

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Advanced Fire Protection)
Systems, LLC)
) Docket No. MSBCA 2868
)
Under MTA Contract)
No. T-8000-0424)

APPEARANCE FOR APPELLANT: Donna M.B. King
Towson, Maryland

APPEARANCE FOR RESPONDENT: Ian R. Fallon
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

This appeal is denied because the underlying bid protest was not filed in timely fashion within 7 days from the time that the basis of protest was known or should have been known.

Findings of Fact

1. On June 7, 2013, the Maryland Transit Administration (MTA) issued a certain Invitation for Bids (IFB) for the purpose of identifying a qualified vendor to provide inspection, testing, and maintenance services for fire suppression systems at MTA facilities. (State's Ex. 1.)
2. When bids were opened on the bid due date of July 19, 2013, the controlling MTA procurement officer, Karen Elsey (Elsey), determined that the lowest bid was offered by appellant, Advanced Fire Protection Systems, LLC (AFPS), which submitted a bid of \$195,930, substantially lower than the competing bids of \$285,639 and \$294,375 offered by BFPE International and Wayman Fire Protection, respectively. (State's Ex. 5.)
3. AFPS was advised by MTA that it was the low bidder on the IFB and was subsequently notified by July 30, 2013 e-mail that AFPS should expect to receive the contract documents by FedEx

- delivery "soon." (Appellant's Ex. 1; Peters trial testimony, Tr. 15.)
4. AFPS has significant prior experience performing fire suppression systems inspection and maintenance pursuant to state contract. (Peters trial testimony, Tr. 34-35.)
 5. By e-mail dated August 14, 2013, Elsey advised AFPS that she was "getting the contract ready for the approvals" and in the same communication requested that AFPS update its address on file with the federal government on this contract, which includes the expenditure of federal funding. (Appellant's Ex. 2; Peters trial testimony, Tr. 16.)
 6. By correspondence to AFPS dated September 17, 2013, MTA reversed its notice of intention to award the contract to AFPS. (State's Ex. 11.)
 7. The September 17, 2013 letter bore a subject line which stated in part: "REJECTION OF BID." (Capitals and quotations in original.)(*Id.*)
 8. The aforementioned letter also stated as the basis of the rejection of the low bid offered by AFPS, "Your firm offered the fifteen percent (15%) of the overall DBE [Disadvantaged Business Enterprise] goal, however the DBE firm you chose is not in the correct category for this particular type of work." (*Id.*)
 9. The September 17, 2013 rejection letter further stated, "The Maryland Department of Transportation (MDOT) has performed an analysis of your offered DBE firm and determined that your bid is not responsive and therefore, denied your DBE vendor. This denial means that your bid does not meet the requirements set forth in the IFB and is, as such, not responsive. Therefore, in accordance with COMAR [Code of Maryland Regulations] 21.06.02.03.B(2), the bid submitted by Advance Fire Protection Systems, LLC for the above referenced contract is rejected." (*Id.*)

10. The bid that had been submitted to MTA by AFPS included DBE Form D as Attachment 11, which is the form used by the Maryland Department of Transportation (MDOT) for contractors to identify DBE participation in federally funded contracts. (State's Ex. 6A.)
11. The aforementioned Form D provided by AFPS as part of its bid identified Amigos Labor Services (Amigos) as the DBE participant to be used by AFPS as a subcontractor, indicating that Amigos would "provide labor to assist with contract requirements" for at least 15% of the total contract value, as required by the subject IFP. (*Id.*; Peters trial testimony, Tr. 70.)
12. As fully disclosed by AFPS to MTA in its original Form D submission, Amigos is certified by MDOT as a qualifying DBE, bearing MDOT's certification number 11-368 and an NAIC (North American Industry Classification) code of 561320, the classification category for temporary help labor construction. (*Id.*)
13. When Michael R. Peters (Peters) on behalf of appellant AFPS received MTA's September 17, 2013 correspondence in the mail a couple of days later, he was surprised and confused by MTA's turnabout based upon his listing of Amigos in an improper labor category, which he thought could easily be corrected, and he therefore called the procurement officer within "a day or so" to ascertain specifically why his low bid was now being rejected. (Peters trial testimony, Tr. 10-12, 52-57, 71-73.)
14. Upon Peters' receipt of the MTA bid rejection letter no later than September 20, 2013, AFPS had actual knowledge that the basis of the bid rejection determination was that its designated DBE, Amigos, was alleged by MTA to be not in a correct labor category for the work to be performed. (Peters trial testimony, Tr. 70.)
15. After a short delay reaching the MTA procurement officer by phone, Peters was informed that the rejection determination

had been made by MTA's Office of Fair Practices, and Peters was given by Elsey the contact name and telephone number for the individual in that office responsible for the rejection determination which appellant considered to be incorrect, namely, Paula Cullings (Cullings). (Peters trial testimony, Tr. 20-21, 48-49, 59.)

16. When Peters contacted Cullings at MTA's Office of Fair Practices on or about September 23, 2013, he was admonished by her for making direct inquiry regarding the rejection decision, and was instructed to re-contact the procurement officer instead, which Peters then attempted, but experienced some delay before successfully contacting Elsey again by telephone on this second occasion after his receipt of MTA's September 17, 2013 rejection letter. (Peters trial testimony, Tr. 60.)
17. Strangely, on or about October 7, 2013, upon finally reaching the procurement officer by phone in his continuing effort to determine the precise basis of MTA's rejection decision, Peters was informed by Elsey that she could not send to him the Fair Practices' rejection determination letter but that she could read the letter to him, which she did. (Peters trial testimony, Tr. 27.)
18. Peters' notes regarding the aforementioned letter that was read to him by the procurement officer state as the basis of MTA's rejection of the AFPS bid at the behest of the MTA Office of Fair Practices: "AFPS submitted Amigos Labor to meet [the] 15% DBE goal established for this project to provide labor to assist contract requirements. Further review of this DBE profile indicates that this firm is only classified under NAICS Code 561320, Temporary Help Services, specifically certified in providing construction laborers. The subject project is a maintenance contract that provides for testing and maintenance services. The scope of work does not [have a] contract line item for construction labor or construction

- work. Therefore it has been determined that AFPS is not in compliance with the DBE requirements." (Appellant's Ex. 3; Peters trial testimony, Tr. 31-32.)
19. The following day, by letter dated October 8, 2013, Peters for appellant AFPS noted its bid protest to MTA, claiming that its bid was in compliance with DBE requirements, contrary to MTA determination in that regard, and further setting forth the basis of that claim and allegation of MTA error in rejecting the AFPS low bid. (State's Ex. 12.)
 20. By correspondence dated October 11, 2013, the MTA procurement officer rejected the October 8, 2013 AFPS bid protest on two (2) grounds: first, that the underlying contract did not call for a category of construction labor as offered by AFPS but instead, testing and maintenance of fire suppression systems; and second, that the protest noted by AFPS was not timely filed because it was due no later than September 27, 2013 but not submitted until October 8, 2013. (State's Ex. 13.)
 21. By correspondence dated October 21, 2013 and docketed the same day, counsel for AFPS filed the instant appeal, for which the Agency Report was filed November 18, 2013, appellant's Response to Agency Report was filed December 4, 2013, and hearing commenced February 12, 2014 before the Maryland State Board of Contract Appeals (Board) on the limited preliminary question of whether the AFPS bid protest to MTA was filed in timely fashion.

Decision

The first issue which must be resolved by the Board before undertaking consideration of substantive merits is whether the underlying appeal is timely filed pursuant to COMAR 21.10.02.03, which provides in part, "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier" and "[a] protest received by the procurement officer after the time limits prescribed..may not be considered." In this case it is undisputed that AFPS received

MTA's "REJECTION OF BID" letter dated September 17, 2013 no later than September 20, 2013. As a result, MTA claims that the 7-day statute of limitations required appellant to note its appeal of the rejection determination no later than September 27, 2013. It is further uncontested that AFPS did not note its protest until October 8, 2013. The existence and applicability of the 7-day rule is likewise not in dispute; but in its appeal, AFPS claims that it could not have filed a protest earlier than October 8, 2013 because it did not know the specific basis of MTA's rejection of its bid until October 7, 2013. The evidence, however, compels the Board to find and conclude otherwise.

