

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

In The Appeal of)
Abacus Corporation)
) Docket No. MSBCA 2712
Under)
SHA Contract 5261371415)

APPEARANCE FOR PETITIONER: David M. Hausner, Esq.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Jason D. Couch
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

Because appellant did not note its bid protest in accordance with the strict time limitations required by State procurement regulations, this appeal must be dismissed as a result of procedural and not substantive deficiency.

Findings of Fact

1. The Maryland State Highway Administration (SHA) issued a certain Invitation for Bids (IFB) for asset management of the north and southbound rest areas on Interstate 95 in Howard County, Maryland for a period of five (5) years from the originally anticipated start date of July 1, 2010.
2. The asset management services solicited were those associated with janitorial management, maintenance, and operation of two (2) separate 1,900 square foot buildings located on two (2) separate parcels of real properties, each

just less than 40 acres in size and located on opposite sides of I-95 about 12 miles southwest of Baltimore.

3. The subject IFB was known as Contract No. 5261371415 for which a pre-bid conference was conducted on January 20, 2010 and bids were due on February 4, 2010.
4. The IFB defines "contractor" as "the Prime Contractor hired by the Administration to maintain and provide services for the described property." (Exhibit 1, Agency Report, IFB, page 26.)
5. The affirmative action portion of the IFB defines "contractor/subcontractor" as "[t]he individual, partnerships, firm or corporation undertaking the execution of work under the terms of a contract and acting directly or through his [sic] agents or employees." (Ex. 1, pg. 16.)
6. Section A of the portion of the IFB entitled "**QUALIFICATIONS OF PRIME CONTRACTOR AND SUBCONTRACTORS**" states, "[c]ontractor and subcontractors shall have had a minimum of ten (10) years recent successful experience providing comprehensive building services of the type and nature of the building size specified." (Ex. 1, pg. 27.)
7. The IFB further requires that the individual employed as facility manager supervisor (FMS) "must have a minimum of ten (10) years work experience in a similar capacity in a similar facility." (Ex. 1, pg. 30.)
8. It is undisputed by appellant that at a pre-bid conference in October 2009 on an unrelated but similar rest area maintenance contract, representatives of both of the parties to the instant dispute were present when one of them specifically asked SHA representatives whether the experience of corporate principals would be attributed to the experience requirement of a newly formed corporation, and all of those present were informed by SHA that yes, SHA would attribute to the corporation the experience of

individual incorporators in SHA's evaluation of the qualifications and experience of the corporation.

9. In response to the foregoing IFB, four (4) bids were received and opened on the bid due date, including bids purportedly submitted by H. D. Myles, Inc. (Myles), which submitted the apparent low bid of \$4,825,381.67 and Abacus Corporation (Abacus), with the second lowest bid of \$5,288,908.20, a price difference of \$463,526.60 or about 10% of the low bid.
10. The two (2) other bidders were Consolidated Construction & Engineers, Inc., with a bid of \$6,867,000.00, and Green Thumb Landscaping, Inc., with a bid of \$6,900,000.00.
11. Myles did not formally exist as a corporation on the bid due date of February 4, 2010, because it was not officially incorporated until March 24, 2010 when the corporation was formally established by Michael A. Lesniowski, who is named President and Resident Agent for Myles.
12. Prior to the formation of H. D. Myles, Inc., Michael Lesniowski was principal of M&R Management, L.L.C. and the two other principals of Myles were Christopher Lesniowski and Hoy Lesniowski, all three (3) of whom had more than ten (10) years of construction or janitorial experience each.
13. Abacus filed a bid protest which was received by SHA on February 25, 2010 in which Abacus claims that Myles did not meet the minimum qualifications established by the IFB to be awarded the contract. (Ex. 2.)
14. The six (6) specific bases of the Abacus bid protest with SHA were that: (1) a Myles designated subcontractor, L&L Moses Janitorial Services, was not "legally able to do business in the State of Maryland" as required by the IFB; (2) another Myles designated subcontractor, Custom Cuts Lawn Care, was similarly not able to do business in Maryland; (3) the minimum requisite references provided by Myles had not

actually received services from Myles of comparable scope as the Maryland contract, as required by the IFB; (4) the recent projects listed by Myles were actually performed by principals of Myles and not Myles as a corporation; (5) Myles as a corporation had no prior work experience; and (6) the subcontractors identified by Myles did not sufficiently disclose their work experience. (Ex. 2.)

15. On May 6, 2010, the SHA Procurement Officer rendered a final decision on the Abacus protest in which each of the six (6) bases of the bid protest was addressed and the bid protest was denied. (Ex. 3.)
16. On May 14, 2010 Abacus filed the instant bid protest with the Maryland State Board of Contract Appeals (Board) in which Abacus complains essentially that because Myles did not even exist as a corporation at the time of its bid submission, Myles as the prospective contractor could not possibly qualify as a responsible bidder because it lacked the required ten (10) years of previous experience set forth in the IFB. (Ex. 5.)
17. The rationale of the SHA Procurement Officer to reject the Abacus position on this point is found in the procurement officer's attribution of the prior experience of the principals of Myles to the newly created corporate entity, the SHA Procurement Officer stating specifically and repeatedly in his correspondence to Abacus, "SHA may look to the experience of principal firm members in instances where a business entity is newly formed."
18. On June 2, 2010, Abacus filed a second bid protest with SHA citing Section A of the Miscellaneous Provisions of the Special Provisions of the IFB which states, "Contractor shall not hire currently employed State employees" and alleging that Michael Lesniowski is "currently a member of the Maryland State Police, and thus, he is currently

employed by the State of Maryland" therefore rendering Lesniowski's corporation, Myles, ineligible to be awarded the contract. (Ex. 9, citing Ex. 1, pg. 37.)

