

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
H.D. Myles, Inc.)
)
) Docket No. MSBCA 2714
)
Under)
SHA Contract No. 5261071415)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Jason D. Couch
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER DOORY

This appeal is dismissed for failure to file a timely bid protest.

Findings of Fact

1. On November 5, 2009 the State Highway Administration (SHA) publicly opened bids for Contract 5261071415 which is an asset management contract for a rest area on I-70 in Frederick County.
2. Abacus Corporation (Abacus) provides the low bid at \$4,630,963.20 of the three bids received. H.D. Myles, Inc. (Myles) bid came in at \$4,895,195.51 and the third bidder, Roy Jorgensen Associates, Inc. came in with a bid of \$5,594,767.00.
3. No bid protest was filed within seven (7) days of the November 5, 2009 bid opening date.

4. SHA sent Abacus a notice of apparent low bid letter on November 6, 2009. SHA requested an Affirmative Action Plan and its Experience and Equipment Statement from Abacus and Abacus complied with the request in November and December of 2009.
5. The Board of Public Works approved the award to Abacus on February 24, 2010.
6. On February 26, 2010 SHA sent a Notice of Award letter to Abacus.
7. On March 3, 2010 the contract was executed by SHA and on March 4, 2010 SHA issued a Notice to Proceed to Abacus.
8. On March 5, 2010 Myles submitted a bid protest.
9. On May 6, 2010, the SHA Procurement officer denied Myles's protest by letter and Myles filed a Notice of Appeal on May 28, 2010.

Decision

The protest is hereby denied for lack of a timely filing, thus preventing the Board from having jurisdiction. COMAR 21.10.02.03B states "protests shall be filed not later than seven (7) days after the basis for a protest is known or should have been known, whichever is earlier.

The time requirement is mandatory and must be strictly construed. Initial Healthcare MSBCA 2267, 5 MSBCA ¶512 (2002). It is clear that whether a bidder knew or should have known the basis of the protest is also to be strictly construed by the Board. Clean Venture Inc., MSBCA 2198, 5 MSBCA ¶486 (2000).

In this matter, on November 5, 2009, SHA publicly opened bids for the contract. All open bids were available for public inspection. The proper time for a bid protest would have been seven (7) days from November 5, 2009. The Appellant did not timely file when it knew or should have known that SHA had opened

all bids. Instead, Myles filed a bid protest on March 5, 2010, almost four (4) months later.

This inaction prevented the procurement officer from having the legal jurisdiction to consider the protest. Moreover, the failure to timely file the bid protest also prevents the Board from having jurisdiction to hear this appeal.

A concern was raised by Myles about the administration of another contract between SHA and Abacus. However, Myles essentially is complaining about another disparate contract, not the one being protested. The other contract Myles references is not before the Board.

It is ordered that the protest be denied for lack of jurisdiction due to the failure to timely file.

Wherefore it is Ordered this _____ day of September 2010 that the above-captioned appeal is DISMISSED.

Dated:

Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
Chairman

Dana Lee Dembrow
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 2714, appeal of H.D. Myles, Inc. under SHA Contract No. 5261071415.

Dated:

Michael L. Carnahan
Deputy Clerk