The September 17, 2013 correspondence was more than a "vague statement" not affording AFPS fair notice of the basis of a protest, as contended by appellant. That letter included a subject line which plainly identified the correspondence as MTA's "REJECTION OF BID" and specifically informed AFPS as the basis of the rejection that "the DBE firm you chose is not in the correct category for this particular type of work." The Board sees no reason why AFPS could not have directed a timely letter of protest to MTA on or before September 27, 2013, indicating at that time its contention that Amigos was included in its bid in a proper labor category, rather than waiting 15 days before filing its protest. At that time, it would have been a simple thing to do, and the noting of such a protest would have preserved AFPS's rights while it continued to communicate with MTA in an effort to reverse the determination by MTA's Fair Practices Office to reject the AFPS bid as non-responsive, or to permit AFPS to correct any alleged error, as AFPS sought to do. (The Board makes no finding here regarding the ability of AFPS to revise the contents of its bid after submission.) Appellant did not have to wait until it garnered further information on October 7, 2013 before noting a protest.

While the Board is sympathetic to the dilemma faced by AFPS in desiring additional information explaining further the basis of its bid rejection, and possibly also preferring to resolve the dispute

amicably rather than through formal bid protest, that dilemma is not unlike the circumstances presented to any potential contractor. An aggrieved bidder simply has to note its bid protest in timely fashion, even if discussions are at that time still pending and advancing toward a bidder's anticipated resolution of a dispute over a bid rejection.

Peters for AFPS testified that appellant is a highly experienced state contractor and that he well knew and understood that protests must be filed within 7 days after the basis for a protest is known. He also testified that he recognized that the first notice to him disclosing the alleged defect in his bid and the cause for its rejection was MTA's determination that the DBE it designated was not certified in the proper category of work classification. He knew that this was the basis of the bid rejection, but firmly and perhaps rightfully believed that that determination was incorrect. Yet AFPS elected not to file a protest after it received the September 17, 2013 rejection letter, opting instead to elicit additional information, confidently believing at that time that its rejection was a mistake that could and would be corrected. But as a result of Peters' election not to file a protest prior to October 8, 2013, the Board never reaches the question of whether the bid rejection was actually correct, or in error.

Sadly, for appellant, and for resolution of this contest on the merits of appellant's claim rather than on a procedural technicality, the 7-day limitation for filing bid protests is as unforgiving as it is unambiguous. Seven days is a very short period of time, but presumably the reason for that rigid rule arises out of concern to expedite procurement contracts by resolving bid protests as quickly as possible. If a potential contracting party believes that it has not been treated fairly in the course of procurement decision-making, it must say so within a week of learning the basis of a protest. The occurrence here is unfortunate not only for AFPS but also for the State, which by its

rejection determination demands that MTA be permitted to expend an extra \$89,709 on this contract, constituting a price increase of nearly 50% over the AFPS bid. But it is not for the Board to substitute its cost concerns for the views of the contracting agency, and even if the Board sought to do so, consideration of the merits of MTA's action would be premature at this stage of the litigation because this appeal must be denied before receiving substantive evidence from the parties on the correctness of the bid rejection determination.

Under the circumstances presented, the Board has no alternative but to deny the instant appeal because of the absence of a timely protest to MTA. If this appeal were permitted to proceed, the 7-day limitation on filing bid protests would cease to exist. As much as the Board would like to entertain evidence on the substantive merits of this appeal, the Board cannot create and invoke authority that it does not possess. It must follow the requirements of COMAR, just as appellant is obliged to do.

For all of the foregoing reasons, this appeal is denied.

Wherefore it is Ordered this _____ day of February, 2014 that this appeal be and hereby is DENIED.

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 2868, appeal of Advanced Fire Protection Systems, LLC Under MTA Contract No. T-8000-0424.

Dated:

Michael L. Carnahan
Deputy Clerk