STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. MSBCA 2251	Date of Decision: 12/5/01
Appeal Type: [X] Bid Protest	[] Contract Claim
Procurement Identification: Under DGS Project No. MU-000-001-001	
Appellant/Respondent: Alliance Roofing & Sheet Metal, Inc. Department of General Services	

Decision Summary:

Bid Protest - Timeliness - A protest filed more than seven (7) days after a protestor knew or should have known of the grounds for protest is late and the Board is without jurisdiction to hear the appeal from the denial of the protest.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of ALLIANCE ROOFING & SHEET METAL, INC.	)	
	)	**Docket No. MSBCA 2251**
Under DGS Project No. MU-000-001-001	)	

APPEARANCE FOR APPELLANT: **Joel S. Rubinstein, Esq.**
Bell, Boyd & Lloyd, PLLC
Washington, MD

APPEARANCE FOR RESPONDENT: **John H. Thornton**
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: **Frank Kollman, Esq.**
(Krupnik Brothers, Inc.) **Kollman & Saucier, P.A.**
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its bid protest which was denied on timeliness grounds. For the reasons that follow the Board concludes that the protest was not timely and dismisses the appeal.

Findings of Fact

1. On May 16, 2001 DGS issued Invitation to Bid No. 001IT812751 (ITB) for replacement of a roof of the Upper Shore Community Mental Health Center, DGS Project No. MU-000-001-001 (Project).
2. The ITB requested prices for a Base Bid and an Alternate No. 1. The scope of work for the Base Bid included the application of acrylic paint to be applied to a cupola.
3. Alternate No. 1 provided:

> "Delete acrylic paint system. Add installation of `Liquid Siding' coating system as manufactured and installed by Procraft, with twenty-five (25) year warranty.

4. Prior to the deadline for receipt of bids no one protested against

any of the provisions of the ITB.

5. The ITB also provided in pertinent part:

> 2.2 PAINT MATERIALS, GENERAL
>
> * * *
>
> B. Material Quality: Provide manufacturer's best-quality paint material of the various coating types specified. Paintmaterial containers not displaying manufacturer's product identification will not be acceptable.
>
> 1. Proprietary Names: Use of manufacturer's proprietary product names to designate colors or materials is not intended to imply that products named are required to be used to the exclusion of equivalent products of other manufacturers. Furnish manufacturer's material data and certificates of performance for proposed substitutions.

6. The General Conditions provided in relevant part:

> The terms "or equal," and "approved equal" are used as synonyms throughout the specifications. They are implied in reference to all manufacturers or products in the specifications unless otherwise stated. The Department is the final judge as to equality. The Department does not represent or warrant under any circumstances that there exists an equal to any item specified or that an equal is readily available, even if the words "or equal" are used in the specifications.

7. The deadline for receipt of bids was 10:30 a.m. on July 19, 2001, and bids were opened at that time. Bids were received from Appellant and the interested party (Krupnik) among others.

8. The low bidder for the base bid plus Alternate No. 1 was Krupnik at $594,130.00. The low bidder for the base bid only was Appellant at $587,000.00.

9. Bids were available for public inspection immediately after bid opening.

10. From bid opening on July 19, 2001 through August 19, 2001, Appellant made no request to review the bids and made no inquiries to the Procurement Officer.

11. On August 20, 2001 Appellant called the Procurement Officer regarding the status of the award and was informed that Krupnik would be awarded the contract with Alternate No. 1.

12. On August 21, 2001 Appellant filed its protest. The protest stated:

> We refer you to the project manual, section 01230 ALTERNATES, 3.1 SCHEDULE OF ALTERNATES, A. ALTERNATE NO. 1: "Delete Acrylic Paint System. Add installation of `liquid siding' coating system as manufactured and installed by Procraft, with twenty-five (25) year warranty." According to STATE PROCUREMENT REGULATIONS, Title 21, Subtitle 04, Chapter 1.02.A states "Specifications may not be drawn in such a manner as to favor a single vendor over other vendors." Continuing in Chapter 1.04, "The procurement officer or his designee shall be responsible for reviewing the specifications for content, clarity, and completeness and to insure that the specification is **nonrestrictive**." (Emphasis added.) We claim that ALTERNATE NO. 1 is proprietary and restrictive. Furthermore, Procraft declined to bid the pro-

> ject. This created a situation where the bidders were compelled to guess at a price in order to have a valid, responsive bid.
>
> Our remedy for the protest is to declare ALTERNATE NO. 1 as non-conforming to regulations and non-responsive. Award the contract to Alliance Roofing & Sheet Metal, Inc., the lowest responsive bidder.

13. By decision dated September 7, 2001, the Procurement Officer denied the protest as untimely on the grounds that the bases for the protest, the alleged proprietary nature of the specification for liquid siding and the alleged fact that Procraft would not furnish Appellant with a quote, were apparent to Appellant before the deadline for receipt of bids, yet the protest was not filed until approximately August 21, 2001, thirty days after the July 19, 2001 due date for receipt of bids.
14. The Procurement Officer's decision was received by Appellant on September 7, 2001 and on September 12, 2001 Appellant filed a timely appeal with this Board.
15. On November 9, 2001, Respondent filed an Agency Report and Motion to Dismiss on timeliness grounds. Appellant responded thereto on November 29, 2001. No party requested a hearing.

