

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Corizon Health, Inc.,	:
Petitioner	:
	:
v.	: No. 1740 C.D. 2012
	: Argued: December 12, 2012
Department of General Services,	:
Respondent	:

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY SENIOR JUDGE COLINS**

FILED: January 4, 2013

Corizon Health, Inc. (Corizon), petitions for review of the denial of its bid protest by Deputy Secretary James E. Henning of the Department of General Services (DGS). DGS issued a Request for Proposal for health care services (RFP) on behalf of the Department of Corrections. The Contracting Officer received submissions from five offerors, including Corizon and the winner of the contract, Wexford Health Resources, Inc. (Wexford). Wexford's proposal received the highest overall score according to the criteria set forth by DGS in the RFP. Corizon's score was second, with a difference of seven points, or 0.7 percent of the total points available (959.56 to 952.42).

The Deputy Secretary denied Corizon's bid protest in his final determination, with Findings of Fact and Conclusions of Law, on August 29, 2012. Corizon appealed to this Court and also filed an emergency application for a stay or supersedeas. Wexford intervened on September 14, 2012. We denied Corizon's emergency application on September 24, 2012.

For the reasons that follow, the denial of the bid protest is affirmed.¹

I. BACKGROUND

DGS issued the RFP on September 16, 2011, and advertised it on DGS's eMarketplace website. (DGS Final Determination of RFP No. 6100019380, Findings of Fact (F.F.) ¶1.) The RFP provided that DGS was requesting proposals from suppliers that have the ability and expertise to provide health care services for inmates at state correctional institutions across the Commonwealth. (F.F. ¶4; RFP Parts I-4, IV-1, Reproduced Record (R.R.) at 7a, 30a.) The value of the contract is estimated to be approximately \$296 million for the initial five year term with five renewal periods. (Contracting Officer Recommendation, R.R. at 396a.) Corizon is the incumbent contractor for these services. DGS held a pre-proposal conference for the RFP on September 26, 2011, which was attended by Corizon CEO, Stuart K. Campbell, among others. (F.F. ¶¶8-9.) Five offerors timely submitted proposals, including Corizon and Wexford. (F.F. ¶10.) Four of the five offerors, including Corizon and Wexford, were asked to submit a Best and Final Offer (BAFO). (F.F. ¶13.)

The RFP provided that the proposals would be evaluated according to three criteria: 50 percent of the available points would be based on the Technical submittal, 30 percent would be based on the Cost submittal, and 20 percent would be based on the Disadvantaged Business Participation (DB) submittal. (F.F. ¶11.) Additionally, bonus points of up to three percent would be awarded for Domestic

¹ The Procurement Code sets forth the scope and standard of review in an appeal from a determination denying a bid protest. Section 1711.1(i) provides, "The court shall hear the appeal, without a jury, on the record of determination certified by the purchasing agency. The court shall affirm the determination of the purchasing agency unless it finds from the record that the determination is arbitrary and capricious, an abuse of discretion or is contrary to law." 62 Pa. C.S. § 1711.1(i); *Stanton-Negley Drug Co. v. Department of Public Welfare*, 943 A.2d 377, 383 n.12 (Pa. Cmwlth. 2008).

Workforce Utilization (DW) and for Enterprise Zone Small Business Participation (EZ). (F.F. ¶11.) The categories and scoring system were fully described in the RFP. (RFP Part II, R.R. at 17a-29a.)

Relevant to Corizon’s protest, the RFP described in detail the content each offeror was required to include in its DB submittal and how DGS would evaluate and score it. The content requirements are at Part II-9, Proposal Requirements, Disadvantaged Business Submittal. (RFP Part II-9, R.R. at 20a.) First, in order “[t]o receive credit for being a Small Disadvantaged Business” the Offeror “must include proof of Disadvantaged Business qualification in the Disadvantaged Business Submittal of the proposal,” including (1) a copy of their BMWBO² certificate that the Small Disadvantaged Business is certified by the BMWBO as a Minority Business Enterprise (MBE) or a Women Business Enterprise (WBE); (2) “attest to the fact that the business has no more than 100 full-time or full-time equivalent employees”; and (3) “proof” that their gross annual revenues are less than \$20,000,000. (RFP Part II-9 at 14, R.R. at 20a.) Second, the RFP required that: “In addition to the above verifications, the Offeror must include in the Disadvantaged Business Submittal of the proposal the following information”:

(c) *All* Offerors must include a numerical percentage which represents the total percentage of the total cost in the Cost Submittal that the Offeror commits to paying to Small Disadvantaged Businesses as subcontractors. To support its total percentage DB subcontractor commitment, Offeror must also include:

i.) The dollar amount of each subcontract commitment to a Small Disadvantaged Business.

