

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

Docket No. 2526	Date of Decision: 03/14/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Aviation Administration IFB No. MAA-MC-2005-013	
Appellant/Respondent: CSCI, LLC Maryland Aviation Administration	

Decision Summary:

Bid Protest - Form - Under COMAR 21.03.05.02A, if a solicitation does not specify that electronic transactions are permitted or required, bidders or offerors may not use electronic means for any part of the procurement, including the filing of a bid protest. Therefore, a bid protest sent by facsimile may not be considered unless the solicitation authorizes protests to be sent by facsimile.

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.

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of CSCI, LLC                    )  
  )  
  )  
Under Maryland Aviation                    ) Docket No. MSBCA 2526  
Administration IFB No. MAA-                )  
MC-2005-013                                    )

APPEARANCE FOR APPELLANT:                Scott A. Livingston, Esq.  
  Lydia B. Hoover, Esq.  
  Rifkin, Livingston, Levitan  
  & Silver, LLC  
  Greenbelt, Maryland

APPEARANCE FOR RESPONDENT:               Stanley Turk, Esq.  
  Assistant Attorney General  
  Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:       None  
(BWWS, Inc.)

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from a final decision of the Maryland Aviation Administration (MAA) which denied its bid protest regarding a contract for window cleaning services at the Baltimore Washington International/Thurgood Marshall Airport. For the reasons that follow we will dismiss the appeal on grounds that the Appellant's protest was not timely filed.

Findings of Fact

1. Due to the filing of several protests by Appellant, this procurement remained open throughout 2005. At the request of the Procurement Officer, the low bidder BWWS, Inc. (BWWS), the interested party herein, extended its

bid price in February, May, August 2005, and again on November 10, 2005. In addition, BWWS provided MAA with replacement bonds issued in May 2005 and November 2005. Similarly, Appellant extended its bid price in February, May, August, and November 2005, and has provided replacement bonds issued in May and November 2005. Most recently, in February 2006, bid prices were again renewed by both BWWS and Appellant.

2. Expressing a concern that there may have been a lapse in coverage in BWWS's bid bond, on Friday, December 2, 2005, counsel for Appellant sent an e-mail to the Assistant Attorney General who had handled Appellant's previous bid protest requesting "a copy of Section L for BWWS, Inc.'s bid." On that same date, by return e-mail, counsel for Appellant was advised that the Procurement Officer would be out of the office that particular week and that a response would be forthcoming.
3. In response to Appellant's concern, the Office of the Attorney General requested that BWWS's surety confirm that there had been no lapse in coverage. In a memorandum dated December 5, 2005 to MAA counsel, BWWS's surety confirmed continuing bid bond coverage as follows:

BWWS, Inc., notified us on November 10<sup>th</sup> about the bid bond extension need on the Glass Cleaning Services Contract at Baltimore/Washington International Airport. The fax is to notify you there has been no lapse in coverage on their bid bond, and their bid bond has been extended until February 23, 2006.
4. Thereafter, on Tuesday, December 6, 2005, the requested Section L bid bond for BWWS was sent by facsimile to counsel for Appellant, along with the confirmation from

BWWS's bonding agent confirming that there had been no lapse in coverage of the bid bond. This document was received by counsel for CSCI on December 6, 2005 at 9:46 a.m.

5. On Friday, December 9, 2005, counsel for MAA received a facsimile from counsel for Appellant stating that "CSCI protests the award of the contract to BWWS on the grounds that its failure to furnish a new bid bond, in compliance with the MAA procurement officer's request of Nov. 10, disqualifies BWWS for award of the contract." This facsimile to counsel also advised that "I expect a supplement to this new bid protest on this basis to be filed on or about Monday, Dec. 12, 2005."
6. On December 12, 2005, counsel for Appellant sent Appellant's formal bid protest letter by both facsimile and U.S. mail to both the Procurement Officer and counsel for MAA. This was received by those parties only by facsimile on that date. The Procurement Officer did not receive the original of Appellant's protest sent by U.S. Mail until December 15, 2005.
7. By final decision dated January 25, 2006, the MAA Procurement Officer denied the bid protest. While discussing the protest on the merits, the Procurement Officer also noted that the protest could not be considered because it was not timely filed. By letter dated February 3, 2006, Appellant appealed the final decision to this Board. No party requested a hearing, and thus the appeal is decided on the written record.

### Decision

We conclude that this protest must be dismissed as untimely. Under COMAR 21.10.02.03.B, a protest must be filed "not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." The term "filed" means receipt by the Procurement Officer. COMAR 21.10.02.03.C.

Appellant contends that there was a lapse in BWWS's bid bond coverage in November 2005. As described in Appellant's protest letter, the basis for that contention was found in the documents provided to Appellant, through counsel, on December 6, 2005. Thus, the bases for this protest were actually known by Appellant on that date. Accordingly, any protest must have been properly filed with the Procurement Officer by December 13, 2005.

The December 9, 2005 facsimile to MAA counsel and the December 12, 2005 facsimile to the Procurement Officer did not constitute the proper filing of a protest. Maryland regulations prohibit the filing of bid protests by facsimile except where specifically permitted in the solicitation. See COMAR 21.03.05, attached as Exhibit A and incorporated herein by reference. Under COMAR 21.03.05.01.B(6), protests are considered to be a "procurement transaction." Under COMAR 21.03.05.02.A, if a "solicitation or contract does not specify that electronic transactions are permitted or required, bidders and offerors may not use electronic means for any part of the procurement." In this case, the solicitation does not specifically authorize protests to be filed electronically. Because the December 9, 2005 and December 12, 2005 facsimiles were improper attempts to conduct an electronic bid protest, those facsimiles did not result in a proper bid protest.

There is no discretion on the part of MAA to accept the facsimile as a properly submitted protest. MAA is bound by COMAR 21.03.05.03A which provides: "an attempt by a bidder, offeror, or contractor to conduct an electronic procurement may not be considered by the procurement officer unless the solicitation or contract specifically authorizes the electronic means for the specified transaction." MAA is also bound by COMAR 21.03.05.03B which provides that an "attempt by a bidder...to conduct a transaction by electronic means including any...protest...does not satisfy the requirements of this title unless the solicitation or contract specifically authorizes the use of electronic means for the specified transaction." These sections clearly warns bidders that in the absence of authorization in the solicitation, an electronic transaction, as defined by COMAR, will not be considered under any circumstances.

The protest was only properly received by the Procurement Officer by U.S. mail on December 15, 2005. As the December 12, 2005 facsimile did not constitute a legally recognized procurement transaction, the protest cannot be deemed to have been received by MAA until December 15, 2005. It follows that since the protest was not received until after the seven day time limit, under COMAR 21.10.02.03.C, this protest is untimely.

In its appeal letter to this Board, Appellant argues that since prior business involving this procurement was conducted by facsimile, this COMAR requirement should be considered to have been waived. Nothing in COMAR prevents parties from conducting ordinary business or even procurement transactions by electronic means. Electronic transactions are specifically permitted, but only when properly authorized.

While the MAA did not authorize bidders to conduct protests electronically for this procurement, the MAA did specifically authorize bidders to ask pre-bid questions and to return their bid renewal letters by facsimile.<sup>1</sup> This is in conformance with COMAR 21.03.05.02 which permits electronic transactions where both the transaction and the means are specified. In the bid extension letters, MAA specifically identified both the transaction (the bid extension) and the means (facsimile) for which that transaction could be conducted. This is consistent with COMAR; electronic transactions are permitted, but only to the extent that they are authorized. Accordingly, we do not find as argued by Appellant that any provision of COMAR 21.03.05 has been waived.

Because the protest was not timely filed, it may not be considered. COMAR 21.10.02.03.C. Accordingly, this appeal must be dismissed.

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<sup>1</sup> A facsimile is considered to be an electronic transaction. COMAR 21.03.05.02B(2)(a).

In The Appeal of CSCI, LLC )  
 )  
 ) Docket No. MSBCA 2526  
Under Maryland Aviation )  
Administration IFB No. MAA- )  
MC-2005-013 )

ORDER

Wherefore, it is Ordered this            day of March, 2006 that  
the appeal of CSCI, LLC in the above captioned matter 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 2526, appeal of CSCI, LLC under Maryland Aviation Administration IFB No. MAA-MC-2005-013.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Recorder