Decision

The letter of appeal to this Board alleges that the protest was timely under COMAR 21.10.02.03(A) because the alleged proprie-tary nature of the ITB was "not apparent . . . until the bid was due." Appellant has asked the Board to "declare Alternate #1 as non-conforming to regulations, and non-responsive and to award the contract to Appellant Roofing & Sheet Metal, Inc., the lowest responsive bidder."

Respondent contends that: (1) the protest against the terms of the ITB was untimely under COMAR 21.10.02.03(A); and (2) the protest was untimely under COMAR 21.10.02.03(B) assuming *arguendo* that the alleged

deficiency in the ITB was not apparent until bids were opened; and thus the Board lacks jurisdiction to consider the appeal from such an untimely protest. We agree with the Respondent.

Appellant complained in its protest that: (1) Alternate No. 1 substituting liquid siding for acrylic paint amounted to an impermissibly restrictive specification in that only one source for liquid siding exists; and (2) prior to submitting a bid Appellant was unable to obtain a price from Procraft, the liquid siding supplier named in the specification as having an acceptable product because Pocraft declined to bid on the Project.

Appellant knew or should have known before the deadline for receipt of bids on July 19, 2001 of both grounds for the protest it finally filed a month later on August 21, 2001. Alternate No. 1 clearly says: "Add installation of `Liquid Siding' coating system as manufactured and installed by Procraft . . . ." Therefore, even assuming *arguendo* that the ITB limited bidders to a single supplier or product, it would also have been clear on the face of the ITB that this product or supplier was required. An objection to that requirement had to be filed before the deadline for receipt of bids. COMAR 21.10.02.03(A). In addition, by its own admission Appellant knew before the deadline for receipt of bids that Procraft declined to give Appellant a bid for the Project. Therefore, Appellant was required to protest on that ground before the deadline for receipt of bids. COMAR 21.10.02.03(A).

Since no protest was filed until after bid opening, the protest was late and may not be considered. COMAR 21.10.02.03(C); FMB Laundry, Inc., MSBCA 2136, 5 MSBCA ¶467(1999); Wilbanks Technologies Corp., MSBCA 2066, 5 MSBCA ¶440 (1998); Bruce D. Royster, MSBCA 1968 & 1969, 5 MSBCA ¶406(1996); Chimney Restorations, Inc., MSBCA 1476, 3 MSBCA ¶230(1989). Since the deadline for filing a protest is jurisdictional,

Appellant's appeal must be dismissed. ISmart, LLC ("ISmart"), MSBCA 1979, 5 MSBCA ¶417(1997) affd., Maryland State Board of Contract Appeals v. ISmart, LLC., No. C-97-034415 (Cir. Ct. How. Co., March 17, 1998); PTC Corporation and Ion Track Instruments, Inc. ("PTC"), MSBCA 2027, 5 MSBCA ¶430(1998); JCV, Inc. ("JVC"), MSBCA 2067, 5 MSBCA ¶445 (1998).

Even if the Board were to accept Appellant's arguments that the alleged proprietary nature of the ITB and Appellant's alleged inability to obtain a bid from Procraft were not apparent "until the bid was due", the protest was still untimely. Appellant says the grounds for the protest were not known until "the bid was due" which was July 19, 2001. In that case, COMAR 1.10.02.03(B) re-quired that the protest be filed not later than 7 days after the basis for the protest was known or should have been known, whichever was earlier, i.e., within 7 days after July 19, 2001. However, Appellant did not file the protest until over one month later, on August 21, 2001, after it learned that it was not awarded the contract with Alternate No. 1. At bid opening it would have been apparent from a review of the bids that Krupnik was the apparent low bidder for the base bid plus Alternate No. 1. Any protest involving a challenge to the possibility of award under Alternate No. 1 was thus required to be filed by Appellant within 7 days of bid opening on July 19, 2001 when Appellant would have had constructive knowledge that it was not the apparent low bidder.

Therefore, even if the Board accepts Appellant's assertions that the bases for protest did not become apparent until bid opening, Appellant's protest was still untimely under COMAR 21.10.02.03(B) and the protest, filed over a month later, was late and may not be considered. COMAR 21.10.02.03(C); Clean Venture, Inc., MSBCA 2198, 5 MSBCA ¶486(2000); Century Elevator, Inc., MSBCA 2125, 5 MSBCA ¶466(1999); American Sanitary Products, Inc., MSBCA 2110, 5 MSBCA

¶455(1999). Since the timeliness requirement is substantive in nature, the protest and appeal must be dismissed. ISmart; PTC; JCV, all supra.

Accordingly, it is Ordered this day of December, 2001 that the appeal is dismissed with prejudice.

Dated:

Robert B. Harrison III
Board Member

I concur:

Anne T. MacKinnon
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 2251 appeal of Alliance Roofing & Sheet Metal, Inc. under DGS Project No. MU-000-001-001.

Dated:

_____
Mary F. Priscilla
Recorder