² The BMWBO is DGS’s Bureau of Minority and Women Business Opportunities.

- ii.) The name of each Small Disadvantaged Business. The Offeror will not receive credit for stating that after the contract is awarded it will find a Small Disadvantaged Business.
- iii.) The services or supplies each Small Disadvantaged Business will provide, including the timeframe for providing the services or supplies.
- iv.) The location where each Small Disadvantaged Business will perform services.
- v.) The timeframe for each Small Disadvantaged Business to provide or deliver the goods or services.
- vi.) A signed subcontract or letter of intent for each Small Disadvantaged Business. The subcontract or letter of intent must identify the specific work, goods or services the Small Disadvantaged Business will perform and how the work, goods or services relates to the project.
- vii.) The name, address and telephone number of the primary contact person for each Small Disadvantaged Business.

(RFP Part II-9(A)(3)(c) at 15-16, R.R. at 21a-22a (emphasis in original).)

The evaluation method is set forth in the RFP at Part III, Criteria for Selection. (RFP Part III at 20-21, R.R. at 26a-27a.) First, the RFP states that DGS's BMWBO, independent of the Contracting Officer, is responsible for evaluating and scoring the offerors' DB submittals. (*Id.*) Second, the RFP states that the DB submittal is 20 percent of the total points available and that scoring of the DB submittal will be based on the dollar amount of commitments to DB businesses as a percentage of the overall dollar amount of the contract. (*Id.*) The offeror with the greatest dollar amount committed to DB business as a percentage of the overall value of the contract would receive the highest DB score.

The RFP also defines what the parties refer to as "sham" or "pass-through" DB subcontractors. To qualify as a DB business, the business "cannot

enter into subcontract arrangements for more than **40%** of the total estimated dollar amount of the contract.” (*Id.* (emphasis in original).) In other words, the DB business must perform at least 60 percent of the services it is contracted to perform. If a DB business sub-subcontracts for more than 40 percent of the total estimated dollar amount of the contract, it is not disqualified as a DB business, but its score in the RFP shall be proportionally lower. (*Id.*)

Wexford’s DB submittal provided a chart listing each subcontracted DB business, the service each was to provide, the estimated dollar value of the subcontract, and the percent of the overall dollar value of the prime contract. (R.R. at 427a.) Also, as required by the RFP, Wexford’s DB submittal included certificates to prove that its DB subcontractors were pre-certified as DB businesses in the service areas that they were contracted to perform and that they met the requirements for revenue and number of employees. (Wexford DB Submittal, R.R. at 431a-568a.) The content of Corizon’s DB submittal was similar, but committed lower dollar amounts and a lower overall percentage to DB subcontractors. (Corizon DB Submittal, R.R. at 621a.)

As set forth in the RFP, the DB submittals were forwarded to the BMWBO for evaluation, where the BMWBO performed its due diligence based on the requirements of the RFP (*i.e.*, review of the DB subcontractor certifications, annual revenues, number of employees, and scope of work). (March 30, 2012 Memorandum of Recommendation for Contractor Selection, R.R. at 393a.) Wexford committed 23.58 percent of the total contract value to its 14 DB subcontractors, while Corizon committed 19.61 percent. Accordingly, BMWBO gave Wexford the maximum 200 points for its DB submittal (20 percent of the overall points available), while Corizon received 166.33 points. (March 16, 2012 BMWBO Scoring Memorandum, R.R. at 405a-412a.)

The overall scores for Corizon’s and Wexford’s BAFOs were very close. Corizon had a higher Technical score, but Wexford won the contract on account of its higher scores in the DB and Cost categories (F.F. ¶14):

	Technical	DB	Cost	DW	EZ	Overall
Wexford	419.56	200	300	30	10	959.56
Corizon	452.71	166.33	293.38	30	10	952.42

On March 30, 2012, the Issuing Officer recommended that the contract be awarded to Wexford because its BAFO had the highest overall score, and the Contracting Officer signed the recommendation. (F.F. ¶15.) By letter dated May 10, 2012, DGS notified Corizon and the other vendors that they had not been selected. (F.F. ¶19.) On June 29, 2012, DGS completed negotiations with Wexford and made the formal award of the contract, and notified Corizon of the award and that it had the right to request a debriefing. (F.F. ¶20.) Corizon elected to have a debriefing, during which DGS provided Corizon with a Debriefing Statement that indicated the relative score and various strengths and weaknesses of Corizon’s BAFO. (F.F. ¶23.)

Corizon filed a bid protest on July 6, 2012, and the Deputy Secretary announced that he would stay the award of the contract pending resolution of the protest. (F.F. ¶¶27-28.) The Deputy Secretary solicited responses to the protest from the Contracting Officer and Wexford, and Corizon filed replies thereto. (F.F. ¶30.)

