



GOVERNMENT OF THE DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:)
)
 Trusted Health Plan (District of Columbia),)
 Inc., d/b/a/ CareFirst BlueCross BlueShield)
 Community Health Plan)
 District of Columbia) CAB No. P-1162
)
 Under Solicitation No. Doc578403)

DISTRICT OF COLUMBIA’S MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Rule 306.1 of the Rules of the District of Columbia Contract Appeals Board (“Board”), the District of Columbia (“District”), respectfully moves the Board to dismiss the Protest of Trusted Health Plan (District of Columbia), Inc., d/b/a/ CareFirst BlueCross BlueShield Community Health Plan District of Columbia (“CareFirst” or “Protester”) under Solicitation No. Doc578403 (“1st MCO RFP”), docketed as CAB No. P-1162 (“*Protest II*”) for lack of jurisdiction. *See* D.C. Mun. Code tit. 27, § 306.1. In *Protest of Trusted Health Plan (District of Columbia), Inc., d/b/a/ CareFirst BlueCross BlueShield Community Health Plan District of Columbia*, CAB No. P-1154 (May 12, 2022) (“*Protest I*”), the Board found that the District’s rejection of Protestor’s proposal as non-responsive under the 1st MCO RFP was proper; thus, Protester lacks standing to bring the instant protest. If the Board concludes that the Protester does have standing, *Protest I* must be dismissed as it was untimely filed.

I. Background

The Board resolved three protests under the 1st MCO RFP brought by Protestor, MedStar Family Choice, Inc. D/B/A/ MedStar Family Choice-District of Columbia (“MedStar”) and Amerigroup District of Columbia, Inc. (“Amerigroup”), each challenging the District’s rejection

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of their respective proposal as non-responsive for failure to submit a compliant subcontracting plan.

The factual background and procedural history of the procurement under the 1st MCO RFP as related to Protester is described in *Protest I*. See CAB No. P-1154 at 2-6. On May 12, 2022, the Board issued its decision denying the protest. See *id.* at 2, 11. Protester did not file a motion for reconsideration. See D.C. Mun. Reg. tit. 27, § 313.

On June 2, 2022, the Board denied the protest of MedStar, finding that the District’s rejection of MedStar’s proposal as non-responsive for failing to submit a compliant subcontracting plan was proper. See *Protest of MedStar Family Choice, Inc. D/B/A/ MedStar Family Choice-District of Columbia*, CAB No. P-1153 (June 2, 2022) (“*MedStar*”). On June 3, 2022, the Board sustained the protest of Amerigroup, finding that the District’s rejection of Amerigroup’s proposal as non-responsive for failing to submit a compliant subcontracting plan was unreasonable and ordering the District to take corrective action. See *Protest of Amerigroup District of Columbia, Inc.*, CAB No. P-1152 (June 3, 2022) (“*Amerigroup*”).

On June 13, 2022, Protester filed a Petition for Review of Agency Decision of *Protest I* in the Superior Court of the District of Columbia, docketed as 2022 CA 002632 B (“*Superior Court Appeal*”). See D.C. Mun. Reg. tit. 27, § 312.2 (a). Protester requests the Superior Court to issue the following relief:

- A. Find that the Protest I decision was arbitrary, capricious, and clearly erroneous;
- B. Reverse or set aside the decision;
- C. Enjoin the District from making an award or allowing performance to begin under the Solicitation and/or the related MCO procurement that is currently pending for the same work at issue here [Solicitation No. Doc.598380]; and
- D. Grant such other and further relief as the Court may determine to be just and proper.

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Trusted Health Plan (District of Columbia), Inc., d/b/a/ CareFirst BlueCross BlueShield Community Health Plan District of Columbia v. Contract Appeals Board, 2022 CA 002632 (D.C. Super), Petition for Review of Agency Decision (filed June 13, 2022). An initial scheduling conference is scheduled for September 16, 2022.

On June 23, 2022, Protester filed the instant protest. Protester alleges that the Board’s decision in *Amerigroup* “results in unequal treatment against CareFirst, unless the same order is issued with respect to CareFirst.” Protest at 1. Protester argues that the District is treating offerors unequally by complying with Board’s decisions in both *Protest I* affirming the rejection of Protester’s subcontracting plan and proposal as nonresponsive and *Amerigroup* requiring acceptance of Amerigroup’s subcontracting plan and proposal as responsive. *See id.* at 8 (“The District’s Compliance with the CAB’s Amerigroup Decision Results in Unequal Treatment.”); *id.* at 9 (District “complying with [*Amerigroup*] order, however, means that the District is treating offerors unequally. . . .”); *id.* at 14 (“the Amerigroup decision has created circumstances in which CareFirst is significantly prejudiced by the District’s unreasonable and unequal evaluation of its proposal”).

II. The Board Should Dismiss the Protest for Lack of Standing because the District Properly Found that Protester’s Proposal was Non-Responsive and Protester is Not an Aggrieved Person.

