

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT

DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2477	Date of Decision: 06/22/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest <input type="checkbox"/> Contract Claim	
Procurement Identification:	Under DBM Project No. F10R5200095
Appellant/Respondent:	Devaney & Associates, Inc. Department of Budget and Management

Decision Summary:

Interested Party - If a bidder or offeror is not eligible for award, it is not an interested party under COMAR 21.10.02.01B(1) and 21.10.02.02A, and it lacks standing to protest.

Bid Protest - Timeliness - Protests based upon alleged improprieties which are apparent before the closing date for receipt of proposals are untimely unless filed before the closing date for receipt of proposals.

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of Devaney &)
Associates, Inc.)
Under DBM Project No.) Docket No. MSBCA 2477
F10R5200095)

APPEARANCE FOR APPELLANT: Cynthia B. Sanders, Esq.
Astrachan Gunst Thomas, LLC
Baltimore, MD

APPEARANCE FOR RESPONDENT: Alan W. Kempske
Assistant Attorney General
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APPEARANCE FOR INTERESTED PARTY: Philip M. Andrews, Esq.
(Market Street Communications,
Inc.) Kramon & Graham, P.A.
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OPINION BY CHAIRMAN HARRISON

This timely appeal concerns (1) a Request for Proposals (RFP) issued by the Department of Budget and Management (DBM) as a Small Business Reserve Program (sometimes herein referred to as SBR Program) procurement under the above referenced Project; (2) the Department of General Services' (DGS) disqualification of Appellant as a "Small Business" under *State Finance & Procurement Article (SFP) §14-501, et. seq.* of the Annotated Code of Maryland (2004 Suppl.); and (3) DBM's subsequent decision to recommend award of the resulting contract to Market Street Communications, Inc. (Market Street), the next highest ranked offeror and the Interested Party herein. For the reasons that follow, we shall dismiss the appeal on grounds that Appellant's protest was not timely filed.

Findings of Fact

1. On November 9, 2004, DBM issued the RFP for the above referenced Project for advertising, marketing and public relations services for Telecommunications Access of Maryland (TAM) programs in support of mandated roles established for TAM under Title 3, Subtitle 8 of the State Finance & Procurement Article.
2. The RFP was advertised as being limited solely to those businesses that qualified as certified Small Businesses. This requirement was set forth on the cover page of the RFP in bold face type and underlining as follows:

SMALL BUSINESS RESERVE PROCUREMENT

This procurement has been designated a Small Business Reserve procurement in accordance with Title 14, Subtitle 5 of the State Finance and Procurement Article of the Annotated Code of Maryland, as amended by Chapter 75, Laws of Maryland 2004. The Contract to be awarded under this solicitation may be awarded only to businesses meeting the qualifications of a Small Business as defined in §14-501(c) of the State Finance and Procurement Article.

- The first and second sentences of Subsection 1.1.1 of the RFP also advised that DBM would only contract with businesses that (1) meet the statutory requirements set forth in State Finance and Procurement Article, §§ 14-501 – 14-505, Annotated Code of Maryland, and (2) are registered with the Department of General Services Small Business Reserve Program.
3. The requirement to be a qualified Small Business also appeared in Section 1.30 of the RFP, entitled "Small Business Reserve Procurement". Section 1.30 repeated the

notification that the RFP was limited to businesses that met the qualifications of a "Small Business" as defined in §14-501(c) of the SFP and provided a list of the criteria for being a "Small Business", as set forth in §14-501(c) of the SFP.

4. The certification process for the Small Business Reserve Program is administered by DGS and is one of self-certification that takes place through DGS' website. DGS provides oversight and review of whether the companies who self-certify as Small Business Reserve Program qualified businesses are, in fact, so qualified before any contract is awarded. It is common practice for DGS to require businesses that have self-certified as a Small Business Reserve Program small business to provide documentation substantiating such claim before any contract is awarded to them under an SBR Program procurement. It is also common practice for the Procurement Officer to check with DGS to assure that the apparent awardee is qualified under the SBR Program before a contract is awarded.
5. A pre-proposal conference attended by Appellant was held on November 22, 2004. Proposals were due on December 23, 2004. Appellant submitted a proposal, along with other offerors, including Market Street.
6. The DBM Procurement Officer put together an evaluation team to evaluate all of the proposals submitted. The evaluation committee evaluated the proposals and ranked Appellant first and Market Street second.
7. Upon completion of the evaluation herein, the DBM Procurement Officer set out to confirm the Small Business Reserve Program qualifications of the apparent awardee, Appellant. DGS requested substantiating documentation

from Appellant. The documentation revealed that Appellant was not qualified under DGS' Small Business Reserve Program and was, therefore, ineligible for further consideration. The Procurement Officer then moved to the offeror rated the next highest, Market Street, and determined that it did qualify as a small business under DGS' Small Business Reserve Program and was therefore eligible for award. Appellant was advised of its disqualification and of a proposed award to another offeror on March 14, 2005.

