

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

In The Appeals of Civil)
Construction, LLC)
)
) Docket No. MSBCA 2564
)
)
Under SHA Contract No. PG1115384)

APPEARANCE FOR APPELLANT: Robert A. Klimek, Jr., Esq.
Kklimek, Kolodney & Casale, P.C.
Washington, DC

APPEARANCE FOR RESPONDENT: Scot D. Morrell
Assistant Attorney General
Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant appeals the denial of its bid protest by the Procurement Officer on timeliness grounds regarding a State Highway Administration Invitation for Bids for a contract for a Community Safety and Enhancement Project.

Findings of Fact

1. The Maryland State Highway Administration ("SHA") issued an Invitation for Bids ("IFB") for a Community Safety and Enhancement project - SHA Contract No. PG 1115384 ("contract").
2. Among the bidders for this contract was Appellant Civil Construction, LLC ("Civil Construction").
3. A public bid opening for the contract, in accordance with COMAR 21.05.02.11B., was held on August 24, 2006.

4. At the time of bid opening, the three bids which had been received for the contract were opened, and bid information was announced.
5. The opening and announcement of bids was open to all bidders as well as to the general public.
6. Omni Excavators, Inc. ("Omni") had the apparent low bid for the contract in the amount of \$2,043,814.40.
7. Appellant had the next lowest bid in the amount of \$2,449,851.35.
8. At the time of the opening of bids, the bid of Omni was announced as "irregular" due to "insufficient bid security".
9. The term "irregular", in the context of bid openings, is not a determination of bid responsiveness or bidder responsibility. It is, rather, a term used to note the need for further inquiry into the matter deemed to be "irregular".
10. Subsequent to the opening of bids on August 24, 2006, SHA found that Omni's bid was valid and effective, and the contract was awarded to Omni.
11. After having been informed by SHA of the award of the contract to Omni, Appellant filed a protest with the SHA Procurement Officer.
12. Appellant's protest was dated September 15, 2006 and read as follows:

The above referenced project was opened for bid on August 24, 2006, the apparent low bidder had an irregular bid in which he had insufficient bid bond amount. This is a fatal error and material deficiency. Per applicable sections of the Maryland Department of Transportation State Highway Administration's Specifications, we hereby

request that this project be awarded to us immediately without further delay.

13. By way of a letter (and facsimile) dated September 25, 2006, the Procurement Officer, Mr. Mark J. Flack, denied Civil Construction's bid protest.
14. The basis for the Procurement Officer's denial was that Maryland regulations and law required Civil Construction's protest to be filed no later than seven days from the date when the basis of the protest was known or should have been known; that the basis for the protest occurred at opening of bids on August 24, 2006 with the announcement of the irregularity with Omni's bid; that the protest had been filed more than seven days after the basis was known or should have been known (the protest actually being filed on September 15, 2006); and, therefore, that the protest had been filed late, had not been timely filed, and that the protest was denied.
15. Civil Construction knew, or should have known, the basis of the protest outlined in its protest letter of September 15, 2006 on August 24, 2006.
16. Civil Construction appealed the Procurement Officer's denial of its protest to the Maryland State Board of Contract Appeals ("Board") in an appeal docketed by the Board on October 5, 2006 (MSBCA 2564).
17. Respondent SHA filed a Motion to Dismiss or in the Alternative, Motion for Summary Disposition, with the Board on October 18, 2006.
18. A hearing was held by the Board regarding Respondent's Motion on March 1, 2007.

Decision

Respondent SHA has filed a Motion to Dismiss or in the Alternative, for Summary Disposition. SHA argues that the Board is without jurisdiction to consider Civil Construction's appeal because the underlying protest was not filed in a timely manner.

For the reasons that follow, the Board finds that the Motion must be granted.

SHA issued an Invitation for Bids for the contract at issue and a public bid opening for the contract, in accordance with COMAR 21.05.02.11B., was subsequently held on August 24, 2006. At the time of bid opening, the three bids which had been received for the contract were opened and bid information was announced.

The opening, and announcement, of bids was open to all bidders as well as to the general public. Omni had the apparent low bid for the contract. Appellant Civil Construction had the next lowest bid.

At the time of the opening of bids, the bid of Omni was announced as "irregular" due to "insufficient bid security".