19. The SHA Procurement Officer denied the second bid protest filed by Abacus both on the basis of timeliness as well as on substantive merits by citing an e-mail opinion by the State Ethics Commission permitting Myles to bid notwithstanding Lesniowski's employment, clarifying for Abacus that Lesniowski is principal and not an employee of Myles, and construing Section A of the IFB in a limited fashion as intending to prohibit a new state contractor from hiring the same state employees who currently perform the same or similar work to do that particular work, rather than a blanket prohibition against the hiring of any state employee.
20. No appeal to this Board was filed with respect to SHA's rejection of the second bid protest filed by Abacus and no hearing before the Board was requested by either party.

Decision

In order for the Board to have authority to address the substantive merits of an appeal, an appellant must first establish that its appeal is timely filed. Maryland statute specifically states that "a protest...shall be submitted within the time required under regulations..." *Annotated Code of Maryland, State Finance and Procurement* §15-217(b). The applicable regulations provide that "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." *Code of Maryland Regulations (COMAR)* §21.10.02.03(B).

Assuming *arguendo* the presence of jurisdiction of the Board to address this matter on the merits, it does appear to the Board that the sole issue raised by this appeal is whether Myles can be

properly considered by SHA as a responsible bidder with respect to the IFB requirement of 10 years of prior experience. That is to say that the question presented is whether the prior work experience of the principals of a corporation is fairly attributable to the corporation itself. Contrary to contentions by the State, it further appears to the Board that this issue was fairly and fully raised in the first Abacus bid protest dated February 24, 2010 and received and file-stamped by SHA the following day. Although appellant's allegations of inadequate experience are more plainly, concisely and persuasively set forth in its appeal to this Board dated and filed May 14, 2010, the issue of whether Myles was correctly recognized by SHA as a responsible bidder was included and indeed, referenced repeatedly among the six (6) points of contention set forth and therefore preserved in the Abacus bid protest to SHA dated February 24, 2010 even though counsel for Abacus may not have used the precise words, "responsible bidder," in that initial protest letter.

However, as set forth above, the protest here at issue was required by COMAR to be filed within seven (7) days of the date that the grounds for the protest were known or should have been known. Here it appears that Abacus knew that Myles was deemed the apparent low bidder on the date that bids were first opened on February 4, 2010. It further appears from the undisputed factual allegations set forth by the parties in their pleadings that Abacus specifically knew even before bid opening about the status of Lesniowski's plan to incorporate as Myles and Abacus knew also that SHA intended to recognize the experience of Myles' incorporators as attributable to the newly created corporation. Therefore Abacus had only seven (7) days from February 4, 2010 to note its bid protest. Because the protest was not filed by February 11, 2010, it was not timely and cannot be considered in accordance with the strict limitations requirements of bid protests as set forth in COMAR. Abacus could have noted its

objection to Myles' bid prior to February 4, 2010 but in no event should Abacus have failed to register its complaint within seven (7) days thereafter, namely, by February 11, 2010. That SHA's denial of the Abacus protest did not rely upon timeliness but instead addressed appellant's concerns on the merits does not waive the necessity of a bid protest to be timely filed. (For a litany of dozens of prior Board cases affirming the seven (7) day strictly construed filing limitation for bid protests, see Pessoa Construction Co., Inc. v. MAA, MSBCA 2656, _____ MSBCA ¶____ (2009).)

Because the Abacus bid protest to SHA was not timely filed, the Board is without authority to entertain this appeal or afford relief. As a result, this decision does not address the central substantive issue of whether an entity that does not exist is nonetheless sufficiently responsible to offer ten (10) years of experience in order to be able to submit a bid for a state contract. The Board notes this query, which is the crux of appellant's case, with the hope that it may be recognized by the State as suggestive of the need for clarification of bidder qualification in future contracts. If an entity that is not yet created at law is allowed to bid successfully on a state contract, how does the State intend to be able to enforce the terms of a prospective contract with an entity that does not even exist? SHA may well wish for the present and the future to encourage the creation of new business entities in Maryland, whether they may be corporations, partnerships, solely owned firms or other forms of business organization. But when an IFB specifically limits eligible bidders to those entities which can demonstrate ten (10) years of prior pertinent experience, such a solicitation should also spell out expressly what is meant by SHA's qualification requirements in that regard should SHA simultaneously seek to allow a non-existent bidder to put forward the personal experience of individual incorporators as sufficient

to render as fully qualified at the time of bid submission any business entity offered for service which at the time of bid submission is merely contemplated for creation in the future.

Notwithstanding the foregoing *dicta*, because appellant failed to note its bid protest in timely fashion, this appeal must be and hereby is dismissed.

Wherefore it is Ordered this _____ day of August, 2010 that the above-captioned appeal is DISMISSED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
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 2712, appeal of Abacus Corporation under SHA Contract 5261371415.

Dated:

Michael L. Carnahan
Deputy Clerk