Corizon’s protest was based on three assertions: (1) Wexford’s score in the DB category was invalid because of irregularities in its DB submission and in the Commonwealth’s review and scoring of the submission; (2) Corizon’s score in the Technical category was improperly scored and evaluated; and (3) the Deputy Secretary did not follow the requirements of Section 513 of the Procurement Code, 62 Pa. C.S. § 513, in requesting competitive sealed proposals (*i.e.*, RFPs), rather

than requesting competitive sealed bids. Specific to Wexford's DB submittal, Corizon argued that the BMWBO failed to properly evaluate certain subcontractors and that Wexford should have received a lower DB score for those subcontractors. Corizon raised several concerns, including a \$6 million commitment to Clark Resources, Inc. (Clark Resources), where Corizon claimed that the only service identified was the leasing of office space, which would have resulted in Clark Resources receiving an unusually high price per square foot for the leased space. (Corizon Protest at ¶73, R.R. at 188a.) Corizon also alleged that Sioux Services, Inc. (Sioux Services), was a sham or pass-through DB entity because it was not certified to perform the bulk of the work proposed, which Corizon claimed would necessitate the use of sub-subcontractors for more than 40 percent of the total commitment, in violation of the RFP's requirements. (Corizon Protest at ¶¶74-75, R.R. at 189a.)

Wexford responded to Corizon's protest explaining, *inter alia*, that the letter of intent with Clark Resources included in Wexford's BAFO shows that Clark Resources was subcontracted to provide "call center services," in addition to leasing office space, and, as such, the \$6 million subcontract amount was for significantly more services than just the leasing of office space. (Wexford Response to Corizon Protest at 10, R.R. at 587a.) Wexford also explained that Sioux Services was pre-certified as a DB business to perform all aspects of infectious waste disposal activity and would be directly and contractually responsible to perform those services. (*Id.* at 11, R.R. at 588a.)

As permitted by Section 1711.1(e) of the Procurement Code, and in light of the arguments raised by Corizon regarding Wexford's DB subcontractors, the Deputy Secretary requested additional information from the Contracting Officer and Wexford regarding Clark Resources and Sioux Services. The Deputy Secretary requested the following:

(1) Please provide a detailed explanation as to what services Clark Resources would perform pursuant to this contract, as well as an explanation of how each listed service would fit within the scope of work detailed in the contract.

(2) Please provide a detailed explanation of what services Sioux Services, Inc., would perform pursuant to this contract. In responding to this question, specify what services Sioux Services, Inc., would provide directly and which services they would secondarily subcontract out. Your response should include a percentage breakdown of those services Sioux Services, Inc., would perform on their own as compared to those services they would secondarily subcontract out. Please also indicate what vendor(s) Sioux Services, Inc., intends to utilize to perform any secondarily subcontracted services.

(Deputy Secretary Letter of Aug. 3, 2012, R.R. at 914a.)

The Contracting Officer responded via letter of August 10, 2012, stating that he could not provide any information other than what was already submitted in Wexford's proposal. (R.R. at 918a.) Wexford responded via letter of August 10, 2012, providing the detailed information requested regarding Clark Resources and Sioux Services. (R.R. at 920a-921a.) In particular, Wexford explained that Sioux Services would directly perform 65 to 85 percent of the contracted services, which was the transport and disposal of medical waste, and that Sioux Services would sub-contract out 15 to 35 percent to Alpha Bio Medical Services, which would assist in the transport. (R.R. at 922a.) Along with its August 10, 2012 letter, Wexford submitted additional information that it claimed was confidential and could not be shared with any other party. (R.R. at 920a.)

Corizon reviewed the additional submissions of the Contracting Officer and Wexford, excluding the confidential exhibits, and responded in its 13-page letter of August 16, 2012. (R.R. at 924a-36a.) Corizon argued, *inter alia*, that Wexford should not be permitted to correct deficiencies in its DB submittal by

providing additional, after-the-fact information regarding Clark Resources and Sioux Services. Corizon also objected to Wexford's use of confidential information and the fact that Corizon was not given an opportunity to review it or respond to it.

The Deputy Secretary addressed and rejected Corizon's grounds for protest in the final determination issued on August 29, 2012. With respect to Wexford's DB submittal, the Deputy Secretary summarized the DB submittal scoring process set forth in the RFP, explaining that DB vendors must be pre-certified by the BMWBO before an offeror submits a proposal for a government contract. (Final Determination, Conclusions of Law, at 5-6.) Once a DB proposal has been submitted, the BMWBO again investigates the DB vendor and the proposed contractual arrangement to ensure that "no material changes have occurred in the status of the DB firm that would invalidate its certification, and that the scope of work listed in the DB submittal matches the type of work for which the DB is certified." (*Id.*) The Deputy Secretary concluded that the BMWBO followed that procedure here and that Corizon had failed to establish any defects in the procedure. The Deputy Secretary characterized Corizon's assertion that Wexford's DB subcontractors were unable to perform their contractual obligations as speculative. According to the Deputy Secretary, his function, absent evidence of fraud or bad faith, was to ensure that the proper procedures were followed when the proposals were scored and that the RFP requirements were met, not to predict whether the DB subcontractors would be unable to perform.³ (*Id.* at 6.)

³ In addition to Clark Resources and Sioux Services, Corizon challenged Wexford's scores for other DB subcontractors, including LW Consulting and TreCom Systems Group. (Corizon Protest ¶¶68-69.) Corizon challenged the ability of these DB subcontractors to perform the services they were contracted to perform and alleged they were shams. The Deputy Secretary rejected those arguments.

Regarding Corizon's protest specific to Clark Resources and Sioux Services, the Deputy Secretary concluded that Wexford had submitted sufficient information to substantiate its DB submittal. (*Id.* at 6.) He stated that he did not use the confidential information that Wexford submitted, which is why he was not required under the Procurement Code to provide it to Corizon. (*Id.* at 6; F.F. ¶37.)

This appeal followed.

II. DISCUSSION

A. Whether the Deputy Secretary violated the Procurement Code

Corizon first argues that the Deputy Secretary violated the Procurement Code in three ways: (1) the Deputy Secretary denied Corizon an opportunity to review documents that Secretary Henning requested and Wexford submitted during the protest proceedings; (2) the Deputy Secretary violated the Code by permitting the Contracting Officer and Wexford to submit sur-reply briefs, which are not permitted under the Code; and (3) the Deputy Secretary violated the Code by permitting Wexford to participate in Corizon's protest, because the Code only permits the presiding officer and the protestor to participate in protest proceedings. Corizon also argues that it was deprived of due process of law and that the Deputy Secretary abused his discretion by denying Corizon's request for a hearing. We first address the due process claim, followed by each individual argument.

In *Durkee Lumber Co., Inc. v. Department of Conservation and Natural Resources*, this Court ruled that, because a disappointed bidder on a government contract has no right to have a contract awarded to it, its due process rights were not violated by the denial of a hearing. 903 A.2d 593, 598-99 (Pa. Cmwlth. 2006) (quoting *Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority*, 103 F.3d 1165 (3d Cir. 1997)). Because Corizon has no right to

have the contract awarded to it, whatever process Corizon is due is set forth in the protest remedy of Section 1711.1 of the Procurement Code. 62 Pa. C.S. § 1711.1.

Corizon cites *Direnzo Coal Co. v. Department of General Services* in support of its argument that its due process rights were violated, including its right to a hearing. 779 A.2d 614 (Pa. Cmwlth. 2001). We held in *Direnzo* that a protestant has a right to notice and a hearing under the Administrative Agency Law (AAL),⁴ because, at the time, the Procurement Code did not prescribe a remedy and the AAL is the default administrative remedy that comports with due process. That part of our holding in *Direnzo* was abrogated by the 2002 amendments to the Procurement Code. In 2002, the General Assembly amended the Procurement Code to include specific procedural safeguards, set forth at Section 1711.1, repealing and replacing old Section 1711. Section 1711.1(l) specifically provides that the AAL “shall not apply” to bid protests. 62 Pa. C.S. § 1711.1(l), effective Dec. 3, 2002. Thus, whatever due process rights Corizon has are coextensive with the Procurement Code bid protest procedures. We, therefore, reject Corizon’s due process claim asserting rights separate from those available under the Procurement Code. Likewise, we find no error or abuse of discretion in the Deputy Secretary’s decision to not conduct a hearing. On appeal, Corizon fails to identify a single fact that was in dispute and would have merited a hearing. Rather, Corizon identifies in its brief six items that it calls “facts,” which are, in reality, a list of legal issues related to Corizon’s various legal arguments, which we separately address below. (Corizon Brief at 67.) Procurement Code § 1711.1(e), 62 Pa. C.S. § 1711.1(e) (reviewing official “may, at his sole discretion, conduct a hearing”); *Durkee Lumber*, 903 A.2d at 598-99 (holding, *inter alia*, that a disappointed bidder on a government contract has no absolute right to a hearing).

⁴ 2 Pa. C.S. §§ 501-508, 701-704.

