

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

In The Appeal of)
Gillis Gilkerson)
) Docket No. MSBCA 2791
)
Under)
DGS Project No. P-018-080-010)
)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Stanley Turk
Assistant Attorney General
Baltimore, Maryland**

OPINION BY BOARD MEMBER DEMBROW

This appeal must be denied both on procedural and substantive grounds because appellant seeks to make untimely complaint concerning the State's determination to subject bids to the Maryland Small Business Preference.

Findings of Fact

1. In August 2011 the Department of General Services (DGS) issued a certain Invitation for Bids (IFB) entitled "New Bathhouse and Utility Building at Pocomoke River State Park, Milburn Landing Area" to perform certain construction services identified by DGS as Solicitation No. 001IT818565 advertised on eMaryland Marketplace (eMM).
2. The IFB was identified as subject to a 5% small business preference pursuant to Title 14, Subtitle 2 of the State Finance and Procurement Article (SF&P) of the Maryland Annotated Code.

3. The original bid due date of September 9, 2011 was extended by IFB Addendum to September 15, 2011, at which time DGS determined that seven (7) bidders offered prices for the specified work, including a low bid of \$768,967 offered by appellant GGI Builders, Inc. t/a Gillis Gilkerson (Gilkerson), and a second lowest bid of \$791,332 offered by Interested Party BBCS, Inc. t/a Beauchamp Construction (BBCS), and ranging to a high of \$877,300.
4. BBCS is a Maryland Certified Small Business while Gilkerson is not a Maryland Certified Small Business.
5. The difference in the amount bid by Gilkerson and the amount bid by BBCS is \$22,365, or slightly less than 3% of the total amount bid; or stated as calculated by the procurement officer, 5% more than Gilkerson's bid of \$768,967 equals \$807,415, thereby establishing the threshold for a bid submitted by a Maryland Certified Small Business to be deemed low bid as evaluated with the benefit of the 5% small business preference as compared to Gilkerson's bid.
6. On October 19, 2011, appellant was notified that because its low bid was not at least 5% less than the second lowest bid, which was submitted by a Maryland Certified Small Business, second lowest bidder BBCS was recommended for award of the contract.
7. On October 26, 2011 Gilkerson directed to DGS by e-mail a statement indicating that Gilkerson protested the DGS determination to recommend award of the contract to BBCS.
8. On the morning of the same day, Gilkerson was advised by DGS that a protest transmitted by e-mail was unacceptable under the requirements set forth in the Code of Maryland Regulations (COMAR), at 21.10.02C, and further notifying Gilkerson that the deadline for delivery of a written protest was that date.
9. Gilkerson delivered its protest to DGS the following day,

October 27, 2012.

10. On November 16, 2011, DGS denied the protest on the basis that BBCS was determined to have submitted the most favorable bid because it was given a 5% preference as a Maryland Certified Small Business and the bid offered by BBCS was not greater than 5% more than the bid submitted by Gilkerson.
11. On November 18, 2011, Gilkerson noted the instant appeal to the Maryland State Board of Contract Appeals (Board), which docketed the appeal as MSBCA No. 2791.
12. On December 14, 2011, DGS filed its Agency Report through the Office of the Attorney General.
13. On the following day, the Board received correspondence from Gilkerson requesting waiver of the requirement that corporations appearing before the Board be represented by an attorney as set forth in COMAR 21.10.05.03A.
14. By correspondence from the Board dated December 15, 2011, Gilkerson was notified by the Board that the Board was without legal authority to exempt Gilkerson from application of the requirement of COMAR 21.10.05.03A.
15. No further pleadings were filed and no hearing was requested by either party.

Decision

First, this appeal is dismissed for failure of prosecution by an attorney licensed to practice law in the State of Maryland as required by COMAR 21.10.05.03A. While the Board may be sympathetic to appellant's reluctance to expend the funds necessary to retain an attorney, that is what Maryland regulation requires and the Board is unauthorized to ignore this requirement of COMAR simply because appellant asks the Board to do so.

Second, in accordance with COMAR 21.10.02.03B, the initial protest submitted to DGS by Gilkerson on October 27, 2011 was

untimely because it was not noted within seven (7) days of September 15, 2011, the date on which bids were opened and appellant was able readily to ascertain the amounts of all bids as well as the status of each bidder to receive a small business preference. At the very least, Gilkerson became aware that it was not recommended for award when it was so notified by DGS on October 19, 2011. There is no dispute between the parties that certainly by then Gilkerson had actual knowledge of the basis of any protest. Although Gilkerson's e-mail of October 26, 2012 may therefore have been at least arguably timely if delivered in written form on that date, the application of the requirements of COMAR 21.03.05.01 *et seq.* precludes protest submission by e-mail. Therefore this appeal must be denied because the underlying protest was not filed until October 27, 2011, even though Gilkerson was specifically informed by DGS of the obligation to submit a written protest no later than October 26, 2012 in order to protect its right to further review.

Finally, though it is difficult to conclude with certainty, with respect to the substantive merits of the instant appeal, Gilkerson appears to object to award of this contract to BBCS because Gilkerson does not believe that the IFB should have been made subject to the Maryland Small Business Preference. If this is the basis of the appeal, Gilkerson had the obligation to raise this objection prior to bid opening as mandated by COMAR 21.10.02.03A. It did not. After proposal due date, it is too late for any bidder to complain about the known specifications of the IFB. Thus, this appeal must also be dismissed on the merits. The determination to subject this contract to the Maryland Small Business Preference is for DGS to make, not this Board, nor Gilkerson; and any objection in that regard should have been directed to DGS in time for the State to consider whether to modify the IFB or otherwise afford a remedy.

For all of the foregoing reasons, this appeal must be DENIED.

Wherefore it is Ordered this _____ day of January, 2012 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 2791, appeal of Gillis Gilkerson under DGS Project No. P-018-080-010.

Dated:

Michael L. Carnahan
Deputy Clerk