

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

In The Appeal of)
Affiliated Computer Services,)
Inc.) Docket No. MSBCA 2717
)
Under)
University of Maryland)
Baltimore RFP No. 86294-WI)
)

APPEARANCE FOR PETITIONER: None

APPEARANCE FOR RESPONDENT: David P. Chaisson
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

This appeal must be dismissed because appellant did not file the predicate agency bid protest in a timely fashion before seeking relief from the Maryland State Board of Contract Appeals (Board).

Findings of Fact

1. On or about January 15, 2010, the University of Maryland Baltimore (UMB) issued a Request for Proposals (RFP) to secure certain services related to the management of student loans, known as RFP No. 86294-WI, for which proposals were due on or before February 19, 2010.
2. The subject RFP specifically stated: "Failure to comply with any of the mandatory requirements will disqualify a vendor's proposal. The University reserves the right to waive a

Mandatory requirement when it is in its best interest to do so." (Ex. 1, RFP, Sec. IV-B, pg. 19)

3. On February 17, 2010, appellant Affiliated Computer Services, Inc. (ACS) submitted a response to the RFP in which ACS checked "no" in response to one or more mandatory provisions set forth in the RFP, as a result of which UMB deemed the ACS proposal to be insufficient to permit award of the contract.
4. On April 28, 2010, UMB notified ACS that a competing bidder, namely, Educational Computer Systems, Inc. (ECS), was recommended for award.
5. On May 6, 2010, ACS made inquiry into the basis of ECS being recommended for award and was notified by UMB that the ACS proposal had been deemed nonresponsive because it failed to agree to all of the mandatory provisions of the contract.
6. On May 10, 2010, ACS filed a protest which was denied by UMB on May 24, 2010.
7. On June 3, 2010, ACS transmitted to the Board a facsimile (fax) which purported to constitute an appeal and on the following day an appeal was received by the Board which was docketed as being filed June 4, 2010 as MSBCA No. 2717.
8. No attorney entered an appearance on behalf of appellant.
9. On June 30, 2010, UMB, through its attorney, filed its Agency Report along with a Motion to Dismiss, or in the Alternative, a Motion for Summary Judgment, to which ACS filed no opposition or other response.
10. No hearing was requested by either party.

Decision

The instant appeal must be dismissed as the result of procedural fatal defects more fully discussed below. First, the Board notes that ACS failed to retain counsel as required by the Code of Maryland Regulations (COMAR) §21.10.05.03, and as ACS was

specifically informed by the Board in its initial acknowledgement to ACS of the Board's receipt, acceptance, and filing of this appeal. Several recent Board decisions have sought to remind prospective appellants of this obligation by dismissing corporate appeals without the benefit of professional legal counsel. Pipes & Wires Service, Inc. v. MAA, MSBCA 2709, _____ MSBCA ¶_____ (2010); Mumsey's Residential Care, Inc. v. DHR, MSBCA 2702, _____ MSBCA ¶_____ (2010); Okojie Group, Inc. v. DHR, MSBCA 2700, _____ MSBCA ¶_____ (2010); Visions America Community Development Corp. v. DHR, MSBCA 2701, _____ MSBCA ¶_____ (2010).

Second and more importantly, a long history of other Board precedent has repeatedly emphasized the strictly construed seven (7) day limitation for noting a bid protest. See Pessoa Construction Co., Inc. v. MAA, MSBCA 2656, _____ MSBCA ¶_____ (2009), citing dozens of other appeal dismissals on this basis. Here it is apparent that ACS did not have actual notice of the basis for ECS being recommended for award until May 6, 2010, which ACS claims renders its bid protest timely because it was made within seven (7) days thereafter. But COMAR §21.10.02.03(B) sets the deadline for filing a bid protest not as the date of actual notice, but as the first date of constructive notice, namely, "not later than 7 days after the basis for protest is known or *should have been known*." (Emphasis added.) One might argue that ACS should have known that its bid was defective when it was filed on June 17, 2010, expressly indicating that ACS did not agree to comply with all of the mandatory provisions of the solicitation; but naturally the Board will not accelerate the tolling of the statute in advance of the date of notice to a bidder that another bidder is recommended for award, which is ordinarily the date that the seven (7) day limitation begins to run. That occurred here on April 28, 2010. As a consequence, appellant's bid protest was due May 5, 2010, but it was not

actually received by UMB until five (5) days later, on May 10, 2010. That the ACS bid protest letter was dated May 7, 2010 and memorialized its oral notice to UMB on May 6, 2010 of intention to file a bid protest are irrelevant.

With respect to actual notice, that ACS may have been willfully blind to the reason for its bid rejection until May 6, 2010 does not excuse or extend the deadline for noting a bid protest. ACS could and should have inquired on April 28, 2010 why its bid had not been favorably viewed, and if such duly diligent inquiry had been made, it would have promptly discovered that its bid was deemed nonresponsive because ACS failed plainly to consent to perform all of the mandatory provisions for which UMB sought to have agreement by the solicitation here at issue. If the Board were to rule otherwise, it would open the door for future bidders to remain deliberately uninformed about the reason for the State's rejection of a proposal and thereby secure extension of the rigid seven (7) day filing limitation.

At the same time, ACS should understand that the Board is not unsympathetic to appellant's dilemma in this procurement. Among the mandatory provisions of the subject RFP was Specification #10, which required bidders to assure the State that "a [single] consolidated billing statement" could contain "an unlimited [i.e., infinite] number of accounts." Reading this provision literally would mandate a practical impossibility which ACS properly clarified in its explanation of the reason for its selecting "no" in response to this particular specification. Why UMB would reject the ACS proposal on this basis remains an unaddressed mystery which one might speculate was the reason that ACS may have expected UMB follow-up on the ACS bid rather than wholesale rejection.

The terms of the IFB invite confusion in this regard because the IFB includes the back-to-back sentences referenced in Finding of Fact No. 2 above to the effect that on the one hand, bids

which failed to comply with a mandatory provision would be rejected, but on the other hand, they might not be. It is indeed unfortunate that this confusion ultimately caused UMB to limit its choices of eligible bids and ACS to lose the opportunity of contract renewal, but UMB expressly reserved this discretion by the terms of its IFB and this Board will not retroactively withdraw that right, principally because ACS did not object to Specification #10 prior to bid opening and did not protest its objection until after the expiration of seven (7) days following bid opening.

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 2717, appeal of Affiliated Computer Services, Inc. under UMB RFP No. 86294-WI.

Dated:

Michael L. Carnahan
Deputy Clerk