

Docket No. 2096	Date of Decision: 12/2/98
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DGS ITB No. 001IT809591	
Appellant/Respondent: Scanna MSC, Inc. Dept. of General Services	

Decision Summary:

Bid Protest - Timeliness - Pursuant to COMAR 21.10.02.03, a bidder must file a protest within seven days of when it knew or should have known of the basis for protest.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Scanna MSC,)
 Inc.)
) Docket No. MSBCA 2096
Under DGS Invitation to Bid)
 No. 001IT809591)
)

APPEARANCE FOR APPELLANT: John Carroll Broderick, Esq.
 Polovoy, Turner & Broderick, LLC
 Hunt Vally, MD

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

APPEARANCE FOR INTERESTED PARTY: Thomas A. Baker, Esq.
 (Control Screening, LP) Baltimore, MD

MEMORANDUM OPINION BY CHAIRMAN HARRISON
ON RESPONDENT'S MOTION TO DISMISS

Respondent, Department of General Services (DGS), moves to dismiss the above captioned appeal involving the purchase of fourteen letter bomb scanners for use in the Maryland prison system on grounds that the Appellant's protest was not timely filed.

Preliminarily we observe that since its inception seventeen years ago the Board has recognized, considered and granted motions for summary disposition¹, although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal,

¹ The word disposition is used rather than judgement because the Board is not a court and has no equitable powers or equitable jurisdiction. The Respondent's Agency Report challenged the jurisdiction of this Board on grounds the protest was not timely filed and this Board preliminarily determined to treat the challenge as a Motion for Summary Disposition.

expeditious, and inexpensive resolution of appeals" Section 15-210, Division II, State Finance and Procurement Article; See e.g. Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983). In all instances the legal standards the Board will apply to determine the appropriateness of summary disposition remain the same. The party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See Mercantile Club, Inc. v Scheer, 102 Md. App. 757 (1995). The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. Coffey v. Derby Steel Co., 291 Md. 241 (1981); Russo v. Ascher, 76 Md. App. 465 (1988); King v. Bankerd, 303 Md. 98, 111 (1985). See Heat & Power Corp. v. Air Products, 320 Md. 584, 591 (1990); King v. Bankerd, *supra*, 303 Md. at 111. In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party (in this instance the Appellant) against whom the motion is directed. See Honaker v W.C. & A.N. Miller Dev. Co., 285 Md. 216 (1977); Delia v. Berkey, 41 Md. App. 47 (1978), Affd. 287 Md. 302 (1980).

Findings of Fact

1. On May 15, 1998, DGS issued the above captioned Invitation to Bid (ITB) for the purchase of "Contraband Detectors/Mail Screening Equipment" (referred to by the parties as letter bomb scanners).
2. Three bids were received and were publicly opened immediately after the bid deadline of 2:00 p.m. on June 9, 1998. The bids were immediately made available for public inspection.
3. The apparent low bidder was Control Screening, LP (Control

Screening) at \$20,846 and the second low bidder was Appellant at \$40,250.

4. The ITB identified acceptable equipment as "Scanmail 10K or approved equal." The ITB also provided: "Equivalent items shall be considered but only if accompanied by specifications and/or descriptive literature."
5. Control Screening offered to provide what its bid describes as its Model 3001-A, a customized version of Control Screening's Model 3001, and its bid contained descriptive literature. Appellant offered a Scanmail 10K.
6. On June 15, 1998, Mr. Marc Lane, Vice President of Appellant, sent a letter dated June 12, 1998 by facsimile to the Procurement Officer, Ms. Delores Coleman, in which Mr. Lane questioned whether or not the Control Screening Model 3001-A actually existed and if it did, whether or not it would meet the requirements of the specifications. This June 12 letter, however, did not constitute a bid protest.
7. On June 20, 1998, Mr. Lane faxed to Ms. Coleman a letter dated June 19, 1998 further commenting on the Model 3001-A. In relevant part Mr. Lane stated that his inquiries had shown that the proposed Model 3001-A did not exist, and that:

Apparently, the offeror is planning to customize a standard Control Screening 3001 unit to conform to the size requirements of the bid specification. In as much as the standard 3001 does not meet the performance requirements of the bid specification, there is no assurance available that a 3001 that has been customized to be physically larger will be able to consistently meet the performance requirements of the specification.