Corizon next argues that the Deputy Secretary violated the Procurement Code because he denied Corizon an opportunity to review documents that he used to resolve the bid protest, in violation of Section 1711.1(e). That Section provides:

(e) Evaluation of protest. – The head of the purchasing agency or his designee shall review the protest and any response or reply and may request and review such additional documents or information he deems necessary to render a decision and may, at his sole discretion, conduct a hearing. *The head of the purchasing agency or his designee shall provide to the protestant and the contracting officer a reasonable opportunity to review and address any additional documents or information deemed necessary by the head of the purchasing agency or his designee to render a decision.*

62 Pa. C.S. § 1711.1(e) (emphasis added). Thus, the protestant must be given a reasonable opportunity to review and address any additional information that the reviewing official deems necessary to render a decision. *Id.*; *Integrated Biometric Technology, LLC, d/b/a L-1 Enrollment Services v. Department of General Services*, 22 A.3d 303, 307 (Pa. Cmwlth. 2011) (reversing determination denying a bid protest due to a violation of this Section).

Here, the Deputy Secretary permitted Wexford to participate in, and file a response to, Corizon's bid protest. (F.F. ¶30.) Based on issues raised in Corizon's protest, the Deputy Secretary requested additional information from Wexford regarding certain commitments in its DB submittal (F.F. ¶34). On August 10, 2012, Wexford submitted a letter responding to the Deputy Secretary's requests, and marked certain exhibits to the letter as confidential and requested that they not be shown to Corizon or anyone else. (F.F. ¶37.) Accordingly, the Deputy Secretary stated he did not use the information in rendering his decision, which is why he was not required under the Procurement Code to provide copies of those

exhibits it to Corizon. (F.F. ¶37.) In other words, he deemed the information was not necessary to render a decision. Our own review of the record confirms this – the facts set forth in the final determination regarding Clark Resources and Sioux Services are readily apparent from Wexford’s original proposal and the face of the August 6, 2012 letter, responding to the request for additional information.⁵

Corizon disputes the Deputy Secretary’s findings of fact on this issue, insisting that he used the confidential information, but Corizon offers no basis, other than argument, why the findings are incorrect. Corizon contends that the situation here is controlled by *Integrated Biometric*, but that case is distinguishable. In *Integrated Biometric*, a panel of this Court vacated the award of a contract because DGS’s deputy secretary assigned to review the bid protest violated Section 1711.1(e) of the Procurement Code, 62 Pa. C.S. § 1711.1(e). 22 A.3d at 307. The deputy secretary deemed it necessary to review the protestant’s Form 10-K and Form 10-Q Securities and Exchange Commission (SEC) filings in order to determine whether the protestant was financially capable of performing the contract. *Id.* at 306. The deputy secretary denied the bid protest, ruling that the protestant was not financially capable, expressly relying on the SEC filings. *Id.* at 307. This Court vacated the contract award because the deputy secretary, in violation of Section 1711.1(e), had failed to give the protestant a reasonable opportunity to address the information in the SEC filings. *Id.*

⁵ For example, the Deputy Secretary found that Sioux Services would perform 65 percent of the overall work in its contract. (Final Determination, Conclusions of Law, at 6.) Corizon claims that the source of that finding can only be the confidential information Wexford submitted on August 6, 2012, which Corizon was not permitted to review. Corizon is wrong. Wexford submitted the 65 percent figure in the letter itself, not the attachments. (R.R. at 921a.) Because Sioux Services will perform at least 60 percent of the contract itself, it is not a pass-through as defined in the RFP and the BMWBO’s score was proper.

The situation here is not similar. In *Integrated Biometric*, the deputy secretary expressly stated that he relied on the SEC filings to make his decision. Here, the Deputy Secretary expressly excluded from his consideration the proprietary information that he could not share with Corizon. Corizon has given us no reason to question the Deputy Secretary's findings.

Corizon's next argument that the Deputy Secretary violated the Procurement Code in that he permitted the Contracting Officer and Wexford to submit sur-reply briefs, which Corizon contends are not permitted under the Code. Section 1711.1(d) authorizes the contracting officer to submit a response to a bid protest and authorizes the protestant to submit a reply to the response. 62 Pa. C.S. § 1711.1(d). Section 1711.1(e) provides that the presiding officer "shall review the protest and any response or reply and may request and review such additional documents or information he deems necessary to render a decision and may, at his sole discretion, conduct a hearing." 62 Pa. C.S. § 1711.1(e).

We disagree with Corizon's interpretation of the Procurement Code. Simply, sur-replies are not prohibited and may be requested by the presiding officer at his discretion. We also disagree with Corizon's characterization of the record and with the assertion that its protest was prejudiced by the alleged sur-replies. The Deputy Secretary asked for additional information regarding Wexford's DB submittal in response to arguments raised in Corizon's protest. There was nothing improper about that procedure. The Contracting Officer and Wexford, as parties often do, took the opportunity of providing supplemental information to also submit sur-reply arguments. Although he was not required to do so, the Deputy Secretary, in his discretion, accepted them and permitted Corizon the opportunity to respond. For that reason, Corizon was not prejudiced. It received copies of the supplemental information and the so-called sur-replies and responded thereto in its 13-page letter of August 16, 2012. (R.R. at 924a-36a.)

