

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of )  
Gilford Corporation )  
 )  
 ) Docket Nos. MSBCA 2871 & 2877  
Under DGS Project No. )  
P-075-080-010 )

APPEARANCE FOR APPELLANT: Harold D. Young  
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Meryle Freiberg Dunlap  
Assistant Attorney General  
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Michael J. Cohen  
Hyattsville, Maryland

OPINION BY BOARD MEMBER DEMBROW

These appeals must be denied because appellant has no standing to pursue them, having withdrawn its offer by refusing to extend its bid price beyond the period of irrevocability established by the solicitation, and also because appellant failed to comply with State regulation governing the requirements of filing a timely bid protest.

Findings of Fact

1. This appeal arises from the State's effort to construct the Harriet Tubman Underground Railroad Visitor Center in Dorchester County, Maryland.
2. The underlying solicitation, in the nature of a multi-step Invitation for Bids (IFB), was managed by the Department of General Services (DGS) and established a 30% participation goal for Disadvantaged Business Enterprises (DBE).
3. Appellant Gilford Corporation (Gilford) submitted its technical and price proposals to DGS on August 23, 2013; however, by telephone conference and e-mail on September 4,

- 2013, appellant was notified by DGS that "Gilford Corporation's technical proposal was deemed unacceptable, thus your price proposal will be returned unopened..." (Appellant's Amended Response to Motion to Dismiss, Ex. 1.)
4. The following day, appellant was notified by DGS of a reversal of the aforementioned decision, that appellant's technical proposal was deemed acceptable, and that its price proposal would therefore be opened after all, later that day. (Appellant's Amended Response to Motion to Dismiss, Ex. 2, Tolbert Affidavit, #9.)
  5. Financial offers were opened on September 5, 2013, and were "irrevocable for a period of 120 days following bid opening" according to the terms of IFB, rendering all bid prices in force until January 4, 2014. (State's Motion to Dismiss, Ex. 2, #12.)
  6. Gilford's bid in the amount of \$12,720,000 was determined by DGS to be the low bid. (Agency Report, Tab 1; State's Ex. 1.)
  7. According to the State, the bid submitted by Gilford "did not list any DBE participation in its MDOT [Maryland Department of Transportation] DBE Form B, which bidders were required to complete and submit with their bids on September 5, 2013. Left blank, the Procurement Officer could only conclude that GC [Gilford] requested a full waiver of the 30% goal on MDOT DBE Form A." (Agency Report, Tab 10.)
  8. Gilford requested a waiver of the 30% DBE goal established by the subject IFB, which was denied by DGS on October 8, 2013 based at least in part on an internal analysis of appellant's waiver request conducted by DGS and directed to the procurement officer on September 30, 2014. (Agency Report, Tabs 4, 5, 7, 9; Appellant's Amended Response to the State's Motion to Dismiss, Ex. 4.)
  9. The October 8, 2013 denial letter written by the controlling DGS procurement officer stated as the grounds for the denial

that it was "based on my determination that Gilford failed to submit sufficient documentation to show that it engaged in good faith efforts to meet the 30% DBE goal set for the Project." (Agency Report, Tab 8.)

10. Appellant's receipt of the October 8, 2013 decision triggered the tolling of the 7-day statute of limitations for filing a bid protest with DGS to secure reconsideration of the decision to deny Gilford's request for the State to waive the 30% DBE goal specified in the subject IFB.
11. There is no evidence of record that a bid protest was ever filed in response to the October 8, 2013 denial determination.
12. The State contends that no bid protest of the October 8, 2013 decision was filed at any time with DGS and appellant does not claim otherwise.
13. The written record in this appeal reflects that, after the State denied appellant's waiver request, specifically, on or about October 15, 2013, Gilford filed an MDOT DBE Form B offering to meet 22.9% of the 30% DBE goal and seeking to obtain only a partial waiver. (Agency Report Tab 9; Appellant's Amended Reply to Motion to Dismiss, Ex. 4.)
14. Appellant requested that the DGS denial determination of October 8, 2013 be reconsidered, as a result of which a conference was conducted on October 23, 2013 and thereafter DGS again denied Gilford's waiver request, this time with the concurrence of the State Highway Administration (SHA), notifying Gilford of that decision by cover letter dated October 25, 2013, along with a 4-page attachment from SHA dated the same date which said: "For the reasons stated in the Procurement Officer's [October 8, 2013] Decision, GC simply has not provided the documentation, set forth in COMAR 21.11.03.11, which would allow the Procurement Officer to conclude that GC's Good Faith Efforts [to achieve the 30% DBE goal] were sufficient under Maryland law. Addressing

the issue of whether GC requested a waiver of the full 30% DBE goal, or merely a partial waiver, SHA agrees that GC did not request a partial waiver of the 30% DBE goal." (Agency Report, Tab 10.)

