

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

Docket No. 2536	Date of Decision: 07/07/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under PSC ITB PSC #07-0106	
Appellant/Respondent: OCF Environmental Consulting Public Service Commission	

Decision Summary:

Notice - Telephone message not sufficient notice to begin running of 7 day appeal filing requirement - The COMAR requirement that a protest be filed not later than 7 days after the basis for a protest is known or should have been known (COMAR 21.10.02.3B) was met in this appeal. Respondent's telephone voice mail message did not constitute legal notice to Appellant for purposes of the 7 day appeal filing period beginning to run.

Notice - Procurement Officer's decision regarding a protest is the final action of the unit regarding that protest - When a procurement officer issues a decision to the protestor concerning a protest that decision will be considered to be the unit's final decision on the protest regardless of whether or not the decision has been approved by the unit head or other reviewing authority.

Standard of Board review of award of contract - The contest of a procurement award is a serious matter and mere disagreement with the evaluation of proposals or the recommendation for award is insufficient to meet an appellant's burden to show that the evaluation and/or award is unreasonable.

Contract formation - No legally binding contract was formed when a contract was sent to appellant by respondent by mistake and there was no intent on the part of respondent to contract with appellant.

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**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of OCF)
Environmental Consulting, LLC)
)
) Docket No. MSBCA 2536
)
)
Under PSC ITB PSC #07-0106)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Miles H. Mitchell
Deputy General Counsel
Maryland Public Service
Commission
Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant appeals from a final decision of the Maryland Public Service Commission which denied its bid protest regarding an Invitation to Bid for engineering consulting services in conducting a Liquefied Natural Gas Exclusion Zone Analysis for Washington Gas Light Company's proposed Chillum liquefied natural gas storage facility.

For the reasons that follow the appeal is denied.

Findings of Fact

1. On or about January 23, 2006 Respondent, the Maryland Public Service Commission (PSC) issued Invitation to Bid (ITB) PSC# 07-01-06.
2. The PSC is a quasi-judicial agency that regulates utilities under its jurisdiction.
3. The purpose of the ITB was to procure engineering consulting services to calculate the required thermal

radiation and vapor dispersion exclusion zones for Washington Gas Light Company's (WGL) proposed Chillum liquefied natural gas (LNG) storage facility, and compare the results to those submitted to the PSC by WGL for the facility.

4. The Mandatory Minimum Consultant Qualifications under Section 5 of the ITB required: familiarity with specific federal regulations; a working knowledge of various specified computer models and software; three project references; and, no business relations with WGL, regarding LNG projects, within the past three years.
5. This ITB was a small procurement as defined by *State Finance and Procurement Article, § 13-109*.
6. Storage of LNG involves compliance with various federal regulations.
7. The Contract was designated as a Fixed Price Contract.
8. The Contract was to be awarded by use of the Competitive Sealed Bidding procurement process.
9. Either party to the Contract could terminate the Contract without showing cause upon written notice to the Contractor specifying the extent and the effective date of the termination.
10. On February 7, 2006, the PSC received two technical and price proposals in response to the ITB. One was submitted by the interested party herein, Quest Consultants, Inc. (Quest); the other was submitted by OCF Environmental Consulting, LLC. (OCF), the appellant.
11. Each proposal was evaluated by the PSC's Engineering Division (PSCED) to determine whether the bidders' submissions satisfied the mandatory minimum consultant qualifications contained within the ITB.

12. After reviewing OCF's bid, the PSCED determined that it was unclear whether OCF had sufficient familiarity with relevant federal regulations.
13. On February 24, 2006, the PSCED e-mailed OCF requesting additional project references.
14. OCF responded to the PSCED's request by e-mail on February 24, 2006. After reviewing OCF's response, the PSCED again e-mailed OCF requesting additional information on March 14, 2006.
15. OCF responded to this second request for information by way of an e-mail dated March 15, 2006.
16. After reviewing all of the documentation submitted by OCF to the PSC, the PSCED found in a Memorandum dated March 20, 2006, that OCF did not meet all of the mandatory minimum qualifications required by the ITB - specifically the requirement for sufficient familiarity with federal regulations - and that OCF should not be awarded the contract.
17. In the March 20, 2006 Memorandum, the PSCED determined that Quest met the requirements of the bid qualifications and recommended to the PSC's procurement officer that Quest be awarded the contract, even though the \$7,500.00 bid of Quest exceeded OCF's bid.
18. The procurement officer had drafted two contract award letters, including an executed small procurement contract, for each bidder.
19. As a result of "an administrative error", on March 28, 2006, the procurement officer sent the contract award letter and package to OCF and the contract award notification letter to Quest instead of sending the contract award letter and package to Quest and the notification letter to OCF. The award letter was received by OCF on March 30, 2006.

20. At some point the procurement officer learned of this error and on March 29, 2006 telephoned OCF to inform it of the error. The procurement officer, by way of a letter also dated March 29, 2006 informed OCF of the error and notified OCF that OCF had been found to not meet the mandatory requirements of Section 5.1 of the ITB and OCF had, therefore, been disqualified.
21. According to the procurement officer's letter of April 13, 2006 denying OCF's contract award Protest, the telephone call from the procurement officer to OCF resulted in a voice mail message being left for OCF noting the error and the award to another vendor. OCF claims to have never received the voice mail message.
22. The letter from the procurement officer to OCF concerning the error and the disqualification of OCF was received by OCF on April 1, 2006.
23. By way of a letter dated April 5, 2006, OCF protested the award of the contract to Quest. This letter was received by the procurement officer on April 7, 2006.
24. In its protest, OCF disputed the finding that OCF was not familiar with applicable federal regulations, that the OCF bid was the lowest and therefore met the "Best Value Criteria for the State", and that "OCF had a legal signed contract with the State of Maryland Public Service Commission". OCF further claimed that the PSC had improperly evaluated its proposal and had acted in an arbitrary, irrational and biased manner.
25. As noted, the procurement officer denied OCF's protest by way of a letter dated April 13, 2006. In that letter, the procurement officer found that OCF's protest was untimely, that OCF's protest was without merit, and that bias was not a factor in the selection process.

26. On April 24, 2006 OCF filed the instant appeal with the Maryland State Board of Contract Appeals (Board). OCF has alleged that its protest was timely filed with the procurement officer; that OCF is familiar with relevant federal regulations; that OCF's bid was lowest and therefore meets the "Best Value Criteria for the State"; that OCF had a "legal signed contract" with the PSC; and, generally, that the PSC conducted an improper evaluation of OCF's proposal which was irrational and arbitrary and that there was bias involved in the selection of Quest rather than OCF.
27. Appellant did not file comment on the Agency Report, and no party requested a hearing.

Decision

The first issue for consideration is whether OCF's initial protest with the PSC was filed in a timely fashion.

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. Protests received by a procurement officer after the time limits described in COMAR may not be considered. *Id.*

Respondent first claims that "the substance of the protest goes to the formation of the ITB itself." Respondent asserts that OCF's protest concerns the use of the word "familiarity" in the ITB. Respondent argues that OCF's protest of the meaning given this word by the PSC results in a situation covered by COMAR 21.10.02.03.A:

A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before the bid opening or the closing date for receipt of initial proposals.

Respondent claims, therefore, that OCF should have filed its protest concerning the meaning of "familiarity" long before the protest was actually filed by OCF.

The Board does not agree. There was no dispute as to the meaning of "familiarity" until the PCSED's inquires to OCF in regard to OCF's familiarity with federal regulations. This dispute was not apparent until after the opening of bids.

Indeed, this dispute is not over the word "familiarity", it is over the evaluation by the PSC of OCF's compliance with the ITB's Mandatory Minimum Consultant Qualification requirement that a potential awardee "be familiar with" various federal regulations.

Such an evaluation by a procuring authority involving a determination as to a potential vendor's knowledge of relevant rules and regulations is common in many solicitations. To find that such an evaluation involves "improprieties in a solicitation" that are "apparent" before bid opening or the closing date for receipt of initial proposals in procurements is not practical and would be highly unfair to potential contactors, who would be forced by Respondent's position to parse solicitations word by word and protest as a matter of course numerous words and clauses in order to preserve their rights to protest under Respondent's rationale.