This June 19, 1998 letter did not, however, constitute a bid protest.

8. On June 27, 1998, Mr. Lane faxed to Ms. Coleman, in a single fax transmission, two letters, one dated June 26, 1998² and the other June 25, 1998. The June 25, 1998 letter said in relevant part:

Thank you for your consideration in the above matter. This is in response to our conversation of this afternoon in which you indicated that you may be compelled to award the above referenced bid to Control Screening, as low bidder, based upon their assurances that they will be providing equipment that meets the specifications and that will be an equal to the basis of the specification--the Scanmail 10K.

* * *

As I stated to you, we wish to protest this award. I would ask that you advise us as to the procedures for doing so. Alternatively, because of the confusion as to the nature and type of equipment that Control Screening will be furnishing, we would be willing to reserve the right to protest pending the opportunity to examine the proposed equipment.

Based upon information provided by Control Screening we suspect that the Model 3001-A, offered in response to the bid request has never been in production.

* * *

We also expect that if the 3001A is not currently in production, Control Screening will experience difficulty producing a unit equal to the specifications in a timely manner.

² The June 26 letter alluded to sending the June 25 letter to the Department of Corrections and enlisted that Agency's aid in determining whether the Control Screening product existed, was suitable, and met specifications.

We also wish to subject this purchase to close scrutiny to make sure that the projected dates of delivery are met and that the equipment, once delivered, is equal to the Scanmail 10K in performance and capabilities.

* * *

We find ourselves forced to make some protest to this bid but are hampered because we have been unable to find any evidence that the 3001A exists except in name. That inability has also been expressed by Control Screening's Customer Service Headquarters personnel. Our intended action is as follows:

1. If the 3001A does exist and has been produced we would be pleased to visit its installation, examine it, and drop any bid protest if it is, indeed equal to the Scanmail 10K.

2. If no 3001A users/owners can be identified and no units exist in inventory and you still feel compelled to award the contract for a product that exists only in anticipation and expectations, we would be willing to reserve our right to protest the bid, if that would be helpful to you, until the units are delivered provided that the projected delivery schedule is maintained. We would protest the bid on the grounds that the award went to a bid that was not responsive or responsible if delivery projections are not met and/or if the delivery units are not equal in every way to the Scanmail 10K. [Emphasis in the original.]

3. If the State accepts equipment that is not equal to the Scanmail 10K in every way, we will protest the bid as being unfair on the grounds that we also could have offered cheaper, lesser equipment that was non-responsive to the bid had we known that such equipment would be acceptable.

I have, over the years, developed strong opinions against utilizing unproved equipment in security

applications until it has been thoroughly evaluated and been in production long enough to be predictable and readily serviceable. Certainly, the 3001A could be placed into that category, particularly if it has never been manufactured.

* * *

If you are, however, compelled to award this bid to the provider of the proposed 3001A, we would ask that you advise us as to procedures for filing a protest.

9. At the hearing on the Motion for Summary Disposition, Appellant asserted that the June 25, 1998 letter as received by Ms. Coleman by fax on June 27, 1998 constituted a timely protest. Respondent, on the other hand, argued that the June 25, 1998 letter did not constitute a protest and that the first time a protest was filed was on August 20, 1998.

Decision

The Board finds from the record, after resolving all permissible inferences in favor of the Appellant that the Respondent's Motion must be granted.

We first observe that COMAR 21.10.02.03 provides:

.03 Time for Filing.

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt

of proposals following the incorporation.

B. In cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in §A or §B means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest received by the procurement officer after the time limits prescribed in §A or §B may not be considered.

There was no pre-bid opening protest that Appellant's product, the Scanmail 10K, was proprietary and thus that the ITB providing for a "Scanmail 10K or Approved Equal" was inappropriate. The post-bid opening protest concerning the low bidder's product, Control Screening Model 3001-A, was on grounds that the product offered did not exist and that if it did the proposed customization of the Control Screening Model 3001-A would result in a product that would not meet the requirements of the specifications.

