

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Broadview)
Networks)
)
) Docket No. MSBCA 2619
Under DBM RFP LOCAL)
TELECOMMUNICATIONS SERVICES)
PROJECT NO. 050B880008¹)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Wendy M. Brickus
 Assistant Attorney General
 Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Leigh A. Hyer, Esq.
(Verizon) Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant timely appeals from a final decision of the Maryland Department of Budget and Management which denied its bid protest concerning a contract for local telecommunications services in Maryland. For the reasons that follow this appeal will be dismissed because the Appellant's protest was not timely filed with the procurement officer.

Findings of Fact

1. On or about September 14, 2007, the Maryland Department of Budget and Management ("DBM") issued Request for

¹ While this RFP number represents the correct number for this solicitation, the appeal was originally docketed under DBM Project No. F10B8800008 RFP Local Telecommunications Services, which was the RFP information contained in the Procurement Officer's decision letter to Appellant.

Proposals **LOCAL TELECOMMUNICATIONS SERVICES** PROJECT
NO. 050B8800008 ("RFP").

2. The purpose of the RFP was to obtain local telecommunications services within the four geographic Local Access and Transport Areas ("LATAs") of Maryland (Hagerstown, Salisbury, Baltimore, and Washington).
3. In response to the RFP, DBM received proposals from Verizon, Appellant Broadview Networks ("Appellant"), and TelephoNET Corporation.
4. Verizon and TelephoNET Corporation submitted proposals regarding all four LATAs.
5. Appellant submitted a proposal only for the Baltimore and Washington LATAs.
6. Appellant's bid protest is limited to its proposal regarding the Baltimore LATA.
7. Two of the offerors, Appellant and Verizon, were invited to participate in oral presentations and discussions on October 31, 2007.
8. As outlined in a letter sent by the Procurement Officer dated October 22, 2007, each offeror was given specific instructions regarding requirements and presentation content regarding the oral presentations.
9. Six specific questions were also provided to Appellant. These six questions dealt with Appellant's: transition plan; exceptions to Service Level Agreements; Disaster Recovery Plan; Experience and Capabilities; Proposed Personnel; and financial ability to handle the costs of the contract pending after-the-fact payment by the State. At the time these questions were provided to Appellant it was stated that Appellant should provide more information concerning each of the questions at the October 31, 2007 meeting.

10. The October 31, 2007 presentations and discussions took place.
11. Both Appellant and Verizon were determined to be qualified offerors.
12. The financial proposals of both Appellant and Verizon were opened and reviewed.
13. Following the opening of the financial proposals, three Best and Final Offers ("BAFO") were requested.
14. After receipt of the third BAFO on March 13, 2008, a final combined overall technical and financial ranking was established for Verizon and Appellant.
15. Verizon was recommended for award of the contract.
16. On April 11, 2008, Appellant was notified by way of an email communication that it had not been selected for award of the contract.
17. The April 11, 2008 email to Appellant included information on the technical rankings and financial proposals of Verizon and Appellant and, among other items, notified Appellant that a debriefing was available regarding the evaluation committee's conclusions regarding Appellant's proposal.
18. Also on April 11, 2008, the Procurement Officer spoke to Mr. Tom Hartnett, Major Markets Manager for Appellant, informing him that the email notification had been sent and that Appellant was not recommended to receive award of the contract. Other matters were also discussed.
19. On April 14, 2008, Appellant filed, by way of electronic mail ("email"), "a formal protest of the pending contract award of Baltimore LATA 238 to Verizon."

20. Appellant did not file, at any time, this appeal to the Procurement Officer in any manner other than by this email communication of April 14, 2008.
21. Appellant has never requested a debriefing in this matter.
22. The RFP in question contains no language authorizing the filing of a protest by means of electronic transactions.
23. Electronic transactions include email.
24. By way of a final decision letter dated May 8, 2008, the Procurement Officer denied Appellant's protest.
25. While discussing the merits of Appellant's protest in that letter, the Procurement Officer also noted that the protest could not be considered because it has not been filed in a timely manner.
26. Appellant filed an Appeal of the Procurement Officer's decision with the Maryland State Board of Contract Appeals ("Board") by way of a filing dated May 14, 2008, and received by the Board on May 15, 2008.
27. DBM filed an agency report with the Board on June 20, 2008.
28. Appellant did not file comments to the agency report and has not requested a hearing in this matter.
29. Since no party has requested a hearing, this appeal will be decided on the written record.