15. Though no bid protest had been filed with the DGS procurement officer, on November 6, 2013, Gilford filed a bid protest appeal directly with the Board, objecting to the DGS determinations of October 8 and 25, 2013, that appeal being docketed by the Board as MSBCA 2871.
16. In addition to the other grounds for its appeals, appellant now also complains that the reconsideration panel which convened on October 23, 2013 should not have included DGS representatives who participated in the original decision, but that complaint was first interposed in one of Guilford's responsive pleadings and not prior to that time, with the DGS procurement officer or otherwise. (Transcript, Pg. 27.)
17. By correspondence dated November 20, 2013, Gilford also sent a document directly to the Board of Public Works (BPW) said to constitute a bid protest. (Agency Report, Tab 16.)
18. The stated grounds of the "bid protest" sent to BPW were:
  - (1) that DGS should have followed the federal standard for DBE compliance review rather than the State standard, and
  - (2) that DGS wrongfully classified Gilford's DBE noncompliance as an issue of bidder responsiveness rather than bidder responsibility. (Agency Report, Tab 16; See 49 CFR 26.53.)
19. The aforementioned correspondence was forwarded by BPW to DGS.
20. By final decision dated December 12, 2013, DGS denied both of the grounds of complaint set forth in Gilford's written transmission to BPW dated November 20, 2013. (Agency Report, Tab 11.)

21. On December 23, 2013, based upon the December 12, 2013 denial letter, Gilford filed a second appeal with the Board, which was docketed as MSBCA 2877.
22. In the meantime, while one of these appeals was pending, delaying contract award, DGS directed correspondence to Gilford dated December 9, 2013, requesting Gilford to "extend your bid price for an additional ninety (90) days [past the designated period of irrevocability until January 4, 2014] (expiring April 3, 2014)." (Agency Report Ex. 12; State's Ex. 2.)
23. By e-mail communication on December 11, 2013, DGS repeated its request for Gilford to confirm that it agreed to extend its bid price through April 3, 2014 and demanded appellant's reply that day. (State's Ex. 3.)
24. Because of inclement weather and in order to secure additional time to contact its subcontractors, by e-mail communication on December 11, 2013, Gilford requested of DGS an extension of one week, until December 18, 2013, to respond to the State's bid extension requests. (State's Ex. 3.)
25. By e-mail of December 18, 2013, appellant notified DGS as follows: "I hereby respond to your "Bid Extension Request" negatively. Because of the volatility of certain sectors of the construction industry today and the potential of material and equipment prices that may increase at the beginning of the upcoming year, we will not extend our bid prices for an additional ninety (90) days, as you have requested." (Agency Report, Ex. 13; State's Ex. 4.)
26. By correspondence to appellant dated December 20, 2013, DGS acknowledged receipt of Gilford's December 18, 2013 notification that it declined to extend the bid price it had earlier offered. (Agency Report, Ex. 14; State's Ex. 5.)
27. By appellant's refusal to extend its offer past January 3, 2014, and by application of the terms of the IFB and

operation of contract law, Gilford's low bid offer was revoked effective January 4, 2014.

28. The Agency Report was filed January 14, 2014, followed by the State's filing of a Motion to Dismiss on January 17, 2014, which was opposed and supplemented with additional pleadings filed through February 21, 2014, the business day immediately preceding the date of the February 24, 2014 scheduled hearing in this matter on the State's Motion to Dismiss.

### Decision

DGS raises two independent bases to assert the necessity of the Board's denial of these bid protests by granting its Motion to Dismiss: (1) that Gilford lacks standing to pursue its appeal, and (2) that its protests were not timely filed. The State is correct on both grounds.

