

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of

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WEXFORD HEALTH SOURCES, INC.

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

**DEPARTMENT OF PUBLIC
SAFETY AND CORRECTIONAL
SERVICES**

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RFP No. Q00177058

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OPINION AND ORDER BY CHAIRMAN BEAM

Having read and considered the Interested Party Corizon Health Inc.'s ("Corizon") Motion to Dismiss or, in the Alternative, for Summary Decision filed on May 22, 2018 in Appeal No. 3086 and Appellant, Wexford Health Sources, Inc.'s Response thereto, and after a hearing thereon on June 27, 2018, the Board finds as follows:

Corizon 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 was untimely filed because Wexford knew or should have known that it had a basis for its allegation of bias by Mr. Leon King not later than February 21, 2018, when Appellant received its document production (which contained, among other things, all email messages from Mr. King as they relate to this Appeal). Corizon further contends that this Board lacks jurisdiction to consider Appellant's newly asserted allegations regarding email messages from Mr. King in 2017 because these messages were in Appellant's possession before it filed its Protest and were not included in the Protest. Corizon concludes that Appellant should be prohibited from using these 2017 email messages in support of its subsequently filed Protest to show that Mr. King was biased and that these emails provided Appellant with knowledge of the alleged bias in 2017.

Appellant contends that one email message from Mr. King in March 2017, which was disparaging to Appellant, was an isolated incident that, by itself, was insufficient to show that Mr. King was biased against Appellant and thus did not give rise to a protest. Appellant further contends that it was not until it received two separate emails dated March 22, 2018, and March 24, 2018 from Mr. King, which were also disparaging to Appellant and which were sent to third parties, that Appellant became aware that Mr. King was exhibiting a pattern of conduct that demonstrated Mr. King's bias.

The Board does not consider the March 2017 email message as a "new issue" not raised in the Protest that deprives us of jurisdiction. Rather, the March 2017 email is evidence of Mr. King's conduct which, when coupled with the March 2018 emails, reflects a pattern of conduct over time that Appellant contends is demonstrative of Mr. King's bias, and which now forms the basis of Appellant's Protest. An offeror is not required to identify in its protest every piece of evidence that supports the basis of its protest.

With respect to whether the Protest was timely filed, as we explained in our recent decision of *Milani Constr., LLC*, MSBCA No. 3074 at 11-12 (2018), in the context of a motion for summary decision, inferences must be resolved in favor of the non-moving party and, where material facts are genuinely in dispute, we cannot enter judgment in favor of the moving party. *Id.* We also explained that it is well-settled in Maryland that summary judgment is generally inappropriate when matters such as knowledge, intent, or motive, that ordinarily are reserved for resolution by the fact-finder, are essential elements of the plaintiff's case or the defense. *Id.* (citing *Hicks v. Gilbert*, 135 Md. App. 394 (2000); *Okwa v. Harper*, 360 Md. 161 (2000); *Brown v. Dermer*, 357 Md. 344 (2000)).

Here we must determine whether there is a genuine dispute as to when Appellant knew, or when it should have known, the basis for its allegation that Mr. King was biased and that his alleged bias negatively affected the evaluation of its Technical Proposal. We recognize that there is a difference between expressing an opinion about a contractor's poor performance and making statements that are intended to influence the outcome of the evaluation process. However, in making our determination in the context of a motion for summary decision, we must view the facts and make reasonable inferences therefrom in the light most favorable to the party opposing the motion. *Delia v. Berkely*, 41 Md. App. 47 (1978), *aff'd*, 287 Md. 302 (1980). Therefore, resolving all inferences in Appellant's favor, as we must in the context of a motion for summary decision, we find that there is a genuine dispute of material fact as to when Appellant knew or should have known that Mr. King's conduct appeared to be biased against Appellant. As such, Corizon's Motion must be denied.

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

ORDERED that the Interested Party Corizon, Health, Inc.'s Motion to Dismiss, or in the Alternative, 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 Opinion and Order in MSBCA Nos. 3066, 3081 and 3086 (Consolidated), Appeals of Wexford Health Sources, Inc., under Maryland Department of Public Safety and Correctional Services RFP No. Q00177058.

Dated: July 5, 2018



/s/
Ruth W. Foy
Deputy Clerk