The Deputy Secretary then gave Corizon a second opportunity to respond (R.R. at 937a) and Corizon informed the Deputy Secretary via letter dated August 20, 2012, that Corizon “would not be resubmitting or supplementing its response” of August 16, 2012. (R.R. at 938a.)

Finally, Corizon argues that the Deputy Secretary violated the Procurement Code by permitting Wexford to participate in the bid protest. Corizon contends that the only proper parties to a bid protest are the contracting officer and the aggrieved “contractor or bidder or offeror, a prospective bidder or offeror, or a prospective contractor.” 62 Pa. C.S. § 1711.1(a). Because Wexford was formally awarded the contract on June 29, 2012 (F.F. ¶20), and Corizon filed its bid on July 6, 2012 (F.F. ¶¶27), Corizon contends Wexford did not have standing to participate in the protest. We disagree. The Procurement Code authorizes the presiding officer to solicit information he deems necessary to render a decision from many sources, including other bidders or offerors. 62 Pa. C.S. § 1711.1(e). The parties agree that under the DGS Procurement Handbook, “all bidders and offerors who appear to have a substantial and reasonable prospect of winning the award shall be notified [of the protest] and may file their agreement/disagreement with the purchasing agency. . . .” (DGS Procurement Handbook, Ch. 58(D).) When Corizon filed its protest, the Deputy Secretary suspended the contract award to Wexford until after the protest was resolved, alerted the Contracting Officer and Wexford that a protest had been filed, and solicited responses. (F.F. ¶28.) Corizon has failed to establish that the Deputy Secretary’s procedural decisions were prohibited by the Procurement Code or constituted an abuse of discretion.

B. Whether Wexford’s DB submittal was scored incorrectly

As set forth above, Corizon lost the bid to Wexford by less than one percent of the total points available, predominantly due to Wexford’s significantly higher score in the DB category. Corizon contends that DGS’s BMWBO erred by

crediting certain Wexford subcontractors with DB status and that Wexford's DB score was calculated incorrectly. To support this general proposition, Corizon raises several arguments. We address each of them in turn.

Corizon's first argument related to Wexford's DB submittal is that the BMWBO violated the RFP by failing to ensure that Wexford's DB subcontractors are not pass-through entities. (Corizon Brief at 36.) Corizon cites the provision in the RFP setting forth the 40 percent threshold for receiving full DB credit as an affirmative duty on the BMWBO to ensure that DB subcontractors are not pass-through entities. (RFP Part III-4(C), R.R. at 27a.) As one example of the BMWBO's alleged failures, Corizon points to Wexford's submission of Sioux Services to provide the services of "medical and hazardous waste collection and disposal." (Wexford DB Submittal, R.R. at 538a.) Corizon claims that there is a disconnect between the services Sioux Services is supposed to perform under Wexford's proposal (collection and disposal of hazardous waste) and the services Sioux Services is certified to perform or capable of performing (just collection). As evidence of its assertion, Corizon submitted an email it received from Sioux Services in which Sioux Services stated that it does not own its own facilities or trucks for disposal of medical waste and that it "broker[s] the transportation and disposal." (Nov. 4, 2011 Email from Sioux Services to Corizon, R.R. at 570a.)

We find that Corizon has failed to establish an error of law or abuse of discretion related to this issue. The Deputy Secretary described the BMWBO's scoring process and found that it was consistent with the Procurement Code and met the requirements of the RFP. The BMWBO ensures that DB subcontractors are properly pre-certified as disadvantaged businesses and that they are certified in the services for which they are contracted to perform. That is what occurred here. Thus, for example, the BMWBO properly scored Wexford's DB submission for Sioux Services where Wexford represented in its proposal that Sioux Services will

directly perform at least 60 percent of the contracted services. The BMWBO confirmed that (a) Sioux Services is pre-certified as a WBE, (b) there are no changed circumstances that would cause Sioux Services to lose that certification, and (c) Sioux Services is certified to perform the services it is contracted to perform. The BMWBO reviewed Corizon's DB submittal using the same standard of review. More generally, the Deputy Secretary described that his function, absent evidence of fraud or bad faith, was to ensure that the proper procedures were followed when the proposals were scored and that the RFP requirements were met, not to engage Corizon in speculative, predictive judgments regarding whether the DB subcontractors would be unable to perform.