In order to have standing to pursue an appeal, a prospective appellant must hold the status of an interested party by virtue of being in line for contract award. (See Appeal of Branch Office Supply, MSBCA 2372 (Nov. 2003), 6 ¶540; Appeal of PTC Corp., et al., MSBCA 2027 (Jan. 1998), 5 ¶430). Upon the filing of its first appeal on November 6, 2013, appellant had standing, having submitted an offer which was determined to be the low bid. But afterwards, Gilford plainly withdrew its offer. By the terms of the IFB, its bid was not revocable until 120 days elapsed following bid opening on September 5, 2013, so Gilford's offer was not permitted to be withdrawn until January 4, 2014. After passage of that date, however, appellant's offer could be withdrawn and was expressly withdrawn, as made explicit by affirmative unambiguous communication from Gilford to DGS on December 18, 2013, receipt of which was confirmed by DGS letter to Gilford on December 20, 2013.

At the time that appellant revoked its offer to construct the Harriet Tubman Underground Railroad Center at the stated price of \$12,720,000, Gilford lost standing to pursue these

appeals. Had DGS attempted to accept appellant's offer after January 3, 2013, no enforceable contract could or would have been created because no offer was pending for the State to accept. Gilford was no longer willing or lawfully obliged to perform the work specified at the price initially stated and thereafter withdrawn.

Appellant argues that its pursuit of the instant appeal is sufficient to maintain standing in order to proceed, but Gilford's own words belie that assertion. Gilford had every right to withdraw its offer on or after January 4, 2014; and it did. It very clearly said so on December 18, 2013. The Board does not fault appellant in the slightest for deciding to withdraw its bid. It had every right to do so and from its explanation to DGS it is clear that that decision was based on sound business judgment. Gilford did not want to risk the possibility of unknown price increases being imposed upon it by its subcontractors.

As appellant points out, the Board has previously stated that the filing and pursuit of a bid protest ordinarily serves to confirm that the bidder does indeed extend the offer during the pendency of the protest. (Appeal of Caremark, MSBCA 2544, 2548 & 2865 (March 2007), \_\_\_¶\_\_\_, pgs. 44-48.) But Caremark (*Id.*) is distinguishable, presenting circumstances quite unlike the case at bar. In Caremark (*Id.*), there was no affirmative rejection of the opportunity to allow an offer to remain in force. In this appeal, Gilford specifically informed DGS that it was not willing to extend its offer beyond January 3, 2014, and also notified DGS with particularity that the reason for Gilford's decision to revoke its offer after the expiration of 120 days was "because of the volatility of certain sectors of the construction industry today and potential of material and equipment prices that may increase at the beginning of the upcoming new year."

Appellant could not have been more clear in instructing DGS that its bid was good only for 120 days and not afterwards. The

Board notes also with respect to the precedent relied upon by appellant that in Caremark (*Id.*), the State did not request that either the appellant or the interested party extend their offers past the mandatory irrevocability period, nor did either of them elect unilaterally to do so. The appellant as well as the interested party held the same status in that regard, as neither of them indicated to the State whether they would or would not extend their offers. They were never asked, and by their conduct both were obviously intent upon having their offer accepted. That is the opposite of what happened in the instant procurement.

(As an aside so as not to create further confusion potentially caused by the Board's prior ruling in Caremark (*Id.*), the Board cautions procurement officers that the better practice, as DGS did here, is to solicit an express extension of a contract offer in order to avoid the possibility of a bidder claiming that, upon expiration of the period of irrevocability stated in the solicitation, it is no longer obliged to perform at the price offered.)

To sum, when a bidder expressly responds negatively to the State's request for bid extension and withdraws its offer as of the date that the offer becomes revocable, the offer is thereby revoked. At that time the State is unable to accept an offer that no longer exists and as a consequence, the former offeror loses standing to pursue an appeal because it no longer is an interested party.

