

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

Docket No. 2538	Date of Decision: 07/28/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DBM RFP # 050R6800016	
Appellant/Respondent: Southern Maryland Cable, Inc. Department of Budget and Management	

Decision Summary:

Timeliness of Filing Protest - Electronic Filing of Protest - COMAR 21.03.05.02A states that 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. Here, appellant's use of email to attempt to file protest was legally ineffective, and a protest was not, therefore, legally filed within required 7 day period, and, procurement officer and Board were without authority to consider appeal.

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

In The Appeal of Southern)
Maryland Cable, Inc.)
)
) Docket No. MSBCA 2538
)
)
Under DBM RFP # 050R6800016)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Alan W. Kempske
 Assistant Attorney General
 Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant appeals from a final decision of the Maryland Department of Budget and Management which denied its bid protest regarding a Request for Proposals involving the installation and service of cable and wiring for State agencies.

For the reasons that follow the appeal is dismissed with prejudice because the Board of Contract Appeals is without jurisdiction over the subject-matter of this appeal.

Findings of Fact

1. On or about October 18, 2005, Respondent, the Maryland Department of Budget and Management (DBM), issued Request for Proposals (RFP) Project Number 050R6800016.

2. The major responsibilities of DBM concern the budget of the State of Maryland and assisting the government of the State of Maryland in its functioning.
3. The RFP utilized the Competitive Sealed Proposals procurement method as outlined in COMAR 21.05.03.
4. The purpose of the RFP was to solicit proposals which would result in contracts with up to five master contractors each for two functional areas for the installation and service of cable and wiring for State agencies.
5. The RFP contained an overall Minority Business Enterprise (MBE) subcontract participation goal of 30%.
6. A Pre-Proposal Conference (Conference) was held on October 28, 2005 to discuss the RFP's content and requirements and to address questions from interested contractors regarding the proposal.
7. At the Conference the presiding procurement officials - the Procurement Officer, Mr. Michael Yeager, and his supervisor, Mr. Norman Grinnell - noted the impact of the State law concerning the submission of MBE forms and further stated that the failure to submit correct D-1 and D-2 MBE forms, which were included in the RFP as part of "Attachment D - Minority Business Enterprise Participation", with the offeror's technical proposal would not be curable.
8. Appellant Southern Maryland Cable, Inc. (SMC) attended the Conference.

9. Proposals were received on or before the due date of December 28, 2005, which was established as the deadline for the submission of proposals.
10. SMC submitted a proposal.
11. An examination of SMC's proposal revealed that SMC acknowledged the 30% MBE goal requirement for the contract in its Attachment D-1 (the Certified MBE Utilization and Fair Solicitation Affidavit) and did not request a waiver in connection with the 30% MBE requirement.
12. SMC specified on its Attachment D-2 (MBE Participation Schedule) that two MBEs would be utilized: ABBTECH for 30-40% of the contract and Data Talk for 15% of the contract.
13. As a result of a review of the status of these two proposed MBE subcontractors as State of Maryland-certified MBE contractors, it was found by DBM that ABBTECH was not a State of Maryland-certified MBE as of the due date for the submission of proposals.
14. DBM found that SMC's proposal did not, therefore, meet the required goal of 30% subcontractor MBE participation since the proposal lacked the required Maryland State-certified MBEs necessary to meet the 30% MBE requirement.
15. The failure of SMC to complete and submit the MBE utilization affidavit and MBE participation schedule as required resulted in a finding that the proposal submitted by SMC was not susceptible of being selected for award.
16. The Procurement Officer notified SMC by way of an e-mail letter, dated and sent on March 28, 2006, that SMC had been deemed not reasonably susceptible for

award of the contract and had been removed from further consideration as a result of SMC's failure to meet MBE requirements.

17. In response to this letter, SMC requested a debriefing in an e-mail dated March 31, 2006.
18. SMC also noted its "intent to appeal the decision for the removal" of consideration in the March 31, 2006 e-mail.
19. The RFP does not expressly permit or require electronic transactions (including e-mail) to be utilized by bidders and offerors.
20. An undated letter from SMC to the Procurement Officer (unsigned and not on company letterhead) was received by the Procurement Officer on April 4, 2006 by way of e-mail.
21. In the April 4, 2006 letter, SMC formally protested, and appealed from, the findings concerning SMC's failure to meet MBE requirements in its proposal.
22. A signed, but undated, copy of the same April 4, 2006 e-mail protest letter, on SMC letterhead, was received by the Procurement Officer by way of United State Mail at some time subsequent to April 4, 2006.
23. SMC's protests involved the MBE issues and determinations, in particular the issue of qualified MBEs, previously noted in these Findings of Fact.
24. Any protest of the Procurement Officer's March 28, 2006 letter to SMC was required to be properly filed with the Procurement Officer by April 4, 2006.
25. The Procurement Officer debriefed SMC's representative, Mr. Steve Giles, on April 11, 2006.
26. At the April 11, 2006 debriefing, SMC attempted to submit additional information to the Procurement

Officer to correct the MBE issues noted by the Procurement Officer in his March 28, 2006 letter to SMC.

27. The Procurement Officer denied SMC's protest by way of a letter dated April 19, 2006. In that letter, the Procurement Officer found that SMC's protest was without merit, finding that SMC's proposal was not reasonably susceptible of being selected for award because it did not comply with the MBE requirements of the RFP.
28. On May 2, 2006 SMC filed the instant appeal with the Maryland State Board of Contract Appeals (Board). SMC has alleged that the determination of the Procurement Officer and the DBM regarding the findings that SMC's proposal was not reasonably susceptible of being selected for award because of findings regarding MBE was in error and should be reversed by the Board.
29. Respondent filed an Agency Report on June 16, 2006.
30. Appellant did not respond to, or file comment on, the Respondent's Agency Report.
31. As part of the Agency Report, Respondent has noted various jurisdictional issues regarding SMC's appeal to the Board.
32. A hearing was scheduled for July 17, 2006. Prior to that date, Mr. Steven Giles of SMC notified the Board that no hearing was necessary. The Board, therefore, cancelled the scheduled hearing.
33. The appeal is, therefore, to be decided on the record without a hearing.

Decision

Respondent asserts that, pursuant to COMAR 21.10.02.03 and COMAR 21.11.03.14, this Board is without jurisdiction to consider Appellant's appeal in this matter. Respondent is correct on both counts.

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. A protest received by a Procurement Officer after the time limits described in COMAR may not be considered. *Id.* 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).

SMC received actual notice of why it had been deemed not reasonably susceptible for award by way of a letter from the Procurement Officer dated and e-mailed on March 28, 2006.¹ SMC responded by notifying the Procurement Officer of its "intent to appeal the decision" by way of an e-mail dated March 31, 2006. SMC e-mailed to the Procurement Officer on April 4, 2006 a letter listing the reasons for its protest. The Procurement Officer did not, however, receive the mailed copy of the letter, which had been mailed by SMC to the Procurement Officer, until after April 4, 2006.

¹ There is no evidence in the record as to whether or not SMC received a copy of this letter by way of regular United States Postal Service Mail and, if so, when that letter was received by SMC through the mail. That being the case, the Board must find, for purposes of this decision, that SMC received the letter from the Procurement Officer (sent to SMC by e-mail on March 28, 2006 and regarding the Procurement Officer's finding that SMC was not reasonably susceptible for award because of SMC's failure to comply with MBE requirements contained in the RFP) on March 28, 2006 for purposes of determining when SMC knew or should have known the basis for its protest.

The e-mails sent by SMC to the Procurement Officer on March 31, 2006 and on April 4, 2006 did not constitute legally sufficient filings of a protest of the Procurement Officer's March 28, 2006 decision.

As the Board noted in CSCI, Inc., MSBCA 2526, ___ MSBCA ¶___ (2006), a state agency conducting a procurement:

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."

The Board further recognized that a procuring agency:

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."

CSCI, Inc., *supra*.

The Board held that these COMAR provisions "clearly warns [sic] bidders that in the absence of authorization in the solicitations, an electronic transaction, as defined by COMAR, will not be considered under any circumstances." CSCI, Inc., *supra*.

Electronic mail, or e-mail as it is more commonly known, is specifically covered as a defined electronic transaction in COMAR. COMAR 21.03.05.02B.(2)(b).

The RFP at issue did not specifically authorize the use of electronic transactions, including the filing of protests by e-mail. The letters SMC e-mailed to the Procurement Officer on March 31, 2006 and April 4, 2006

could not, and did not, serve as legal filings of a protest of the Procurement Officer's March 28, 2006 letter to SMC. These two e-mails were without effect.

According to the record, the Procurement Officer received SMC's protest letter by United States Mail at some point after April 4, 2006. Because the Procurement Officer's letter to SMC was received by SMC on March 28, 2006, SMC was on notice on March 28, 2006 of the basis for its protest. SMC's protest letter had to be received by the Procurement Officer within seven days of March 28, 2006 (by April 4, 2006) to be effective. SMC's letter was not received by the Procurement Officer until after April 4, 2006 and thus was not filed in a timely fashion.

To summarize: COMAR 21.03.05.02A states that 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." The RFP herein has no such permissive or mandatory language, and electronic transactions, specifically including the e-mails sent by SMC to the Procurement Officer on March 31, 2006 and April 4, 2006, are not permissible under this RFP and are, therefore, without legal effect. SMC's protest, which was sent by United States Mail, was not received by the Procurement Officer until after April 4, 2006, the regulatory-mandated deadline for receipt of such a protest by the Procurement Officer. SMC's protest was, therefore, untimely, and could not be considered by the Procurement Officer. COMAR 21.10.02.03C. Since the protest could not be considered by the Procurement Officer, the decision of the Procurement Officer regarding the protest cannot be appealed to this Board. The Board is without jurisdiction to hear the

appeal. See, e.g., Aquaculture Systems Technologies, L.L.C., MSBCA 2141, 5 MSBCA ¶470 (1999) at p. 2; Spear Window & Glass, Inc., MSBCA 1955, 5 MSBCA ¶399 (1996) and cases cited at p.3. The appeal of SMC must, therefore, be dismissed with prejudice.

In addition, SMC's appeal is clearly not sustainable because it involves MBE determinations by the Procurement Officer and the procuring agency. COMAR 21.11.03.14 states:

.14 Protest

A protest under COMAR 21.10.02 (the regulation providing for protests such as SMC's) may not be filed:

- A. To challenge a decision whether an entity is or is not a certified MBE; or
- B. Concerning any act or omission by a procurement agency under this chapter.

This Board has been clear that to the extent that an appeal deals with alleged acts or omissions by an agency regarding MBE issues, no bid protest concerning such alleged acts or omissions may be filed. See James F. Knott Construction Co., Inc., MSBCA 2437, ___ MSBCA ¶___ (2004).

This appeal is clearly precluded by COMAR 21.11.03.14. The Procurement Officer and DBM found that SMC failed to comply with various MBE requirements in the RFP herein and that SMC's proposal was, therefore, not susceptible of being selected for award.

Such findings may be right or they may be wrong, but under COMAR 21.11.03.14 the Board of Public Works has quite clearly decided that such findings, involving, as they clearly do, "acts or omissions by a procurement agency" regarding MBE issues, can not be protested to the

"appropriate procurement officer," COMAR 21.10.02. Because no bid protest may be filed with the procurement officer, there can be no decision on such a protest from which an appeal to this Board may be taken. James F. Knott Construction Co., Inc., supra. The Board, therefore, has no jurisdiction over SMC's instant appeal.

The Board, therefore, finds that COMAR 21.11.03.14 is controlling, that no appeal lies to this Board in this matter, that the Board is without jurisdiction over this appeal, and that Appellant's appeal must, therefore, be dismissed with prejudice.

For the reasons cited, SMC's appeal must be dismissed with prejudice, both on timeliness grounds and on jurisdictional grounds regarding the MBE nature of the appeal.

Wherefore, it is Ordered this day of July, 2006 that the appeal is dismissed with prejudice.

Dated:

Michael W. Burns
Chairman

I Concur:

Michael J. Collins
Board Member

Dana Lee Dembrow
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 2538, appeal of Southern Maryland Cable, Inc. under DBM RFP #050R6800016.

Dated:

Michael L. Carnahan
Deputy Recorder