8. Previously, on March 4, 2005, in a letter to the Governor, Appellant's President wrote that on March 2, 2005, she had "told DGS that my tax returns would include media costs that exceed the maximum level of gross sales to qualify for the Program." Appellant also advised in this letter that "[i]n reviewing the SBR Program guidelines, it was clear that our small Company could not qualify."
9. As noted above, Appellant was advised that DBM was awarding the contract to another offeror on March 14, 2005.
10. On March 21, 2005, Appellant submitted a protest to the DBM Procurement Officer.
11. Appellant alleged in its protest that (1) it qualified for the Small Business Reserve Program and (2) the interpretation of the SBR Program as including media costs (which meant Appellant exceeded the maximum level of gross sales to qualify for the Program) would eliminate the full-service advertising agencies that the State sought for the TAM service (i.e. designation of the Project as an SBR procurement was inappropriate) and that

Market Street was a broker and thus could not qualify for the SBR Program.

12. By final decision letter dated April 26, 2005, the Procurement Officer denied Appellant's protest based in part on timeliness considerations and standing.
13. In its appeal, Appellant asserts that its protest was timely filed because, contrary to the assertion in DBM's final decision letter, it was not apparent that there was an impropriety in conducting the solicitation of the TAM Project under the SBR Program because the Procurement Officer instructed Appellant how to qualify under the SBR Program. Alternatively, Appellant asserts that its time for filing a protest did not commence to run until DGS disqualified it from the SBR Program, and DGS did not disqualify Appellant until March 14, 2005.
14. Appellant also asserts in its appeal that designation of the Project as an SBR Program procurement was inappropriate, and Appellant argues that it remains an interested party entitled to protest the award of the Project to another vendor believed to be operating as a broker and thus unqualified under the Project's SBR Program requirements.
15. It is DBM's position as set forth in the Agency Report that Appellant's appeal should be denied on both procedural grounds and on the merits. The Board will dismiss the appeal on grounds involving timeliness and standing.
16. Appellant filed comment on the Agency Report; however, no party requested a hearing and thus the appeal is decided on the written record.

Decision

The Board has observed that the "failure to file in a timely manner deprives this Board of jurisdiction to hear the appeal". Pile Foundation Construction Co., Inc., MSBCA 2224, 5 MSBCA ¶501 (2001), citing ISMART, LLC, MSBCA 1997, 5 MSBCA ¶417 (1997), affirmed, MSBCA v. ISMART, LLC, No. C\97-034415 (Cir. Ct. for Howard County, March 17, 1998).

COMAR 21.10.02.03A provides: "A protest based upon alleged improprieties in a solicitation that are apparent before . . . the closing date for receipt of initial proposals shall be filed before . . . the closing date for receipt of initial proposals."

Appellant failed to meet the time limits contained in COMAR 21.10.02.03A for a protest concerning an apparent alleged impropriety (i.e. that issuing the Procurement as a Small Business Reserve Program procurement would limit competition) in the RFP. The protest was submitted on March 21, 2005; however, Appellant was aware of its concerns regarding eligibility as early as November 2004 when it reviewed the RFP. In Appellant's appeal to this Board, Appellant notes that when the RFP was issued, it "immediately noticed that, due to its method of accounting; it and probably other advertising agencies were excluded from bidding on this Project." A protest concerning Appellant's apparent exclusion from competition should have been filed before the closing date for receipt of proposals, December 23, 2004.

Accordingly, the protest, as it relates to Appellant's not being eligible to compete for SBR Program procurements, must be dismissed. Harford Alarm Company, MSBCA 2371, 6 MSBCA ¶539 (2003) ("Matters related to any alleged improprieties in the solicitation . . . must be raised prior to the time for submission of proposals. . . ."); Wacor Electronic Systems, MSBCA 2310, 5 MSBCA ¶526 (2002); Reliable Reproduction Supply,

Inc., MSBCA 2232, 5 MSBCA ¶495 (2001) (rationale for requiring protest before closing date is to provide the contracting agency with an opportunity to consider the protest while corrective action, if warranted, is still possible).

Notwithstanding its failure to file a timely protest, Appellant alleges by way of an estoppel argument that certain information and instructions provided to it by the Procurement Officer resulted in its not being aware of any grounds for protest until notified on March 14, 2005 that award would be made to another offeror due to Appellant's disqualification. DBM acknowledges that the Procurement Officer received several phone calls from Appellant during the course of the procurement in which Appellant made inquiries about the SBR Program. However, DBM asserts that at no time did the Procurement Officer offer any advice to Appellant concerning measures to take that would result in its qualification as a Small Business and that the Procurement Officer told Appellant that DGS had sole authority for qualifying companies for the Small Business Reserve Program.