Federal cases cited by counsel to DGS are directly on point on the question of whether standing ceases to exist when an offer is withdrawn. See Don Greene Contractor, Inc., B-198612, 80-2 Comp. Gen. ¶74 (July 28, 1980); S.J. Groves & Sons Co., 82-2 CPD ¶423 (1982). Just as Gilford refused to extend its bid offer in the instant appeal, Greene also expressed its refusal to the National Park Service of the Department of the Interior. In dismissing the protest in Greene (*op cit.*), the Comptroller General stated: "By refusing to extend its bid, DGC withdrew its

offer and therefore rendered itself ineligible for award. Therefore, even if we were to sustain DGS's protest, it could not receive award of this contract because it would no longer have an offer outstanding which the Government could accept. . . . Therefore, we find DGC does not have the necessary direct and substantial interest with respect to award under this solicitation to be regarded as an interested party. . . ." (*op cit.*) The same can be said with respect to the instant appeal.

In Groves (*Id.*), the Comptroller General went further, dismissing an appeal because the appellant conditioned its agreement to extend its bid price upon the potential of escalating prices, the same concern explained by Gilford in its December 18, 2013 e-mail to DGS. In accordance with Groves (*Id.*), even an agreement to extend bid prices, but only upon certain conditions, renders such a conditional extension invalid. Surely Gilford's express refusal to extend its bid similarly renders appellant here "no longer an interested party eligible to maintain its protest." (*Id.*) This appeal must be denied because the appellant is no longer an interested party and therefore has no standing.

Even if appellant had extended its bid price rather than refusing to do so, the instant appeal is also required to be denied because Gilford failed to follow the proper procedures for noting bid protests, violating the Code of Maryland Regulations (COMAR) in several respects. Specifically, COMAR 21.10.02.03B provides that a bid protest must be filed "not later than 7 days after the basis for protest is known, or should have been known, whichever is earlier." COMAR 21.10.02.03C further states, "A protest received by the procurement officer after the time limits prescribed. . . may not be considered." This statute of limitations is a hard and fast rule that frequently arises in bid protests. In fact, failure to comply with the 7-day filing rule is cited as the sole ground for dismissal of innumerable appeals heard by the Board. (See Appeal of Advanced Fire Protection,

MSBCA 2868 (Feb. 2014) \_\_\_¶\_\_\_; Appeal of Chesapeake System Solutions, MSBCA 2308 (Nov. 2002, 5 ¶525); Appeal of Numersonlynusource JV, MSBCA 2302, (Sept. 2002), 5 ¶521; Appeal of Omegaman Sprinklers, MSBCA 2202 (Oct. 2000), 5 ¶506; Appeal of Aquaculture Systems Technologies, LLC, MSBCA 2141 (Sept. 1999) 5 ¶470; Appeal of Century Elevator, Inc., MSBCA 2125 (July 1999), 5 ¶466; Appeal of American Sanitary Products, Inc., MSBCA 2110 (Jan. 1999) 5 ¶455; Appeal of JCV, Inc., MSBCA 2067 (Aug. 1998), 5 ¶445; Appeal of Utz Quality Foods, Inc., et al., MSBCA 2060, 2062 (June 1998), 5 ¶441; Appeal of ISMART, LLC, MSBCA 1979 (March 1997), 5 ¶417; Appeal of Crystal Enterprises, MSBCA 1971 (Oct. 1996), 5 ¶407; et al.) And in addition to the strict timing requirement, the form of a valid bid protest is also established with great specificity by COMAR 21.10.02.04, which even includes the requirement that a bid protest be enclosed in an envelope specifically labeled "Protest," not to mention the various disclosures of content also mandated by that regulation.

Gilford's request for waiver of the 30% DBE goal was denied by DGS on October 8, 2013. Therefore any protest was required to have been noted to DGS within 7 days, by October 15, 2014. But no bid protest was filed during that time frame. Indeed, no written bid protest was ever filed at all, as required by COMAR. It is undisputed that Gilford requested and received from DGS a formal reconsideration of the October 8, 2013 denial decision and that a meeting for that purpose was conducted on October 23, 2013, with a final decision affirming the denial issued shortly thereafter, bearing the date of October 25, 2013, but no formal protest to DGS was submitted, only an appeal directly to the Board.

Except for garnering information from the DGS denial letters, the Board can only speculate about the probable or potential contents of a bid protest that was never filed. The responsibility of the Board is to review bid protests to determine independently whether the State's responsive actions

were lawful and otherwise sustainable. Here, there was no protest. As a result, the Board has nothing to review in the first appeal. COMAR specifically forbids consideration of any complaint arising from the State's October 8 and 25, 2014 denials of appellant's requests for waiver of DBE requirements for which no timely bid protest was filed.