Further, there is no provision in the RFP that requires proposals to include the percentage of work that a DB subcontractor will, in turn, subcontract out, so long as the DB subcontractor will not subcontract out more than 40 percent of the work. (RFP Part II-9(A)(3)(c) at 15-16, R.R. at 21a-22a, quoted above.) Thus, under the circumstances here, Wexford and Sioux Services were not required to disclose any sub-subcontractors until after the Deputy Secretary requested further information on August 6, 2012. For that reason, the Sioux Services email is simply not the smoking gun email that Corizon makes it out to be. Sioux Services is certified by the BMWBO in the classifications of "Environmental Consulting Services," "Hazardous Waste Collection," and "Other Waste Collection," for having met the requirements of the regulations of the United States Department of Transportation, Title 49, Part 26 of the Code of Federal Regulations. (July 27, 2011 DB Certification No. 13654, R.R. at 543a.) Wexford's DB submittal identified Sioux Services to perform "medical and hazardous waste collection and disposal." (R.R. at 538a.) When the Deputy Secretary requested additional information, Wexford explained that Sioux Services would directly perform 65 to 85 percent of the contracted services, which was the transport and disposal of

medical waste, and that Sioux Services would sub-subcontract out 15 to 35 percent to Alpha Bio Medical Services, which would assist in the transport. (Aug., 10, 2012 Letter from Wexford to Deputy Secretary, R.R. at 921a.) We find that the Deputy Secretary was properly discharging his obligation under the Procurement Code by requesting this additional information and that Corizon has failed to show that Wexford's DB submittal of Sioux Services was improperly scored.⁶

Corizon's second argument related to Wexford's DB submittal is that the BMWBO failed to review Wexford's DB letters of intent. The RFP requires that offerors submit "signed subcontract[s] or letter[s] of intent for each Small Disadvantaged Business" that specify the services to be performed and how those services relate to the project. (RFP Part II-9(A)(3)(c)(vi), R.R. at 22a.) Corizon challenges the letters of intent for Clark Resources, LW Consulting, and Apparel Print and Promotions, Inc. (APP). (Corizon Brief at 43-52.)

Corizon did not raise this issue in its protest and, thus, the issue is waived. Section 1711.1(g) of the Procurement Code, 62 Pa. C.S. § 1711.1(g) ("Issues not raised by the protestant before the purchasing agency are deemed waived and may not be raised before the court."). Corizon did not mention the letter of intent of APP in the protest. Corizon did reference in its protest the letter of intent with Clark Resources, but it was in the context of the office space lease issue discussed above. (Corizon Protest ¶73, R.R. at 188a.) Corizon also referenced the letter of intent with LW Consulting (Corizon Protest at ¶68, R.R. at

⁶ As the Deputy Secretary noted, the BMWBO cannot ensure contract performance, which is the level of review Corizon sought in its protest. (Final Determination, Conclusions of Law, at 6-7.) To the extent Wexford's representations prove to be false, DGS has an enforcement remedy. The RFP provides that by submitting a proposal, an offeror represents that all information and representations are material and important and that the Commonwealth "shall treat any misstatement, omission or misrepresentation as fraudulent concealment of the true facts relating to the Proposal submission, punishable pursuant to 18 Pa. C.S. § 4904." (RFP Part I-26(A), R.R. at 14a.)

186a), but it was in the context of its sham/pass-through DB subcontractor argument discussed above. The Deputy Secretary adequately addressed those issues when it determined that the BMWBO had fulfilled its obligation to review the offerors' DB submittals.

Corizon's third argument related to Wexford's DB submittal is that the BMWBO violated the RFP by failing to require Wexford to make firm commitments to its proposed DB subcontractors. (Corizon Brief at 53.) Corizon did not raise the firm commitment issue in its protest and, therefore, the issue is waived.

Corizon's fourth argument related to Wexford's DB submittal is that the Deputy Secretary's reliance on Wexford's after-the-fact submission related to Sioux Services proves, *ipso facto*, that Wexford's proposal was incomplete. This issue is a repackaging of Corizon's argument that the Deputy Secretary failed to provide Corizon with information he relied on regarding Wexford's DB submittal. Corizon asks that we infer that the Deputy Secretary's request from Wexford for further information regarding Sioux Services is conclusive proof that Wexford's original proposal was inadequate. To the contrary, as discussed above, the Procurement Code authorizes requests for more information and those requests are not conclusive proof of deficiencies in an offeror's proposal.

