

Docket No. 2090	Date of Decision: 11/16/98
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DGS Walter P. Carter Center ITB #001IT809749	
Appellant/Respondent: Control Systems Services, Inc. DGS Walter P. Carter Center	

Decision Summary:

Bids - Rejection - All Bids - When all bids are rejected under COMAR 21.06.02.02C and there is no timely challenge to the propriety of such rejection, there is no prospect for an award of a contract under the solicitation for which the bids were rejected and a bid protest appeal under such solicitation is moot.

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

Appeal of Control Systems)
Services, Inc.)
)
) Docket No. MSBCA 2090
Under DGS - Walter P. Carter)
Center ITB #001IT809749)
)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: John H. Thornton
 Assistant Attorney General
 Baltimore, MD

MEMORANDUM OPINION BY CHAIRMAN HARRISON

Appellant timely appeals from a decision of the Department of General Services (DGS) Procurement Officer that sustained the Appellant's protest but provided that award of the contract would be made to another bidder.

Findings of Fact

1. On August 11, 1998, DGS opened eleven bids on the captioned invitation to bid (ITB) for pneumatic controls at the Walter P. Carter Center.
2. Appellant, the incumbent contractor, submitted the second low bid of \$50,940.00.
3. Both the low bid of Landis & Staefa, Inc. and Appellant's bid were determined to be non-responsive for failure to acknowledge Addendum No. 1 (Addendum) to the ITB.
4. Appellant filed a protest dated August 18, 1998 with the DGS Procurement Officer on grounds that it had orally acknowledged the Addendum to a Walter P. Carter Center employee prior to bid opening and that failure to include the Addendum with its bid was

a clerical error and should be treated as a correctable or waivable minor irregularity. Appellant also stated in its protest that it had changed its bid price as a result of the Addendum.

5. By final agency decision dated September 8, 1998, the DGS Procurement Officer stated in relevant part that:

Addendum #1 served to reduce the scope of services. On the face of your bid you have included the work eliminated by the Addendum and are still second low bid. Consequently, other bidders will not be prejudiced because you would be bound to the greater requirements of your bid price.

Considering the above, your protest is sustained. The low bidder, Landis & Staefa, was also previously determined non-responsive for the failure to acknowledge the Addendum, but is now deemed responsive and responsible. The contract will be awarded to Landis & Staefa.

6. Appellant filed an appeal from this final agency decision with this Board on September 17, 1998 alleging that the Addendum increased the scope of work and that Appellant should be awarded the contract because it increased its price in response to the Addendum to cover the additional work and verbally acknowledged the Addendum to a Walter P. Carter Center employee prior to bid opening.
7. By letter dated September 23, 1998, the Procurement Officer notified Landis & Staefa, Inc. and the third low bidder, Dynastics, Inc. that Appellant had filed an appeal.
8. On October 14, 1998, this Board received a letter from Landis & Staefa, Inc. (as a division of Siemens Building Technologies, Inc.) noting that it agreed with the Procurement Officer's determination that the Addendum reduced the scope of services and that it had reduced its bid price when the Procurement Officer's office made telephone contact to investigate the Addendum and its

effect on the overall scope and price of the procurement.

9. On October 14, 1998, the Procurement Officer caused a FAX transmission to be sent to all bidders under the captioned solicitation advising of his determination to reject all bids and issue a revised Invitation to Bid in the near future. The reasons for this decision were stated to be:

Specifically, the State has determined that Section CIV6 of the Invitation to Bid as amended by Addendum No. 1, is ambiguous. The limits of liability imposed on the bidder by Addendum No. 1 may be interpreted in different ways. Also the use of the work "additional" is misleading as it could be interpreted to mean a different part from the intended part. The impact of these ambiguities on bidding cannot be determined. The State has determined not to issue a contract under these ambiguous terms.

10. Appellant received the October 14, 1998 FAX on October 14, 1998.
11. No timely protest of the rejection of all bids for the captioned solicitation has been filed with the DGS Procurement Officer by Appellant or anyone else.
12. On October 27, 1998, DGS filed with this Board a Motion to Dismiss the appeal on grounds that the appeal is moot since no timely protest of the rejection of all bids has been filed and therefore no party has any prospect for award of a contract regardless of the outcome of this appeal
13. Appellant has not responded to the Motion to Dismiss.

Decision

The Board will grant the Motion to Dismiss. COMAR 21.06.02. 02C. provides for rejection of all bids after bids are opened but before award. Respondent invoked COMAR 21.06.02.02C. prior to award and no party protested. Accordingly, Appellant may not be awarded a contract under the subject solicitation since all bids have been legally

rejected. Appellant's appeal is therefore moot and the appeal must be dismissed. See Ecolab, Inc., MSBCA 1453, 3 MSBCA ¶212 (1989); Telephonics, Comp. Gen. B-235991, 89-2 Comp. Gen. ¶178 (August 25, 1989).

Wherefore, it is ORDERED this day of November, 1998 that the appeal is dismissed with prejudice.

Dated:

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 2090, appeal of Control Systems Services, Inc. under DGS Walter P. Carter Center ITB #001IT809749.

Dated:

Mary F. Priscilla
Recorder