Appellant argues that it had a right to rely on direction given by the Procurement Officer because Section 1.5 of the RFP states that "the sole point of contact in the State for purposes of this RFP prior to the award of any Contract is the Procurement Officer." However, DGS is responsible for oversight of SBR Program self certification, and DBM avers that the only direction given by the DBM Procurement Officer was to inform Appellant that it needed to contact DGS in connection with establishing certification under the Small Business Reserve Program. DBM further avers that the Procurement Officer at no time gave Appellant any advice or direction concerning how to qualify for DGS' Small Business

Reserve Program, including, by way of example only, deducting media costs from gross sales, as alleged by Appellant.

Appellant did not request a hearing wherein sworn witness testimony on the issue could have been presented to the Board. Accordingly, the Board may only find that an estoppel exists based on the written record. Appellant does not meet its burden to establish its allegations based on this written record.

Accordingly, Appellant's assertion that its protest was timely must fail insofar as it attempts to rely on an estoppel predicated upon alleged instructions or advise by the Procurement Officer as a basis for avoiding the time limitations of COMAR 21.10.02.03A.

Alternatively, Appellant argues that it did not know nor should it have known that it had been disqualified from the SBR Program until receipt of a March 14, 2005 letter from DGS regarding disqualification and a phone conversation on March 14, 2005 with the Deputy Secretary of DBM, who told Appellant that DBM was awarding the Project to another offeror.

This argument raises consideration of the timeliness requirements of COMAR 21.10.02.03B, which provides that for cases not covered by COMAR 21.10.02.03A, discussed above, "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."

However, the record reflects Appellant's acknowledgement that it had actual knowledge of its probable ineligibility prior to the March 14, 2005 date of the formal letter from DGS indicating that it was not qualified under the SBR Program. As noted above, Appellant had concluded as early as November 2004, that it would be excluded from competition, and in Appellant's March 4, 2005 letter to the Governor, Appellant

wrote “[i]n reviewing the SBR Program guidelines, it was clear that our small Company could not qualify.” In the letter to the Governor, Appellant also wrote that on March 2, 2005, Appellant’s President “told DGS that my tax returns would include media costs that exceed the maximum level of gross sales to qualify for the Program.” The record clearly reflects that the March 14, 2005 letter from DGS was merely a written formality of a conclusion Appellant had itself already reached weeks, if not months before.

Accordingly, the protest must also be denied as untimely under COMAR 21.10.02.03B because Appellant, by its own admission, was aware of the basis for the protest (that it could not be awarded the contract) at the time it communicated with the Governor by letter dated March 4, 2005, although it did not file its protest until March 21, 2005, more than seven days later.

Regarding Appellant’s final ground of appeal that it remains an interested party entitled to challenge the denial of its protest that Market Street was unqualified, we note the following.¹ Only an interested party (i.e. one who may be aggrieved by the solicitation or award of a contract) may file a protest. COMAR 21.10.02.01B(1) and COMAR 21.10.02.02A. Appellant is not an interested party and is thus not entitled to protest the award of the Project to another vendor. Appellant is not reasonably susceptible of being selected for an award because it has been removed from the SBR Program by DGS. Appellant thus lacks standing as an interested party to contest an award to another offeror. Branch Office Supply, MSBCA 2372, 6 MSBCA ¶540 (2003); James F. Knott Construction Co., Inc., MSBCA 2437 (December 28, 2004).

¹ Appellant’s protest in this regard was made within seven days of when Appellant was advised that award to Market Street was contemplated.

The letter from DGS to Appellant dated March 14, 2005 stated, in pertinent part, "according to your company's admission: Gross revenues exceed the monetary threshold under the SBR Program. Please note that as a result your company will be removed from the SBR Program." Based on such advise, Appellant could not be considered for award and thus does not have standing before this Board to contest award to another. Appellant's appeal notes that it is still shown as a small business on DGS' website. However, according to the Agency Report, DBM has been informed by DGS that this omission has been rectified. We do not find that the failure to promptly update the DGS website constitutes a rescission of the DGS decision regarding eligibility as set forth in the DGS confirmation letter of March 14, 2005.

For the foregoing reasons, the appeal must be dismissed.

Wherefore, it is Ordered this _____ day of June, 2005,
that the above captioned appeal is dismissed with prejudice.

Dated:

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2477, appeal of Devaney & Associates under DBM Project No. F10R5200095.

Dated:

Michael L. Carnahan
Deputy Recorder