C. Whether DGS violated the Procurement Code by issuing an RFP

Corizon claims that DGS violated the Procurement Code by failing to provide a sufficient reason for using RFPs rather than competitive sealed bidding. (Corizon Brief at 58.) The Procurement Code has provisions authorizing competitive sealed bids, requests for proposals, and sole source bids. "When the contracting officer determines in writing that the use of competitive sealed bidding is either not practicable or advantageous to the Commonwealth, a contract may be entered into by competitive sealed proposals." Section 513(a), 62 Pa. C.S. §

513(a). Competitive sealed proposals are RFPs, which is the method DGS used here. In *PA Associated Builders and Contractors, Inc. v. Department of General Services*, this Court ruled that DGS must meet a “particularity standard” to establish that competitive sealed bidding is not “practicable or advantageous” to the Commonwealth. 996 A.2d 576, 585-86 (Pa. Cmwlth. 2010) (*en banc*).

We agree with the Deputy Secretary that Corizon waived this argument by failing to timely raise it. (Final Determination, Conclusions of Law, at 7.) Section 1711.1(b) of the Procurement Code requires that bid protests shall be filed “within seven days after the aggrieved bidder or offeror or prospective contractor knew or should have known of the facts giving rise to the protest.” 62 Pa. C.S. § 1711.1(b). The fact that DGS did not adequately explain why it was not using competitive sealed bidding was apparent when DGS first issued the RFP on September 16, 2011, without setting forth a reason for using an RFP. (R.R. at 4a.) Corizon chose to engage in the RFP process rather than challenge it. Corizon did not protest until after it failed to win the contract, filing its protest on July 6, 2012. That is untimely under the Code. *See Cummins v. Department of Transportation*, 877 A.2d 550 (Pa. Cmwlth. 2005) (holding that protest period begins to run when grounds are known or should have been known, even if that occurs before the proposal or bid is denied); *Collinson, Inc. v. Department of Transportation*, 959 A.2d 480 (Pa. Cmwlth. 2008) (following *Cummins*).

Corizon attempts to parse hairs and argues that DGS failed, until June 29, 2012, after Corizon’s proposal was rejected, to set forth the reasons why competitive sealed bidding was not practical or advantageous to the Commonwealth for this contract and, as a result, Corizon could not challenge DGS’s rationale for using an RFP until after the rationale was made available. (DGS’s Bureau of Procurement, Form BOP-124, Determination to Use Competitive Sealed Proposals (RFP) Method of Procurement, R.R. at 576a.) This

is a distinction without a difference. DGS's alleged failure to follow Section 513 of the Procurement Code should have been open and obvious to Corizon when DGS issued the RFP on September 16, 2011, or, at the latest, when its CEO attended an information session about the RFP on September 26, 2011. (F.F. ¶¶8-9.)

D. Whether Corizon's Technical submittal was scored incorrectly

Corizon next argues that the Deputy Secretary erred because he failed to analyze each of Corizon's ten separate allegations regarding why its score was wrong, thereby violating Sections 1711.1(e) and 1711.1(f) of the Procurement Code. (Corizon Brief at 63.) After review, we conclude that the Deputy Secretary adequately addressed and disposed of Corizon's challenge to its Technical score. Corizon's protest to its Technical score was premised on the proposition that it is not in the best interests of the Commonwealth to award the contract to Wexford, because Corizon's Technical score is higher than Wexford's and because Wexford's Technical score was third among all offerors.⁷ (Corizon Protest ¶¶78-79.) This argument fails. The RFP clearly sets forth the scoring criteria, which includes the Cost and DB criteria in addition to the Technical. (F.F. ¶11; RFP Part III at 20-21, R.R. at 26a-27a.) Wexford scored higher than Corizon in the Cost and DB criteria. (F.F. ¶14.)

Regarding Corizon's ten separate assertions regarding why its Technical score was incorrect, the Deputy Secretary concluded that none of the assertions tied directly to the deduction of points from Corizon's proposal. Corizon's assertions were based on DGS's Debriefing Statement issued to Corizon. The Deputy Secretary noted that the weaknesses identified in the Debriefing

⁷ Corizon received the second-highest Technical score among the four offerors. Correct Care, Inc., was first in the Technical submittal, receiving a perfect score, but scored next to lowest in the DB submittal and lowest in Cost submittal. (F.F. ¶14.)

Statement were not intended to correlate to the scoring sheets or a reduction in Corizon's points. Corizon has failed to prove legal error or an abuse of discretion in the Deputy Secretary's determination.

For all of the above reasons, the denial of the bid protest is affirmed.

JAMES GARDNER COLINS, Senior Judge

Judge Cohn Jubelirer concurs in the result only.
Judge Brobson did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Corizon Health, Inc.,	:
Petitioner	:
	:
v.	: No. 1740 C.D. 2012
	:
Department of General Services,	:
Respondent	:

ORDER

AND NOW, this 4th day of January, 2013, the denial of the bid protest is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge