

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

Docket No. 2553	Date of Decision: 09/12/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland State Lottery Agency IFB #E75S0219280	
Appellant/Respondent: Wildes-Spirit Design & Printing Maryland State Lottery Agency	

Decision Summary:

Timeliness of Protest - Protest was not timely filed since the grounds should have been raised prior to the award of the contract and were not.

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

In The Appeal of Wildes-Spirit)
Design & Printing)
) Docket No. MSBCA 2553
)
Under Maryland State Lottery)
Agency IFB #E75S0219280)

APPEARANCE FOR APPELLANT: **None**

APPEARANCE FOR RESPONDENT: **Romaine N. Williams
Assistant Attorney General
Baltimore, MD**

OPINION BY BOARD MEMBER DEMBROW

Appellant notes an appeal to the denial of its bid protest by the State Lottery Agency that the award of a contract for printing services should be preferentially issued to appellant as an in-state MBE (Minority Business Enterprise) rather than to the low bid offeror which is an out-of-state firm that is not certified as an MBE. Based upon the uncontested submissions to the Board and the Board's interpretation of the Agency's proper application of current Maryland procurement law and regulation, the Board determines that it has no jurisdiction to address or resolve the issues raised by appellant.

Findings of Fact

1. On or about July 14, 2006, Robert W. Howells, Director of Procurement for the Maryland Lottery Agency, issued a final decision pursuant to COMAR 21.10.02.09 in regard to the protest filed by Wildes-Spirit Design and Printing (Wildes)

denying Wildes' objection to the award of a contract to Nittany Valley Offset (Nittany) for the printing of "RaceTrax -- How to Play" brochures for which bids were received by the Agency on or before 3:00 p.m. on or about June 26, 2006.

2. At a cost of \$4,413, Nittany offered the low bid on the job, while the \$4,457 bid of Wildes was the second lowest of the 23 bids submitted in response to this IFB (invitation for bid) and was only \$44 more than the low bid submitted by Nittany, or approximately 1% of the total contract price.
3. Wildes is a Maryland MBE while Nittany is a business based and located in the Commonwealth of Pennsylvania and not in Maryland.
4. Although COMAR 21.05.02.13 permits the State to award a contract, at the discretion of the Agency, to the most favorable bid price or the most favorable *evaluated* bid price, the instant IFB stated the following as the basis for contract award: "The Contract/Purchase Order resulting from this solicitation will be awarded ... to the responsible bidder submitting the lowest responsive bid."
5. This Board takes judicial notice that the Commonwealth of Pennsylvania historically granted a statutory procurement preference for in-state bidders but that current Pennsylvania statute (*Procurement, Title 62 § 107(b)(4)*) provides only for a reciprocal preference.
6. Maryland statute similarly provides no procurement preference for in-state bidders, but only a reciprocal preference (*Maryland State Finance and Procurement Article § 14-401(c)*).
7. On or about July 21, 2006 this Board received an appeal to the Procurement Officer's rejection of the Wildes bid in favor of the Pennsylvania firm in the nature of a letter of objection dated July 19, 2006 from Katie Stickel, President of Wildes.

8. On or about August 7, 2006, by and through the Office of the Attorney General, the Maryland Lottery Agency filed an Agency Report responding to the objections raised by Wildes.
9. To date no further submission has been received by this Board.

Decision

While sensitive to states' statutory limitations with respect to the placement of restrictions on interstate commerce, this Board is sympathetic to appellant's concern that Maryland State procurement decision-making ought to be engaged to promote Maryland firms in the expenditure of state revenue. However, this Board is also constrained by present law and regulation.

It is important at the outset to underscore that Maryland has no statutory in-state or MBE preference for prime contractors and that this Board has no jurisdiction at all to consider an appeal based upon MBE issues. COMAR 21.11.02.14. Thus, to the extent that the Wildes bid protest concerns complaints arising from MBE preference, this Board makes no comment or ruling whatsoever. To the extent that appellant's objection arises from the frustration of an in-state business competing against an out-of-state enterprise, no in-state preference exists in Maryland law other than a reciprocal preference to level the playing field that Maryland businesses will experience when competing against firms located in states that offer an in-state preference. *Maryland State Finance and Procurement Article § 14-401(c)*. Like Maryland, Pennsylvania procurement law offers no in-state preference.

The Maryland Lottery Agency might have advertised this IFB as affording the opportunity of selecting the most favorable evaluated bid as the successful vendor, thereby permitting the Agency to consider economic impact factors in making the award. But in this instance the State advertised that the firm receiving the contract would simply be the lowest responsive bidder,

without regard to ancillary benefits to Maryland businesses or the State as a whole. At a value of less than \$5,000, the contract itself is miniscule in the context of the State's or even the Lottery Agency's budget, and it is not surprising that such a nominal IFB sought merely to achieve the lowest price available for the printing services the Agency desired to receive.

The Agency notes that the Wildes protest is not timely filed in that appellant's complaints could and should have been raised prior to the award of the contract to the low bidder. COMAR 21.10.02.03A. Appellant does not dispute this assertion.

For the reasons stated above, although this Board certainly concurs with Wildes' desire to see state revenue benefit local MBE firms, this Board lacks jurisdiction to reverse the determination by the Agency's Procurement Officer which was made in correct application of Maryland statute and regulation.

This appeal must therefore be dismissed.

Wherefore, it is Ordered this day of September, 2006 that the above-captioned appeal is dismissed with prejudice.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael W. Burns
Chairman

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 2553, appeal of Wildes-Spirit Design & Printing under Maryland State Lottery Agency IFB #E75S0219280.

Dated:

Michael L. Carnahan
Deputy Clerk