

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

Docket No. 2629	Date of Decision: 12/17/08
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under MAA IFB No. MAA-CO-08-008	
Appellant/Respondent: Mercier's, Inc. Maryland Aviation Administration	

Decision Summary:

Procedure - Appellant must raise before the agency procurement officer all issues which are later sought to be claimed by appeal to MSBCA.

Procedure - Appeal to MSBCA allows only for review of a final decision by a procurement officer.

Procedure - Issues not raised before the procurement officer are not ripe for MSBCA review.

Rejection of Bids - Agency has considerable discretion in determining to reject all bids.

Jurisdiction - MSBCA lacks jurisdiction to address MBE issues.

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

In the Appeal of Mercier's,            )  
Inc.    )  
  )  
  ) Docket No. MSBCA 2629  
  )  
Under Maryland Aviation                )  
Administration IFB No. MAA-CO-        )  
08-008                                        )

**APPEARANCE FOR APPELLANT:               None**

**APPEARANCE FOR RESPONDENT:           Stanley Turk  
   Assistant Attorney General  
   Baltimore, Maryland**

**OPINION BY BOARD MEMBER DEMBROW**

This appeal is a request for review of a decision by the Maryland Aviation Administration (MAA) to reject all bids in connection with the State's efforts to procure services required to repair erosion damage at the Baltimore Washington International/Thurgood Marshall Airport. For the reasons that follow, this appeal is denied.

**Findings of Fact**

1. On June 4, 2008, MAA opened bids on a certain state procurement known as invitation for bids (IFB) No. MAA-CO-08-008, for which MAA sought pricing for specified erosion repair work it solicited to be performed at Baltimore Washington International/Thurgood Marshall Airport.

2. Appellant Mercier's, Inc. (Mercier) submitted the apparent low bid for the work solicited, offering a price of \$811,079.06.
3. After reviewing bids, MAA decided to reject all bids and re-bid the job under its authority pursuant to Code of Maryland Regulations (COMAR) 21.06.02C.
4. On June 25, 2008, MAA directed correspondence to Mercier advising of its decision to reject all bids and further notifying Mercier "[f]or future reference" of "several deficiencies" in its bid, five (5) of which concerned Mercier's minority business enterprise (MBE) submissions and one (1) of which involved Mercier's calculation of its bid.
5. On June 26, 2008, Mercier made timely protest to MAA of Mercier's deficiencies itemized in MAA's June 25, 2008 notice to Mercier of MAA's decision to reject all bids, Mercier at that time complaining specifically only about the six (6) alleged deficiencies as set forth above, which were not the basis of MAA's rejection of all bids, but simply provided for Mercier's information as a courtesy to assist Mercier in making future bids.
6. On October 15, 2008, MAA directed responsive correspondence to Mercier in the nature of final action notification, in which Mercier was advised by MAA that its bid had not been rejected on the basis of its MBE and other deficiencies, which were itemized by MAA for Mercier's benefit "in order to provide clarification when completing future MBE Participation Schedules," but instead, that MAA "rejected all bids for this procurement as it was not in the best interest of the State to award at that time due to changes in the specifications."
7. By correspondence dated October 16, 2008, Mercier noted an

appeal before the Maryland State Board of Contract Appeals (Board).

8. The appeal was docketed by the Board on October 17, 2008 as MSBCA No. 2629.
9. On November 12, 2008, MAA filed a Motion to Dismiss on the basis of lack of Board jurisdiction.
10. Mercier filed no Opposition to the State's Motion to Dismiss.

### **Decision**

The Board first notes that COMAR 21.10.05.03A requires that corporations appearing before the Board "shall be represented by an attorney at law licensed in Maryland." Although appellant is a corporation, no Maryland attorney has entered an appearance on Mercier's behalf. Furthermore, the Board notes that the State's Motion to Dismiss is not opposed by appellant. For either of these procedural grounds, this appeal could be dismissed, but the Board in this matter opts to deny the instant appeal on the additional grounds set forth below.

Mercier's appeal to this Board makes unspecified complaint concerning MAA's "decision." MAA's decision was to reject all bids, as MAA is permitted to do pursuant to COMAR 21.06.02C. However, Mercier's June 26, 2008 protest letter to MAA appears by its terms not to contest MAA's decision to reject all bids, but instead, MAA's itemization to Mercier of alleged deficiencies, apparently provided to Mercier merely as a courtesy for Mercier's future use and reference in bidding on state work, including Mercier's opportunity to submit another bid for the particular work here sought by MAA, subject to the changes in its specifications which were presumably made after MAA's decision to

reject all bids and reissue a new IFB.

Mercier should understand that this Board holds authority and responsibility only to review final action by the State's procurement agents. Appeals are taken to the Board from a procurement officer's final decision. In this instance, Mercier protested to MAA's procurement officer only the courtesy notification made by MAA to Mercier concerning the deficiencies that MAA alleged in Mercier's bid. These were not the reasons for MAA's determination to reject all bids, including Mercier's. Mercier did not protest MAA's decision to reject all bids. Therefore MAA's procurement officer never issued any final action on Mercier's potential protest over MAA's decision to reject all bids. Before MAA, Mercier only protested the allegation that its bid was deficient as a result of six (6) shortcomings itemized by MAA for Mercer's assistance and direction in submitting future bids. As a result, any appeal of MAA's decision to reject all bids is not ripe for Board consideration.

This is not to suggest or imply that Mercier would prevail on any prospective protest of MAA's decision to reject all bids. Indeed, it appears to the Board that that determination was likely authorized by COMAR 21.06.02.03C, which affords considerable agency discretion to reject all bids when it is "in the State's best interest." The decision to reject all of the initial bids in this procurement would certainly appear to be justified in order to permit MAA to modify its specifications for the work that it sought. But the question of whether the rejection of all bids was or was not impermissible cannot come before the Board before it is protested and denied by MAA's procurement officer. Because the basis of rejecting Mercier's bid, along with all of the other bids, was never specifically raised by protest to MAA's procurement officer, this Board is

without jurisdiction to render review, just as the Board lacks jurisdiction over MBE issues pursuant to COMAR 21.11.03.14.

For all of the foregoing reasons, this appeal must be and hereby is DENIED.

Wherefore, it is ORDERED this            day of December, 2008 that the above captioned appeal is DENIED.

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 2629, appeal of Mercier's, Inc. under Maryland Aviation Administration IFB No. MAA-CO-08-008.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk