protests (which further delay contract award) as they discover additional information about the evaluation process out of fear that the initial “placeholder protest” may be too broad.

In this Appeal, the IP and the Respondent argue that the Notice of Appeal raises new issues or bases for a protest that were not specifically raised in the Protest. Specifically, they argue that Appellant’s Protest broadly asserts only one issue, that Respondent failed to follow the TORFP evaluation scheme, and that the only specific details Appellant provided to support this sole basis of its Protest, when narrowly construed, are those alleging that Respondent failed to consider the correct 4.5% price disparity, instead considering only the higher (and incorrect) 10-

15% price disparity. They further argue that providing improper and false information at the debriefing was not raised as a separate basis in the Protest, but only as an explanation for why the Protest should be found timely filed.

Construing the Protest broadly, PO Eshleman, *to his credit*, addressed four specific issues (*See supra* at page 6) that were encompassed within the two asserted bases set forth in the first paragraph of Appellant's Protest. Although Issues 1 and 3 dealt with which price disparity percentage was applied and how it impacted the proposed award and the Protest, Issues 2 and 4 dealt with other distinct and specific issues. Issue 2 addressed the merits of Appellant's assertion that incorrect information was provided at the debriefing and in the follow-up email. Issue 4 addressed Appellant's assertion that the technical proposal is required to be given greater weight than the financial proposal.

As stated *supra* at page 4, the first paragraph of Appellant's Protest contained two bases for protesting PO's Eshelman's proposed award decision. The first basis was that Respondent "failed to follow the evaluation scheme in the [TO]RFP, contrary to COMAR 21.05.03.03." PO Eshleman reasonably understood this to include challenging both which price disparity percentage was applied, as well as whether technical proposals were given more weight than financial in determining the proposal most advantageous to the State. In addition, under Issue 2 in the PO's Final Decision, PO Eshleman clearly addressed the merits of Appellant's second assertion found in the first paragraph of its Protest relating to the debriefing, that Respondent provided incorrect information at the debriefing in violation of COMAR.

Based on the foregoing, the Board finds that the arguments made in the Notice of Appeal are not new issues or "bases" raised for the first time on appeal; rather, they simply provide additional support for the underlying reasons or bases for the Protest: Respondent's failure to

follow the evaluation scheme set forth in the TORFP, and its failure to comply with COMAR when it provided erroneous information relating to the proposed awardee's pricing at the debriefing. Accordingly, under the specific facts of this Appeal, the Board finds that the scope of this Appeal does not exceed the scope of the Protest.

II. The Basis of Appellant's Protest Regarding the Debriefing was Timely Filed.

COMAR 21.10.02.03B requires that "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." *Id.* The 7-day time period to protest begins to run when the protestor has either actual knowledge, or implied knowledge based on inquiry notice, of the basis for the protest. *Milani Constr., LLC*, MSBCA 3074 & 3088 at 27 (2019) *reversed on other grounds by Maryland State Highway Admin. v. Milani Constr., LLC*, No. 1334, Sept. Term 2019, 2020 WL 5797870, at *9 (Md. Ct. Spec. App. Sept. 29, 2020) (unreported). The timing requirement is strictly construed, and a protest filed even one day late may not be considered. *See* COMAR 21.10.02.03C; *See also Facchina-Trumbull-Skanska JV*, MSBCA No. 2630 at 26 (2009).

We find that the second basis raised in Appellant's Protest was timely filed on March 5, 2021, which was within seven days after seeing the BPW Agenda on February 28, 2021, and first learning that the price difference between its own Proposal and GRPA's proposal was 4.5%, and not 10-15% as it had been represented by PO Eshleman at the debriefing.

III. The Basis of Appellant's Protest Regarding Respondent's Failure to Follow COMAR and the TORFP Evaluation Scheme Was Untimely Filed.

On December 21, 2020, Respondent notified Mr. Akula that Appellant had not been selected for award. Within an hour of receiving that notification, Mr. Akula notified his bosses and colleagues that he suspected "foul play." Later, Mr. Akula and other CNSI personnel voiced

concerns that they lost because of price and the fact that they did not come down enough in their BAFO.

Prior to the March 5, 2021 debriefing, Appellant knew that TORFP §6.4.F required the PO to recommend award of the contract to the offeror whose proposal was determined to be the most advantageous to the State considering price and the evaluation criteria in the TORFP and that, in making the selection, the PO was required to give technical proposals greater weight than financial proposals. By the conclusion of the January 5, 2021 debriefing, Appellant had learned everything it needed to know to form this basis of the Protest that it ultimately filed on March 5, 2021. Based on PO Eshleman's and Mr. Akula's testimony at the hearing, it is undisputed that during the debriefing, Appellant learned: 1) it ranked #1 technically; 2) it ranked #5 (and last) financially; 3) it ranked #2 overall; 4) it had lost; and 5) it had lost on price. It also learned that the price disparity between it and the intended awardee was 10-15%, information that was later shown to be inaccurate. It did not learn who won or how the intended awardee's technical proposal had been scored or ranked.

The fact that Appellant did not know the winning offeror's actual price or the price differential of 4.5% on January 5, 2021 does not toll the 7-day filing period. Appellant is not entitled to be provided with that information at a debriefing.⁷ More importantly, it is not the knowledge of GRPA's actual price (and thus a 4.5% price disparity rather than a 10-15% price disparity) that formed the basis for Appellant's Protest, but the fact that it lost on price, even though it knew that it had been ranked first on its technical proposal and that technical was to be given more weight than financial.

⁷ On the flip side, Respondent is also prohibited from providing inaccurate information at a debriefing, which issue will be addressed in more detail *infra*.

Even after learning GRPA's actual price and calculating the correct price disparity of 4.5% (*i.e.*, \$700,107.20) on February 28, 2021, Appellant was in the same position it was in immediately following the debriefing on January 5, 2021. It knew the TORFP evaluation scheme and its own rankings; it did not know the proposed awardee's rankings, how Respondent rated or scored any of the technical proposals, or how Respondent had reached its most advantageous to the State determination. Discovering GRPA's actual price did not create a new basis for a protest that did not already exist on January 5, 2021.

Appellant claims it was "misled ... into thinking there was no basis for a protest due to the great price difference." However, Appellant's subjective opinion about the magnitude of the price difference is not relevant to whether the Respondent properly conducted the procurement or made the award determination in compliance with the evaluation scheme in the TORFP. Appellant made a conscious business decision not to file a bid protest within seven days after the debriefing based on its own judgment about how much weight a certain price disparity should be given in making an award to a lower technically ranked offeror in a procurement where technical proposals were to be given more weight than financial proposals. The Board agrees with Respondent's statement in its post-hearing brief: "choosing not to file is not the same thing as not having a basis for a protest." As of January 5, 2021, Appellant had all the information necessary to file a protest, thus this basis of its March 5, 2021 Protest was untimely filed.

III. The PO Provided Information at the Debriefing in Violation of COMAR 21.05.03.06.

Upon written request to the PO, an unsuccessful offeror is entitled to a debriefing conducted by a procurement official familiar with the rationale for the selection decision and proposed contract award. *See* COMAR 21.05.03.06. The Debriefing shall:

- (a) Be limited to discussion of the unsuccessful offeror's proposal and may not include specific discussion of a competing offeror's proposal;

(b) Be factual and consistent with the evaluation of the unsuccessful offeror's proposal; and

(c) Provide information on areas in which the unsuccessful offeror's technical proposal was deemed weak or deficient.

COMAR 21.05.03.06B(1). A timely debriefing was requested and conducted.

PO Eshleman stated that he knew when he gave the 10-15% range that it was incorrect, but that he gave the broad range because he was not allowed to give out the recommended awardee's pricing at a debriefing. However, even the low end of the price disparity range he provided (*i.e.*, 10%) was above the known actual 4.5% price disparity. Accordingly, PO Eshleman violated COMAR 21.05.03.06B(1)(b) when he provided a factually incorrect price disparity range between Appellant's price and the proposed awardee's price at the debriefing.

The Board further finds that providing *any* price disparity range at a debriefing, even one that is correct and reflects the actual disparity in price, violates COMAR 21.05.03.06B(1)(a) as the debriefing must be limited to a discussion of the successful offeror's proposal. Providing a price disparity range allows an unsuccessful bidder/offeror to estimate the range of the proposed awardee's bid price. This could lead to even more protests concerning whether the price range was factually correct, too big, too small, or just generally misleading or unhelpful. In short, providing *any* information on another bidder's/offeror's proposal is a violation of COMAR. The Board recognizes that this debriefing COMAR violation occurred after the evaluation and recommendation for award to GRPA had already taken place. However, COMAR 21.10.02.01B(2) defines "protest" as a "complaint relating to the solicitation or award of a procurement contract." The Board finds that a complaint regarding the failure of an agency to provide an unsuccessful bidder/offeror with an accurate, factually correct debriefing falls within this definition. As this Board has said on numerous occasions, our authority is limited to

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 Opinion and Order in Docket No. MSBCA No. 3168, Appeal of Client Network Services, LLC, under Maryland Department of Transportation/State Highway Administration TORFP No. J02B0600061.

Date: April 14, 2022

/s/
Ruth W. Foy
Deputy Clerk