

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

Docket No. 2524	Date of Decision: 02/17/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland State Lottery Agency Solicitation# E75SO201200	
Appellant/Respondent: Merjo Advertising/Jeffrey Importing Maryland State Lottery Agency	

Decision Summary:

Bid Protest - Timeliness - A protest based upon alleged improprieties in a solicitation which are apparent before bid opening is required to be filed before bid opening.

THESE HEADNOTES ARE PRODUCED FOR ADMINISTRATIVE REFERENCE AND OPERATIONAL USE ONLY AND SHOULD NOT BE CONSIDERED "OFFICIAL TEXT" OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS, NOR SHOULD IT BE REFERENCED OR GIVEN ANY LEGAL STATUS. A COPY OF THE FULL AND COMPLETE DECISION SHOULD BE CONSULTED AND REFERENCED. FOR FURTHER INFORMATION, CONTACT THE BOARD OF CONTRACT APPEALS.

Description: 3.50 inch long golf pencil. Sharpened point on one end. #2 black lead. Pencils color is white."

Award: This contract will be awarded to the vendor who has the lowest unit cost based on quantities ranging from .5 to 1.5 million pencils. When submitting pricing, please submit only one price, based on the quantities of .5 to 1.5 million pencils. Once award is made the vendor will be notified which quantity the Maryland State Lottery Agency is requesting via a signed purchase order."

4. The IFB provided for the submission of questions and inquiries providing that:

Questions and inquiries must be directed to the Procurement Officer and must be received by the Lottery no later than 3:00 p.m. on Friday, November 18, 2005 (Local Time). All questions must be submitted in writing. The fax number is 410-230-8786. Telephone inquiries will not be answered. The Lottery will prepare written responses to all questions received by the above date and distribute these responses via www.emarylandmarketplace.com on November 21, 2005 by 3:00 p.m.

5. Written questions pertaining to the specifications were received from Appellant on November 16, 2005, and the Lottery's "Responses to Vendors' Written Questions" were also posted on the eMarylandMarketplace website.

6. As relevant to this appeal, one of the written questions received from Appellant on November 16, 2005 stated:

What is the minimum quantity to be shipped on this order? This is how pricing is determined. Lottery cannot expect the same price quote for 500,000 as for 1 ½ million.

The Lottery responded to the above question by stating:

Question # 2: What is the minimum quantity to be shipped on this order? This is how pricing is determined.

Answer: The Maryland Lottery does not know the minimum quantity until pricing is received. We are giving the vendors a quantity range to base their pricing on. The quantity range is .5 million thru 1.5 million pencils. Once pricing is received the vendor will be notified of the quantity via a State of Maryland Purchase Order.

7. Subsequent to the Lottery providing the written answers to the written questions, the Lottery began receiving telephone inquiries from Appellant asking the same question about the solicitation's requirement for only one price for the entire quantity range. Oral responses were provided to Appellant consistent with the written response provided by the Lottery as set forth above; i.e., that the Lottery was requesting a single average price at which the vendor would provide the pencils anywhere in the quantity range .5 through 1.5 million.
8. Notwithstanding Appellant's concerns as expressed by its oral inquiries and written question, Appellant did not file a written protest prior to the time and date for receipt of bids concerning the requirement for submitting only one price based on the entire

quantity range of between .5 and 1.5 million pencils.

9. On November 29, 2005 at 3:00 p.m., the Due Date/Time for receipt of Bids, the Lottery received a total of seven (7) Bids, including that of Appellant in response to the subject IFB.
10. Five (5) of the seven (7) Bidders provided the requested single price for the quantity range of .5 through 1.5 million pencils as required by the IFB specifications. Appellant, whose bid was the lowest, provided a single price; however, it also included a Note in the Comment Section imposing a condition that the price was "price each @ 1 ½ mil".
11. Appellant's bid was, therefore, rejected as "non-responsive" to the specifications because a single price quote limited to the specific quantity of 1 ½ million only was not what the price specification required. Appellant was notified of this rejection on December 2, 2005
12. By letter dated December 7, 2005, and received by the Procurement Officer the same day, Appellant protested for the first time the bid specification in the IFB concerning the requirement that Bidders provide a single average price for the pencils covering the entire range of .5 to 1.5 million.
13. In a Procurement Officer's Decision dated January 3, 2006, it was determined that Appellant's protest would not be considered by the Lottery because it was not timely filed under COMAR 21.10.02.03A.
14. Appellant appealed the Procurement Officer's Decision to this Board on January 12, 2006.

Decision

A protest that is based upon alleged irregularities in a solicitation that are apparent before bid opening is required to be filed before bid opening. COMAR 21.10.02.03A. See, Merjo Advertising & Sales Promotions Company, MSBCA 1948, 5 MSBCA ¶ 396 (1996). See also, Harford Alarm Company, MSBCA 2371, 6 MSBCA ¶ 539 (2002) at pp. 4-5; and FMB Laundry, Incorporated, MSBCA 2136, 5 MSBCA ¶ 467 (1999). Appellant's protest asserts that the IFB should have required a fixed quantity for the single price requested. However, the requirement for average price for the entire range was apparent on the face of the solicitation and, indeed, was the subject of pre-bid inquiry by Appellant. Therefore, a protest on that ground had to be filed no later than the deadline for receipt of bids, which was 3:00 p.m. on Tuesday, November 29, 2005. Accordingly, the Procurement Officer properly determined that Appellant's post-bid-opening protest against the pricing provisions of the IFB was late and, therefore, pursuant to COMAR 21.10.02.03C may not be considered by the agency.

Appellant asserts that by its pre-bid-opening questioning of the Lottery about the solicitation's pricing requirements it was protesting the Lottery's solicitation. However, the term "protest" has a specific and definite meaning within the context of Maryland's procurement law as set forth in COMAR 21.10.02.

COMAR 21.10.02.02B requires that the "protest shall be in writing and addressed to the procurement officer." Not before its letter to the Procurement Officer dated December 7, 2005 did Appellant identify his concerns as a protest addressed to the Procurement Officer in compliance with COMAR 21.10.02.02B. The most that may be said about Appellant's pre-bid inquiry is that it reflects his

disagreement with the Lottery's business judgement concerning pricing. Nothing in its previous pre-bid written questions to the Lottery in connection with the average pricing requirement nor in its follow-up oral questions met the legal requirement for a protest set forth in COMAR 21.10.02.02B. In short, this post-bid-opening protest of a matter based upon alleged irregularities in the solicitation that were apparent before bid opening was late and may not be considered.

Therefore, this appeal must be dismissed.

Wherefore, it is Ordered this day of February, 2006 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 2524, appeal of Merjo Advertising/Jeffery Importing under Maryland State Lottery Agency Solicitation # E75SO201200.

Dated:

Michael L. Carnahan
Deputy Recorder