

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

In The Appeal of)
S.E. Davis Construction, L.L.C.)
)
Under DGS Project No.) Docket No. MSBCA 2655
P-030-080-001)
)
)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Christopher R. Ryon
Assistant Attorney General
Baltimore, Maryland**

OPINION BY BOARD MEMBER DEMBROW

Appellant failed to seek award of the contract that is the subject of this dispute because it mistakenly named a separate corporation as bidder, as a result of which and in the absence of the bidding entity as a party to the appeal, appellant is without standing to complain.

Findings of Fact

1. On December 2, 2008, the Department of General Services (DGS) issued an Invitation for Bids (IFB) for certain construction renovation work to be performed on the Marina Services Building at Sweden Point Marina in Smallwood State Park located in Charles County, Maryland.

2. In accordance with the provisions set forth in the IFB, award was to be made to the responsible bidder submitting the lowest responsive total bid price.
3. Also in accordance with the provisions set forth in the IFB, the solicitation that is the subject of the instant appeal required bidders to submit their pricing online via eMaryland Marketplace (eMM) on or before February 6, 2009.
4. In response to the IFB, DGS received eight (8) bid prices from eight (8) separate bidders, with prices ranging from \$153,049 to \$221,000.
5. Bruce Davis, Inc. submitted a timely bid of \$153,049, which was the lowest price of the eight (8) bidders, but did not provide a bid bond bid/proposal affidavit, minority business enterprise (MBE) Participation Schedule, or Certified MBE Utilization and Fair Solicitation Affidavit, all of which were required by the IFB.
6. Although it did not bid on the job, S.E. Davis Construction, L.L.C. did provide the required bid bond bid/proposal affidavit, minority business enterprise (MBE) Participation Schedule, and Certified MBE Utilization and Fair Solicitation Affidavit, by attaching those electronic files to the bid submitted by Bruce Davis, Inc.
7. Bruce Davis, Inc. and S.E. Davis Construction, L.L.C. are separate and independent corporations which share the same address at Post Office Box 1008, LaPlata, Maryland 20646.
8. The Procurement Officer determined the bid submitted by Bruce Davis, Inc. to be non-responsive and, by correspondence dated March 24, 2009, notified Bruce Davis, Inc. that its bid was rejected because it was deemed non-responsive for failure to attach the required documentation.
9. On March 27, 2009, the Procurement Officer notified a competing bidder, Mid-Atlantic General Contractors, Inc.,

which submitted the second lowest bid price of \$154,900, that it was the apparent low bidder.

10. On March 27, 2009, Sue Ellen Davis on behalf of S. E. Davis Construction, L.L.C. filed a bid protest claiming that it had intended to file a bid in its own name but mistakenly filed its bid in the name of Bruce Davis, Inc. because of a clerical error.
11. On May 4, 2009 the Procurement Officer denied the protest filed by S.E. Davis Construction, L.L.C., noting that bidders were required to log in to the eMM system by registration identification number and that the bid here at issue was submitted bearing the registration identification number for Bruce Davis, Inc. and was made in the name of Bruce Davis, Inc.
12. On May 8, 2009, Sue Ellen Davis on behalf of S.E. Davis Construction, L.L.C. filed the instant appeal before the Maryland State Board of Contract Appeals (MSBCA), which docketed this appeal as MSBCA No. 2655.

Decision

Appellant S.E. Davis Construction, L.L.C. seeks to contend in this appeal that its bid submission in the name of Bruce Davis, Inc. was an error which should have been excused by DGS as a minor irregularity. The Code of Maryland Regulations (COMAR) 21.06.02.04 provides:

"A. A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.

B. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial

or negligible when contrasted with the total cost or scope of the procurement.

C. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State."

In order for this Board to be able to address whether it is or is not a minor irregularity for a bid to be incorrectly submitted in the name of an entity other than the entity which intended to provide it, the Board must first determine the seminal question of whether appellant S.E. Davis Construction, L.L.C. has standing to assert anything at all in an appeal to this Board. Bruce Davis, Inc., the bidder, is not named as a party to this appeal. Because S.E. Davis Construction, L.L.C. does not have standing to file an appeal, having never submitted a bid on the subject project, this appeal must be dismissed.

The Board is not unsympathetic to the dilemma encountered by Ms. Davis and her likely frustration with the circular reasoning and conclusion that she cannot argue whether S.E. Davis Construction, L.L.C. submitted a bid because S.E. Davis Construction, L.L.C. did not submit a bid; but another perspective on the issue of whether this question may be presented is that its answer is self evident. Indeed, it is not contested that S.E. Davis Construction, L.L.C. did not submit a bid for this project. It meant to do so, but it did not. S.E. Davis Construction, L.L.C. concedes as much. For this Board to allow S.E. Davis Construction, L.L.C. to appeal a decision about the prospective award of a contract to which S.E. Davis Construction, L.L.C. never applied to participate would by necessity abrogate of the indispensable element of standing, which this Board is not prepared to do.

COMAR 21.10.02.02A makes plain that only an "interested

party may protest to the appropriate procurement officer against the award or the proposed award of a contract." COMAR 21.10.02.01B(1) further defines "interested party" as "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract." Simply stated, without first submitting a bid, S.E. Davis Construction, L.L.C. cannot contend that its bid must be accepted. For this reason, the Board does not reach the issue of whether making a bid using the wrong name is a minor irregularity, as S.E. Davis Construction, L.L.C. would seek the Board to determine in its favor. Only an entity which has made a bid can have legal standing to challenge the intended action of the State in response to bids. Indeed, not even all bidders enjoy standing; only those which are in line for potential award of a contract have standing to pursue legal recourse. Here, S.E. Davis Construction, L.L.C. admits that it did not bid. It therefore cannot file a bid protest and the instant appeal must be dismissed for lack of standing.

Finally, to the extent that the individuals behind S.E. Davis Construction, L.L.C. may remain offended by the State's actions in this procurement, they should be reminded first, that it was not the State but Sue Ellen and Bruce Davis who apparently opted to create two (2) separate corporate entities operating at the same address, and apparently it was Sue Ellen Davis who notified the State that her bid for the subject project was not on behalf of S.E. Davis Construction, L.L.C. but Bruce Davis, Inc. instead. Second, had either of these entities sought professional legal advice as required by COMAR 21.10.05.03A in proceedings before this Board, appellant probably would have been joined in this or a separate appeal by Bruce Davis, Inc. as the only named bidder of the two corporations, which would therefore have had standing to seek relief in this forum. Instead, Sue

Ellen Davis filed a bid in the name and using the registration identification number of a firm that did not actually intend to make a bid and thereafter filed an appeal to this Board again wrongfully naming the proper corporate entity with legal standing to complain. These are not circumstances compelling DGS to reverse its substantiated conclusion that a contract award to an entity which did not bid would be impermissible. DGS was correct in its determination that the bid by Bruce Davis, Inc. was non-responsive to the IFB and S.E. Davis Construction Co., L.L.C. mistakenly failed to bid at all.

For these reasons, this appeal is hereby dismissed with prejudice.

Wherefore, it is Ordered this day of September, 2009, that this appeal is dismissed with prejudice.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael W. Burns
Chairman

Michael J. Collins
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 2655, appeal of S.E. Davis Construction, L.L.C. Under DGS Project No. P-030-080-001.

Dated:

Michael L. Carnahan
Deputy Clerk