Respondent also claims that OCF knew or should have known on March 29, 2006 the basis for its protest and that, therefore, the protest of OCF dated April 5, 2006 and received by the procurement officer on April 7, 2006 was late and that OCF, therefore, cannot sustain the instant appeal.

As previously noted, COMAR 21.10.02.3B provides that protests shall be filed not later than 7 days after the basis for a protest is known or should have been known, whichever is earlier. A protest must first be presented in a timely fashion

to a procurement officer for consideration before it can be filed as an appeal with the Board. First Health Services Corporation, MSBCA 2514, __ MSBCA ¶__ (2006).

Respondent argues that OCF should have known on March 29, 2006 of the basis for a protest and that OCF's failure to file such a protest with the procurement officer until April 7, 2006 resulted in an untimely protest which removes the Board's jurisdiction over OCF's appeal.

According to the record, OCF received a letter from the PSC awarding OCF the contract at issue (by mistake as it turned out) on March 30, 2006. Respondent claims that OCF was left a telephone voice mail notifying OCF of the mistake in contract award on March 29, 2006 (which is also the date a letter notifying OCF of the mistake in contract award was mailed by the PSC). OCF asserts that it never received the telephone voice mail message. There is no evidence in the record what that message actually consisted of. Respondent asserts that OCF should have, in any case, known by March 29, 2006 of the mistake in award and that its protest was due with the procurement officer by April 5, 2006.

Once again, we cannot agree with Respondent. OCF received a notice on March 30, 2006 that it had been awarded the contract at issue herein. OCF claims to have not received the telephone voice mail message left by the procurement officer on March 29, 2006.

There is no evidence whatsoever as to the nature and extent that that voice mail message informed OCF as to possible grounds for appealing the procurement officer's decision. In his decision letter of April 13, 2006 the procurement officer notes that the voice mail message left on March 29, 2006 noted "the administrative error and the award to another vendor."

To adopt Respondent's argument would be grossly unfair to OCF. The seven day requirement in COMAR is strict, but not so

strict as to cover telephone messages left on answering machines.

As a result of the procurement officer's error, there was clearly confusion in the award of the contract herein. To punish OCF for that resulting confusion by finding OCF was on legal notice as to "the basis of a protest" on March 29, 2006 as a result of a telephone voice mail would not be equitable.

The letter from the procurement officer outlining the error in contract award and the reason for OCF's disqualification from consideration for award was not mailed until March 29, 2006 and was not received by OCF until April 1, 2006. OCF sent a protest letter to the procurement officer dated April 5, 2006. The letter was received by the procurement officer on April 7, 2006. April 7, 2006 is within seven days of April 1, 2006.

The Board finds that OCF was on notice as to the basis for a protest of the contract on April 1, 2006 and that its protest was received by the procurement officer on April 7, 2006. This timeline satisfies the requirements of COMAR 21.10.02.03B., and OCF's protest is not, therefore, barred under this regulation.

Respondent offers one final argument in favor of its position that OCF's proposal is untimely and that the Board, therefore, lacks jurisdiction over OCF's appeal. Respondent claims that OCF's appeal to the Board of Contract Appeals is premature, in that, the reviewing authority has not issued a final decision concerning the procurement officer's decision regarding OCF's protest.

Section 15-218 of the State Finance and Procurement Article provides that upon receipt of a protest, a procurement officer shall review the substance of the protest, *Id. at §15-218 (b)* and shall resolve the protest - either by coming to an agreement among the parties, by wholly or partly denying the protest, or by wholly or partly granting the relief sought by the protestor, *Id. at §15-218(c)*. The procurement officer then is required to

forward the decision in writing to the reviewing authority. *Id.* The decision of the procurement officer shall be reviewed promptly by the head of a unit and the head of the principal department or other equivalent unit of which the unit is a part. *Id.* at §15-218(d). The reviewing authority shall approve, disapprove or modify the decision of the procurement officer and this action by the reviewing authority shall be the final action of the unit. *Id.* at §15-208(e).

As the Board noted in H.A. Harris Company, Inc., MSBCA 1392, 1 MSBCA ¶193 (1988) at p.16:

It is clear from the above [here the Board was referencing its own review of the text of *State Finance and Procurement Article §15-208* - as then codified as *State Finance and Procurement Article §11-137* - (the relevant text is the same as noted by this Board above)] that the procurement officer's decision on a bid protest is to be reviewed by the procurement agency head and the head of any principal department of which the procurement agency is a part and the reviewing authority's decision to approve, disapprove or modify the procurement officer's decision is the final action of the procurement agency. It is this final action of the procurement agency which may be appealed to the Appeals Board.

See also, State Finance and Procurement Article §15-220 (a prospective bidder may appeal the final action of a unit to the Appeals Board.)

Respondent argues that the reviewing authority has not, in spite of the procurement officer's letter to Appellant of April 13, 2006, issued a final action in this matter. Respondent states that since the reviewing authority has yet to issue a decision on whether or not to approve the protest or sustain the procurement officer, OCF's appeal to the Board is premature and the Board is without jurisdiction to consider OCF's appeal.

Respondent's argument is completely rejected by the Board. If the letter of April 13, 2006 to appellant is not the final decision of the reviewing authority to the protester OCF regarding OCF's protest then what is it?

As far as the record indicates, there is still no final agency decision on OCF's protest if the Board accepts Respondent's characterization of the situation.

This situation seems to be one of first impression for the Board and we will, therefore, make our position as clear as possible for the benefit of the parties in this case as well as for future reference. When a protest is received by a procurement officer a decision issued by the procurement officer to the protestor resolving the protest will be considered by the Board to be the final action of the unit/agency regarding the protest and such final action is appealable to the Board.

If a procurement officer chooses to send a decision out to a protestor without the review and approval of the head of a unit or other reviewing authority such an action will, notwithstanding, be considered as the unit's final decision on the protest and such an action will not be allowed to limit the rights of a potential protestor.

Any other finding would be unfair, inefficient and unworkable. Quite simply, how would a protestor such as OCF know that the letter of April 13, 2006 from the procurement officer to OCF did not represent the final action of the unit regarding OCF's protest?

It would be unfair to OCF, and injurious to the procurement appeal process in general, to adopt Respondent's argument and find in Respondent's favor. The Board, therefore, rejects Respondent's argument and finds that the April 13, 2006 letter from the procurement officer to OCF represented the final action of the unit concerning OCF's protest and that OCF properly has appealed that final action to the Board.

In sum, all of Respondent's arguments regarding dismissing OCF's appeal based on OCF's appeal to the Board being untimely or premature are rejected.

As to the appeal claims of OCF, the Board notes, once again, that Appellant OCF has filed no comment on the Agency Report nor was a hearing requested. Thus, the Board's decision is based on the record as it exists with these factors noted.

In its protest, OCF disputed the finding that OCF was not familiar with applicable federal regulations, that the OCF bid was the lowest and therefore met the "Best Value Criteria for the State", and that "OCF had a legal signed contract with the State of Maryland Public Service Commission". OCF further claimed that the PSC had improperly evaluated its proposal and had acted in an arbitrary, irrational and biased manner.

The Board will deal with OCF's allegations regarding the finding by the procurement authorities that OCF was not familiar with applicable federal regulations, OCF's bid and the "Best Value Criteria for the State", that the PSC improperly evaluated OCF's proposal, and that the PSC acted in an arbitrary, irrational and biased manner as a single group.

Apart from OCF's simple assertions regarding the issues raised in the preceding paragraph, the record indicates little or no evidence supporting OCF's allegations.

As we have noted on numerous occasions, the contest of a procurement award is a serious matter and an Appellant has the burden of proving that a Procurement Officer's award of a contract was contrary to law or regulation or otherwise unreasonable, arbitrary capricious or an abuse of discretion. *E.g.*, Yellow Transportation, MSBCA 2374, 2380, 2382 and 2389, ___ MSBCA ¶___ (2004); *Delmarva Community Services, Inc.*, MSBCA 2303, 5 MSBCA ¶523 (2002).

An Appellant's mere disagreement with the evaluation of proposals or the recommendation for an award is insufficient to meet an appellant's burden to show that the evaluation of proposals, and/or the award of a contract, has been unreasonable. *E.g.*, ACS State Healthcare, LLC, MSBCA 2474, ___

MSBCA ¶____ (2005); Delmarva Community Services, *supra*. The Board does not second guess an evaluation of a proposal, but will determine whether or not a reasonable basis exists for the conclusions reached. *E.g.*, ACS State Healthcare, LLC, *supra*; Baltimore Industrial Medical Center, MSBCA 1815, 4 MSBCA ¶368 (1994) at pp.5-6. Bias must be demonstrated to exist, when alleged, by substantive hard facts or evidence. *E.g.*, Stronghold Security, LLC, MSBCA 2499, ____ MSBCA ¶____ (2005); Kennedy Personnel Services, MSBCA 2415, ____ MSBCA ¶____ (2004) at pp. 9-10.

This Board has expressed well-founded reluctance to substitute its judgment for that of an agency, in part because it is the procuring agency that will have to "live with the results" of its decision. *E.g.*, Stronghold Security, LLC, *supra*; Klein's of Aberdeen, MSBCA 1773, 4 MSBCA ¶354 (1994) at p. 7. Procuring officials enjoy a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award, and such determinations are entitled to great weight and must not be disturbed unless shown to be unreasonable or in violation of the procurement statutes or regulations. *E.g.*, ACS State Healthcare, LLC, *supra*; United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 & 1409, 3 MSBCA ¶201 (1989) at pp.58-59.

There is, quite simply, no credible evidence to support any of the appeal grounds noted by Appellant regarding the issues listed above. The Board will not disturb the recommendation for the award of this contract to Quest because the proof burden established by Board precedent in these cases has clearly not been met by Appellant.

Finally, Appellant claims that Appellant "had a legal signed contract with the State of Maryland Public Service Commission".

The Board finds that there was no contract between the parties herein. The contract sent to Appellant by Respondent was sent by mistake to Appellant. Respondent realized the mistake the day after sending the contract to Appellant and immediately took steps by telephone and by mail to notify Appellant of the mistake.

There was no agreement between Respondent and Appellant to make a contract. There was an intention by Respondent to make a contract with the interested party herein, Quest, not with the Appellant OCF. Since there was no agreement on the part of both the parties - the PSC and OCF - to enter into a contract no contract was entered into. Any other finding would not be equitable.

Even if a contract was entered into herein, the ITB included a "Small Procurement Contract" in which Article VIII - General Conditions (Small Procurement) (6) provided that either party could terminate the contract, in whole or in part, without showing cause, upon written notice to the contractor specifying the extent and the effective date of the termination. Such contract provisions are permissible. See, Acme Markets v. Dawson Enterprises, 253 Md. 76 (1968).

In this case, the PSC sent OCF notice one day after erroneously sending OCF notice of the award of the contract explaining that an error had been made and that the contract was not to be awarded to OCF. If a contract between the PSC and OCF did exist, the letter informing OCF that a mistake had been made and OCF was not to receive the contract clearly constituted notice of termination of the contract pursuant to Article VIII (6) of the Small Procurement Contract.

The PSC acted quickly and appropriately to notify OCF of the mistake made by the PSC and to correct that mistake by terminating the contract - if the contract did indeed exist.

The Board holds that Appellant is not entitled to relief based on the allegation that Appellant "had a legal signed contract" with the PSC.

In summary, the Board, after consideration of OCF's claims and the record as it exists herein, finds that the actions and judgments of the procurement officer and the other officials responsible for the award of the contract at issue herein have not been proven by Appellant OCF to have been arbitrary, capricious, irrational, contrary to law, or biased and that there are, after a review of the facts submitted and the Board's precedents, no bases for sustaining OCF's appeal.

The appeal of OCF is, therefore, denied.

Wherefore, it is Ordered this day of July, 2006 that the appeal is denied.

Dated:

Michael W. Burns
Chairman

I Concur:

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 2536, appeal of OCF Environmental Consulting, LLC under PSC ITB PSC #07-0106.

Dated:

Michael L. Carnahan
Deputy Recorder