Unlike the first appeal, with respect to the second of these two appeals, there is at least documentary evidence of record reflecting the basis of the "bid protest" that preceded that appeal. So we know with certainty the grounds of the December 23, 2013 appeal as set forth in appellant's complaint to BPW by the transmission of a document dated November 20, 2013 and purporting to constitute a "bid protest." But that protest is also violative of COMAR requirements and invalid. It is undisputed that no bid protest was ever sent by Gilford to the procurement officer as mandated by COMAR, which requires that a valid bid protest must first be filed with the designated procurement officer at the agency responsible for the action from which the protest arises. That is the precursor to an appeal to the Board. But here appellant's "bid protest" was improperly sent to BPW instead. Moreover, it was untimely as well as being filed with the wrong persons.

Gilford's filing with BPW was labeled "bid protest" and claims to constitute a protest of the October 25, 2013 DGS denial letter in response to appellant's request for partial DBE waiver. But as set forth above, bid protests must be filed with the procurement officer within 7 days of the time that the basis of protest is known or should have been known. This is a strict and unforgiving rule. Gilford's December 23, 2013 appeal to the Board is a complaint over a determination by DGS made on December 12, 2013. That decision was founded upon Gilford's written transmission to BPW dated November 20, 2013, complaining of an event that occurred on October 25, 2013 affirming a decision initially made October 8, 2013. Objection to that determination

should have been sent to the DGS procurement officer no later than October 15, 2013. Therefore the bid protest sent to BPW on November 20, 2013 and thereafter forwarded to DGS is untimely and may not be considered.

Of course appellant is free to contact public officials on BPW, namely, the Governor, Comptroller, and Treasurer. Citizens and others may freely communicate whatever information or material they choose to convey. But a document purporting to be a "bid protest" filed more than a month late and directed to BPW is *ultra vires*, entirely outside of Maryland's well established procurement process. That process is defined in law and regulation in great detail. The State's procurement procedures are adopted and reliably enforced in part to insure that all bidders are treated fairly and equally. So it is indeed ironic that in characterizing the State's application of its transparent and impartial procurement policy, appellant elects to "question the integrity" of the procurement process undertaken here, using words like "bias," "fraud," "scheming," "shady," and "deceitful." Such terms should not be used loosely, as they were in this appeal. There is no indication that anything untoward or underhanded was done by the State throughout the course of this important procurement. It was appellant alone who deviated from acceptable procurement practices, deliberately attempting to circumvent lawful process by taking its complaint directly to BPW when the proper channel established by law to handle and resolve a complaint such as this is first through the procuring agency and thereafter to the Board. BPW was exceedingly correct in simply referring Gilford's late purported bid protest back to the agency where it belonged, at which time appellant's untimely misdirected grievance was nonetheless again reviewed and rejected a third time.

Though the State's actions during this procurement were evidently not what Gilford may have anticipated, it certainly should not have come as a surprise to anyone that the State might

insist that the vendor selected to construct the Harriet Tubman Visitor Center might be required to comply with strict adherence to the State's DBE participation inclusionary goals.

Neither of these appeals is properly before the Board, so the granting of the State's Motion to Dismiss both of them is fully warranted. For all of the foregoing reasons, these appeals are hereby denied because appellant does not have standing nor did appellant file a timely bid protest with DGS.

Wherefore it is Ordered this 5<sup>th</sup> day of March, 2014 that the State's Motion to Dismiss be and hereby is GRANTED and these appeals be and hereby are DENIED.

Dated: 3/5/14

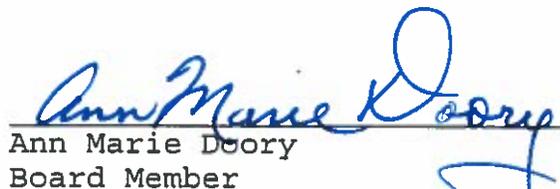


Dana Lee Dembrow  
Board Member

I Concur:



Michael J. Collins  
Chairman



Ann Marie Doory  
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 2871 and 2877, appeal of Gilford Corporation Under DGS Project No. P-075-080-010.

Dated:

3/5/14



Michael L. Carnahan  
Deputy Clerk