Decision

It is clear that this protest must be dismissed as untimely. Pursuant to 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's protest was sent to the Procurement Officer only by way of electronic mail (email). A protest may be filed by electronic means only if expressly permitted and in the manner specified by the solicitation. COMAR 21.10.02.02.C. An attempt by an offeror to conduct a transaction by electronic means, including any protest, is not authorized or permissible unless the contract or solicitation specifically authorizes the use of electronic means for the specified transaction. 21.03.05.03.B. A Procurement Officer is prohibited from considering any electronic procurement transaction (including a protest) unless the solicitation or contract authorizes the electronic means for the specified transaction. COMAR 21.03.05.03A.

The solicitation at issue herein did not authorize the use of electronic means for any purpose, including protests. Protests are a procurement transaction which may be conducted by electronic means, COMAR 21.03.05.01.B.(6) but, as noted, only if specifically authorized by the solicitation or contract. Electronic mail is one such possible authorized electronic transaction, COMAR 21.10.03.05.02.B.(2)(b), but, again, only if authorized specifically by the solicitation or contract.

The fact that electronic means were utilized by DBM for various purposes, including notifying Appellant of its failure to receive award of the contract, is irrelevant. As we noted in CSCI, LLC, MSBCA 2526, ___ MSBCA ___; (March 14, 2006), nothing in COMAR prevents parties from conducting ordinary business by electronic means. Such communications have nothing to do with the requirement that the utilization of electronic means, including filing protests, must be specifically authorized by a solicitation in order to be permitted and be effective.

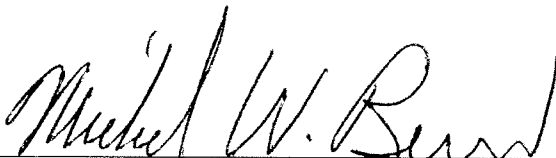
Sending the Appellant the notice that the contract had not been awarded to the Appellant by email or the Procurement Officer's email to Appellant acknowledging receipt of the Appellant's protest did not and could not waive the requirements of COMAR concerning electronic transactions and communications.

Appellant's protest to the Procurement Officer could not permissibly be filed by email or other electronic means. Appellant, therefore, failed to file this protest as required by 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."). Because this protest was not timely filed it may not be considered. COMAR 21.10.02.3C. Accordingly, this appeal must be dismissed.

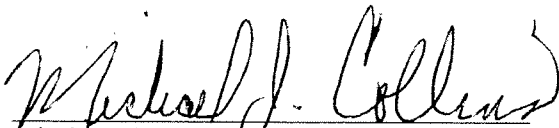
Wherefore, it is Ordered this 22nd day of September, 2008 that the above-captioned appeal is dismissed with prejudice.

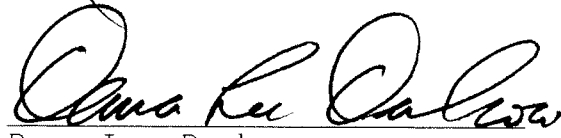
Dated:

22 September 2008


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.

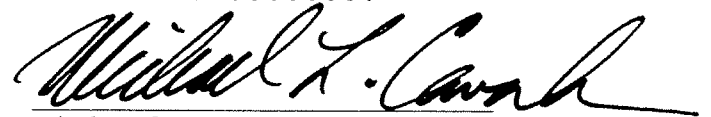
(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2619, appeal of Broadview Networks under Under DBM RFP LOCAL TELELCOMMUNICATIONS SERVICES PROJECT NO. 050B8800008.

Dated:

September 22, 2008



Michael L. Carnahan
Deputy Clerk