

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

Docket No. 2387	Date of Decision: 02/13/04
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DGS Solicitation No. 001IT814396	
Appellant/Respondent: Juice Co., Inc. Department of General Services	

Decision Summary:

Bid Protest - Timeliness - Pursuant to COMAR 21.10.02.03B, a bidder must protest within seven days of receiving actual or constructive notice of facts which might constitute grounds for protest.

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In The Appeal of Juice Co., Inc.)
)
 Under DGS Solicitation) Docket No. MSBCA 2387
 #001IT814396)
)

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

On July 1, 2003 the Department of General Services (DGS) awarded contracts under the above captioned solicitation to Unique Beverage Concepts (Unique) for bag-in-a-box juice bases and to Dispense-All of MD (Dispense-All) for soft drink bladder boxes. The protest from which this appeal arose relates solely to the award to Unique for juice bases. Appellant was not the low bidder for the soda-portion of the procurement, the contract awarded to Dispense-All. The award to Unique was made in the face of Appellant's protest purportedly in accordance with COMAR 21.10.02.11B(1) to protect substantial State interests. It is that award to Unique against which Appellant filed the protest which led to this appeal.

1. This appeal arose from a solicitation for competitive sealed bids for juice bases and soda bases. The Invitation to Bid provided that separate awards would be made to the lowest responsive and responsible bidders for juice bases and soda bases. Appellant submitted the apparent low bid for juice

bases but not soda bases. Appellant's bid for juice bases was rejected by the DGS Procurement Officer as nonresponsive and on June 9, 2003, Appellant protested against the rejection of its bid (hereinafter referred to as the "first protest").

2. On June 13, 2003, the Procurement Officer made a determination, subject to approval by the Secretary of DGS or a designee of the Secretary, that an award to Unique in the face of Appellant's first protest was necessary to protect a substantial State interest. The determination provided:

Bids were directly solicited in EMM for Bag in a Box Juice Bases and Soft Drink Bladder Boxes on May 28, 2003, for a Statewide contract under Solicitation No. 001IT814396 for a one (1) year period beginning July 1, 2003 and ending September 30, 2003. Agencies will begin placing orders on 6/15/03. Five bids were received.

The apparent low bidder was Juiceco, Inc. who submitted a bid on June 6, 2003, was notified that their bid was non-responsive to the published requirements. Vendors were notified that samples were required to be submitted to MCI-Hagerstown by May 16, 2003 for testing and approval. Juiceco, Inc. supplied samples of Nicholson products for juice and soda. When Juiceco submitted a bid it stated that the product Juiceco would be supplying would be Nicholson or equivalent.

Juiceco, Inc. filed a protest on June 9, 2003 contesting the decision of the PO that they were deemed non-responsive.

Based on the circumstances above it is the determination of the PO that it is in the best interest of the State to deny the protest for Juiceco, Inc., upholding the decision that the bid is non-responsive and proceed with the award of the contracts without delay to the Correctional facilities, in the face of the protest Pursuant to COMAR 21.10.02.11 B(1). Failure to award the contract would result in beverage shortage at the facility thereby causing the Agency to declare an emergency and procure the products on the open market at substantially higher costs. This would cause a

hardship to the State which is already in a severe budget deficit.

On June 27, 2003, the Procurement Officer's June 13 determination was approved by DGS Assistant Secretary Mr. Tony Reed, the designee of the Secretary of DGS.

3. The determination to award to Unique in the face of Appellants's protest was available for public inspection on June 27, 2003, after it was approved by Mr. Reed. The award was made to Unique on July 1, 2003.
4. On June 25, 2003 Appellant appealed to this Board from the denial of its first protest that its bid should not have been rejected as nonresponsive. The appeal was docketed as MSBCA 2356.
5. Respondent filed an Agency Report in MSBCA 2356. That Agency Report advised that the contract for juice bases had been awarded to Unique on July 1, 2003, in the face of Appellant's protest. The Agency Report in MSBCA 2356 was filed with this Board on July 11, 2003, and a copy was mailed to Appellant's attorney on that day.
6. The transcript of the hearing in MSBCA 2356 before this Board on August 27, 2003 reflects that Appellant had received the Agency Report by the date of the hearing. The transcript also reflects that the award of the contract to Unique in the face of Appellant's first protest was discussed by the parties and the Board during the hearing.
7. By a decision dated September 9, 2003, this Board sustained the appeal of Appellant in MSBCA 2356. That decision is now pending before the Circuit Court for Baltimore City on appeal by DGS.
8. By letter dated September 29, 2003, counsel for Appellant requested a copy of "that statement of justification and determination made by the head of the general services administration to substantiate that the execution of the

contract without delay was necessary to protect substantial State interest and to identify such State interest."

9. By letter dated October 8, 2003, counsel for DGS sent Appellant's counsel a copy of the June 13, 2003 DGS determination, approved by Mr. Reed, to support award of the contract to Unique in the face of Appellant's first protest.
10. By letter dated October 20, 2003, and received by the Procurement Officer on that day, Appellant submitted the instant protest against award of a contract to Unique in the face of Appellant's first protest alleging that the determination under COMAR 21.10.02.11B(1) is legally insufficient and without basis.
11. By decision dated December 16, 2003, the Procurement Officer denied the instant protest on the grounds that the protest was late under COMAR 21.10.02.03C and that it lacked merit. From the denial of the instant protest Appellant has taken this timely appeal.
12. Appellant did not file comment on the Agency Report and neither party requested a hearing.

Decision

COMAR 21.10.02.11 permits an award of a contract to be made pending issuance of a final decision by this Board on the appeal if a determination is made that execution of the contract without delay is necessary to protect substantial State interests.

When Appellant received the Agency Report filed in MSBCA 2356, Appellant received actual notice of the award of the contract to Unique in the face of Appellant's first protest. Since the Agency Report was mailed on Friday, July 11, 2003, it is presumed that the Agency Report was received by Appellant three business days later on Wednesday, July 16, 2004. Md. Rule 1-203(a) and (c). Under COMAR 21.10.02.03B, Appellant had until July 23, 2003, seven calendar days from July 16, 2003, the date when Appellant is presumed to have received the Agency Report, to protest against the award to

Unique. Since the instant protest regarding award to Unique was not received by the Procurement Officer until October 20, 2003, Appellant's instant protest cannot be considered, and this Board lacks jurisdiction to consider this appeal. COMAR 21.10.02.03C; Kennedy Temporaries v. Comptroller, 57 Md.App. 22(1984). We explain further.

This Board has held that when a bidder is on actual or constructive notice of facts which might constitute grounds for protest the bidder, pursuant to COMAR 21.10.02.03B, must protest within seven days after the date of receiving notice of those facts. When the facts would be apparent from a review of documents available for public inspection, the seven-day period under COMAR 21.10.02.03B begins to run from the date the document is available for review, not from the date the bidder actually reviews the document. Utz Quality Foods, Inc. and Coca-Cola Enterprises, Inc., MSBCA 2060 and 2062, 5 MSBCA ¶441(1998)(the seven-day period for filing a protest ran from the date the protestor knew of the contract awarded to another party, not from the date the protestor reviewed the contract); Potowmac Engineers, MSBCA 2257, 5 MSBCA ¶508(2002) (where the basis for protest would have been known upon a review of a bid, the deadline for filing a protest is seven days from the date bids were available for public inspection, whether or not the protestor reviewed the bid on that date). See also Century Elevator, Incorporated, MSBCA 2125, 5 MSBCA ¶466(1999); The Traffic Group Incorporated, MSBCA 1883 and 1888, 4 MSBCA ¶381(1995).

Appellant received actual notice of the award to Unique when Appellant received the Agency Report on July 16, 2003. The transcript of the hearing on August 27 shows that Appellant also had actual notice no later than August 27 of the award to Unique when it was discussed on the record before this Board during the hearing of the appeal in MSBCA 2356. Respondent's counsel advised the Board during this hearing that it did not matter when the Board issued its decision because the award had already been made to

Unique and that award would not be affected by the Board's decision. The determination made under COMAR 21.10.02.11B was available for public inspection on that date, August 27, 2003, and in fact, was available for public inspection two months earlier, on June 27, 2003, when Mr. Reed approved it. Assuming *arguendo*, however, that August 27, 2003, was the earliest date on which Appellant became aware of the award to Unique, and therefore received notice that there was or should be a determination in the procurement file (COMAR 21.03.04.01) under COMAR 21.10.02.11B, Appellant was bound, at the latest, to file a protest against any alleged defects in that determination within seven days after August 27 or by September 3, 2003. The seven-day deadline was not extended until Appellant reviewed the determination to award in the face of its first protest. Since Appellant's protest was not filed until October 20, 2003, the protest was late and may not be considered. COMAR 21.10.02.03C; Kennedy Temporaries; Utz; Potowmac; Century; Traffic Group, all supra.

Wherefore, it is Ordered this day of February, 2004 that the 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 2387, appeal of Juice Co., Inc. under DGS Solicitation #001IT814396.

Dated:

Loni Howe
Recorder