COMAR 21.10.02.03 is a regulation promulgated by the Board of Public Works pursuant to statutory authority as set forth in State Finance and Procurement Article, Sections 15-217, 12-101 and 12-108. The provisions of the regulation are binding on this Board and on the Respondent. If a post-bid opening protest that involves 21.10.02.03B is not filed not later than seven (7) days after the basis for protest is known or should have been known, whichever is earlier, the protest may not be considered by the Procurement Officer and this Board lacks jurisdiction over the appeal. See Rolm/Mid Atlantic, MSBCA 1094, 1 MSBCA ¶35 (1983); RGS Enterprises, Inc., MSBCA 1106, 1 MSBCA ¶45 (1983); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983); Dryden Oil Company, MSBCA 1150, 1 MSBCA ¶55 (1983); V.E. Engineering, Inc.,

MSBCA 1178, 1 MSBCA ¶73 (1984); Motrola Communications and Electronics, Inc., MSBCA 1343, 2 MSBCA ¶154 (1987); Programmed Security, Inc., MSBCA 1433, 3 MSBCA ¶209 (1989); Manolis Painting Co., Inc., MSBCA 1483, 3 MSBCA ¶233 (1989); Hitek Community Control Corporation, MSBCA 1535, 3 MSBCA ¶248 (1990); Crystal Enterprises, MSBCA 1971, 5 MSBCA ¶407 (1996); ISmart, LLC, MSBCA No. 1979 (Mar. 25, 1997) _____ MSBCA (MICPEL) ¶____, affd., Maryland State Board of Contract Appeals v. Ismart, LLC., No. C-97-034415 (Cir. Ct. How. Co., March 17, 1998); PTC Corporation and Ion Track Instruments, Inc., MSBCA No. 2027 (Jan. 30, 1998)____ MSBCA (MICPEL) ¶____; JVC, Inc., MSBCA No. 2067 (Aug. 6, 1998)____ MSBCA (MICPEL) ¶_____.

The Appellant argues that it filed a timely protest as set forth in its June 25, 1998 letter faxed to the Procurement Officer on June 27, 1998 wherein it complained that the 3001-A did not exist, and if it did that the proposed customization would result in a product that would not meet the requirements of the specifications. If we assume arguendo for purposes of the Respondent's Motion that the June 25, 1998 letter constitutes a protest, was such protest filed not later than seven (7) days after the basis for the protest was known or should have been known?

Appellant in its June 25, 1998 letter continues to assert that the product offered by the low bidder (Control Screening Model 3001-A) did not exist, and if it did, that the proposed customization would result in a product that would not meet the requirements of the specifications. These same assertions are made in the Appellant's letter of June 12, 1998 and repeated in Appellant's letter of June 19, 1998. Therefore, the basis for Appellant's protest was "known or

should have been known" on June 12, 1998. However, the letters of June 12 and June 19, 1998 do not constitute protests for purposes of triggering the dispute resolution process as provided for in the General Procurement Law and COMAR Title 21. Appellant asserts that the letter of June 25, 1998 constitutes a bid protest. Assuming, without deciding, that the June 25, 1998 letter constitutes a bid protest, such protest was not received by the DGS Procurement Officer until June 27, 1998 when Mr. Lane caused the June 25, 1998 letter to be faxed to Ms. Coleman. June 27, 1998 is fifteen days from June 12, 1998 (and eight days from June 19, 1998). Thus, the protest filed on June 27, 1998 was not timely since it was filed later than seven (7) days after the basis for the protest was known or should have been known and could not legally be considered. Further, if the letter of June 25, 1998 does not constitute a protest, as argued by Respondent, then any protest filed thereafter would obviously be untimely. Therefore, the Board is divested of jurisdiction requiring that the appeal be dismissed with prejudice.

Accordingly, the Motion for Summary Disposition is granted and the appeal is dismissed with prejudice.

Wherefore, it is ORDERED this day of December, 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 2096, appeal of Scanna MSC, Inc. under Department of General Services ITB No. 001IT809591.

Dated:

Mary F. Priscilla
Recorder