Because Protester’s proposal is non-responsive unless and until there is a final determination by a District court reversing *Protest I*, Protester is not an “aggrieved person” and therefore lacks standing to bring this protest. The Board exercises jurisdiction over a “protest of a solicitation or award of a contract ...by any actual or prospective bidder.... who is aggrieved in connection with the solicitation or award of the contract.” D.C. Code § 2-360.03(a)(1). Thus,

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before considering Protester’s grounds, the Board must determine whether Protester is an “aggrieved person.” *See id.*; D.C. Mun. Regs. tit. 27, § 199.1.

A person must have a direct economic interest in the protested procurement to be an aggrieved person with standing. *Protest of 1st Needs Medical*, CAB No. P-1075 (Jul. 5, 2018). The Board has consistently held that a non-responsive offeror—one that submitted a non-responsive proposal¹—has no direct economic interest in a procurement because it would not be in line for award even if its protest were sustained and, as a result, cannot be considered an aggrieved offeror. *1st Needs Medical, supra*, CAB No. P-1075 at 3; *Protest of C & E Servs., Inc.*, CAB No. P-356 (Feb. 10, 1993); *Protest of Wayne Mid-Atl.*, CAB No. P- 227, (Aug. 12, 1993).

The Board’s dismissal of *Protest I* with prejudice and holding that the District properly rejected Protester’s proposal as non-responsive for failing to submit a compliant proposed subcontracting plan precludes the instant protest. *See* P-1154 at 11. A protester’s petition for review of a protest decision to the Superior Court does not stay the Board’s decision or the ability of the District to proceed with the procurement. The District may proceed to contract award absent the entry of a stay by either the Board or the Superior Court. *See, e.g., MorphoTrust USA, Inc. v. District of Columbia Contract Appeals Board*, 2012 CA 009430 P(MPA), Oral Ruling on Motion Entered on Docket denying motion for stay of contract award pending appeal (March 22, 2013), *rev’d and remanded on other grounds*, 115 A.3d 571 (D.C. 2015). However, even if the Board or the Superior Court issued a stay of *Protest I*, the stay would maintain the status quo; a stay would not render Protester’s proposal responsive. *E.g., District of Columbia v. Towers*, 250 A.3d 1048, 1053 (D.C. 2021) (in assessing whether to grant

¹ A responsive offeror means “a person who has submitted a bid or offer which conforms in all material respects to the solicitation.” D.C. Code § 2-351.04(56) (2011).

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a motion for a stay pending appeal, “[a] order to maintain the status quo may be appropriate” (citation omitted)).

Protestor cannot alter the status quo or relitigate the Board’s decision in *Protest I* that the District properly rejected its proposal as non-responsive for failing to submit a compliant subcontracting plan in this protest action. At this juncture, whether the Board’s decision in *Protest I* is subject to reversal is for resolution in the *Superior Court Appeal*.

Protester’s proposal is non-responsive and Protester cannot be considered an aggrieved party with standing as a matter of law absent a final decision by the District of Columbia Superior Court or Court of Appeals reversing *Protest I*; thus, the Protest must be dismissed. Compare *Protest of RSC Electrical & Mechanical Contractors, Inc.*, CAB No. P-1004 (Sept. 9, 2019) (dismissing protest for lack of standing where protester’s bid was nonresponsive); *1st Needs Medical, supra*, CAB No. P-1075 (same); *Protest of Stockbridge Consulting, LLC*, CAB No. P-1008 (July 25, 2016) (same), with *Protest of M.C. Dean, Inc.*, CAB No. P-0955 (Jun. 2, 2014) (protester had standing where offeror’s proposal is “not clearly non-responsive and was treated as responsive by the contractor officer”).

III. The Board should Dismiss this Protest as Untimely as the Protester Waited more than 10 Days from When it Knew or should have Known of the Basis of the Protest. Alternatively, if the Board considers this Protest a Motion for Reconsideration, it is Untimely.

There has been no change in facts regarding the District’s actual conduct of the evaluation of Protester’s subcontracting plan and rejection as non-responsive. Protester disagrees with the Board’s decision denying Protester’s initial protest in comparison to the Board’s decision sustaining Amerigroup’s protest. This is not a valid protest ground. To the extent that Protester continues to protest the District’s rejection of its subcontracting plan as non-responsive,

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the protest is untimely. Additionally, any of the arguments challenging the Board's decision in *Protest I* should have been filed as a motion for reconsideration and accordingly are untimely.

Protests shall be filed with the Board not later than ten (10) business days after the basis of the protest is known or should have been known, whichever is earlier. D.C. Code § 2-360.08; D.C. Mun. Reg. tit. 27, § 302.2(b). Additionally, a motion for reconsideration needs to be filed within 15 days after the Board's decision or order is transmitted to a party and “must show that the Board's opinion contained errors of law or fact, rather than merely disagreeing with the Board's decision.” *Protest of Kennedy Development, LLC*, CAB No. P-0987 (Jan. 12, 2016) citing *Volpe Constr.*, CAB No. D-0824, 42 D.C. Reg. 4600, 4601 (May 17, 1994) (rejecting a reconsideration motion in which the movant had not “presented any information that was not previously considered by the Board.”) (citations omitted); D.C. Mun. Reg. tit. 27, § 313.