Subsequent to the opening of bids on August 24, 2006, SHA found that Omni's bid was valid and effective and awarded the contract to Omni. After having been informed by SHA of the award of the contract to Omni, Appellant filed a protest with the SHA Procurement Officer.

Civil Construction's bid protest, dated September 15, 2006 was as follows:

The above referenced project was opened for bid on August 24, 2006, the apparent low bidder had an irregular bid in which he had insufficient bid bond amount. This is a fatal error and material deficiency. Per applicable sections of the Maryland

Department of Transportation State Highway Administration's Specifications, we hereby request that this project be awarded to us immediately without further delay.

Civil Construction's protest, therefore, is that the apparent low bidder for this contract, Omni, had a fatally irregular bid ("Insufficient bid bond amount").

By the text of Civil Construction's own protest letter of September 15, 2006, Civil Construction clearly knew this information - the information which forms the basis of Civil Construction's protest - on August 24, 2006. Civil Construction waited until September 15, 2006 to file a protest. Civil Construction's failure to file its protest with the Procurement Officer within seven days of receiving notice of the basis for the protest (by August 31, 2006) clearly violates COMAR 21.10.02.03. The failure by Civil Construction to file this protest with the Procurement Officer within seven days after the basis for the protest was known or should have been known means that the Procurement Officer is without authority to consider the protest. COMAR 21.10.02.03C.

The Board is, therefore, without jurisdiction to hear and rule on such an untimely filed protest. *E.g.*, Chesapeake System Solutions, Inc., MSBCA 2308, 5 MSBCA ¶501 (2002); Clean Venture, Inc., MSBCA 2198, 5 MSBCA ¶486 (2000). This time requirement is mandatory and must be strictly construed. Initial Healthcare, MSBCA 2267, 5 MSBCA ¶512 (2002). It is clear that whether a bidder knew or should have known the basis for a protest has also been strictly construed by the Board. Clean Venture, Inc., *supra*. The Board is without discretion to waive or toll the seven day filing deadline requirement. *In re* FMC Technologies, Inc., MSBCA 2312, 6 MSBCA ¶527 (2003).

The relevant facts previously discussed make clear the reasons for the Board's decision. The basis for Civil Construction's protest was not only evident in the bid documents opened on August 24, 2006; it was actually announced by a State official at the opening of bids on August 24, 2006.

Civil Construction knew, or certainly should have known, the basis for the protest outlined in its September 15, 2006 protest letter to SHA on August 24, 2006 and, therefore, Civil Construction had until August 31, 2006 to file that protest.

By waiting until September 15, 2006 to file this protest (fifteen days later than the deadline mandated by COMAR), Civil Construction deprived the Procurement Officer of his legal authority to consider that protest. Since the Procurement Officer was without authority to consider the protest, the Board is without authority to consider Appellant's appeal of this protest.

The case of Clean Venture, Inc., *supra*, is directly on point. In that case, appellant Clean Venture attended a bid opening where opened bids were available for public inspection. The basis for appellant's protest was apparent at the bid opening, but the basis was not noticed by the Procurement Officer at bid opening or announced at bid opening. Clean Venture reviewed the bids after being notified by the State that it was not the successful bidder, discovered the basis for its protest, and filed a bid protest. The protest was filed more than seven days after the bids had been opened.

The Board found that the Procurement Officer should have denied the protest under COMAR 21.10.03B on the grounds that Clean Venture had not filed its protest within seven days of bid opening where inspection of the bids would have revealed the basis for the protest. *Id.* at p.4.

In the case at issue, not only were the bids available for review by Civil Construction, the State actually notified Civil Construction of the basis of the protest orally at the bid opening.

Civil Construction knew or should have known the basis for its protest on August 24, 2006. Civil Construction's failure to file that protest until September 15, 2006 leaves the Procurement Officer without the power to consider the protest and this Board without the authority to consider this appeal.

The Motion to Dismiss is, therefore, granted.

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)
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)
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Under SHA Contract No. PG1115384)

ORDER

Wherefore it is Ordered this day of March, 2007 that
the Motion to Dismiss in the above-captioned is appeal is
granted, and the appeal is hereby dismissed.

Dated:

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 2564, appeal of Civil Construction, LLC under SHA Contract No. PG1115384.

Dated:

Michael L. Carnahan
Deputy Clerk