The Board and other administrative tribunals adhere to strict timeliness requirements for filing protests. *Protests of: Sigal Construction Corporation*, CAB Nos. P-0690, P-0693, P-0694, (Nov. 24, 2004); *Community Bridge, Inc.*, CAB No. P-0848 (Jan. 13, 2011); *Our Future, Inc.*, CAB No. P-0860 (Jan. 20, 2011); *Unfoldment, Inc*, CAB No. P-0843 (Nov. 2, 2010); *Clothes Barn*, CAB No. P-0121 (Oct. 3, 1989); *Illumination Control Systems, Inc.*, B-237196 (Dec. 12, 1989). These strict timelines are important as they “help ensure that protesters receive prompt resolution of their claims, and prevent bid protests from delaying the procurement of necessary supplies and services”² See also *Automated Medical Products Corporation*, B-275835, February 3, 1997.

² GAO, Bid Protests: An Overview of Time Frames and Procedures, (January 19, 2016), available at: <https://fas.org/sgp/crs/misc/R40228.pdf>. See also GAO, Office of General Counsel, Bid Protests at GAO: A Descriptive Guide 6 (9th ed. 2009), available at <http://www.gao.gov/decisions/bidpro/bid/d09417sp.pdf>.

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Protester attempts to utilize June 14, 2022, the date it received the public *Amerigroup* Opinion, as the event where it learned of the alleged protest grounds. The pertinent event, however, is not the date of the *Amerigroup* Opinion; it is the District's rejection of Protester's subcontracting plan and the notification of such decision, which occurred on February 1, 2022. *Protest I* at 5. Protester does not raise new protest grounds, only the same ones raised in *Protest I*, and is simply asking the Board to order the contracting officer to re-evaluate its subcontracting plan. Protester knew all relevant facts on February 1, 2022, and there have been no changes regarding Protester's proposal.

Moreover, at all relevant times, the Board was aware of both Amerigroup's protest and *Protest I*, as Amerigroup's protest was filed on February 8, 2022, seven days before *Protest I*. The Honorable Monica C. Parchment, ruled in both protests and had knowledge of the contracting officer's determination in both cases. The only factual difference is that the Board has issued three decisions under the first MCO solicitation and the District is complying with the Board's orders contained within the opinions. *See Amerigroup, MedStar, Protest I*. The Board's issuance of a new opinion is not a basis for a protest.

This protest is substantively a motion for reconsideration, requesting the Board to overturn its decision in *Protest I* to grant any of the requested relief, *i.e.* rescinding the District's non-responsiveness notice and allowing the Protester to correct its subcontracting plan. Protest at 15. To the extent the Board treats the motion as one for reconsideration of *Protest I*, it is untimely. *Protest I* was decided on May 12, 2022. The protester had 15 days, or until May 27, 2022, to file a motion for reconsideration. The Protester filed this instant action on June 21, 2022, or more than three weeks late. Thus, as a motion for reconsideration, it must be dismissed.

For all these reasons, this protest should be dismissed as untimely.

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IV. The Board Should Deny the Protester's Request for Production Of Documents

Protester requests that the District produce a list of documents, which the District either provided in *Protest I*, or which are irrelevant to the Protest. According to Board Rule 309.2, the Board may permit a protester or intervener to engage in discovery if no agency report is filed to provide a sufficient factual basis for the fair and just resolution of the protest. D.C. Mun. Regs. tit. 27, § 309.2.

Here, the Board is not required to determine disputed facts to resolve whether Protester has standing and, thus, there is no need for discovery. The Board has previously opined that “[t]he purpose of discovery is to aid the Board in a just resolution of the protest, not to enable a protester to conduct a fishing expedition so as to develop the grounds of its protest.” *Protest of Optimal Sols. and Techs.*, CAB No. P-1013, at n. 7 (Oct. 11, 2016), quoting *Carter Fuel Oil Co.*, CAB No. P-208 (Jul. 12, 1991). Since the Board “can resolve the instant protest on the record now before [it],” it should deny the Protester’s request for discovery. *Id.* at n. 7; see *Protest I* (decided without discovery); *Amerigroup*, CAB No. P-1152 (decided without discovery); *MedStar*, CAB No. P-1153 (decided without discovery).

V. There Is No Need for a Hearing.

Board Rule 311 allows the Board to order an evidentiary hearing if it “determines that there is a genuine issue of material fact which cannot be resolved on the written record.” D.C. Mun. Reg., tit. 27, § 311.1. Again, the Board has no need to determine issues of disputed material facts such that there is no need for a hearing. See *Protest I* (decided without a hearing); *Amerigroup*, CAB No. P-1152 (decided without a hearing); *MedStar*, CAB No. P-1153 (decided without a hearing).

CONCLUSION

The Board should dismiss the protest for lack of jurisdiction.

June 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 29, 2022, I caused a copy of the foregoing to be filed electronically at the Contract Appeals Board, via FileandServeXpress, which will serve a copy on all parties of record.

/s/ Sheila R. Schreiber
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