

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

In The Appeal of)
Sodexo USA, LLC)
)
Under Morgan State University) Docket No. MSBCA 2895
Contract No. 14/PRO-2019-S)
)

APPEARANCE FOR APPELLANT: Benjamin Howard Meredith
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APPEARANCE FOR RESPONDENT: Melodie M. Mabanta
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OPINION BY BOARD MEMBER DEMBROW

Because this bid protest was not timely filed within seven (7) days of the date that appellant knew the basis of its bid protest, it may not be considered and must be denied.

Findings of Fact

1. On or about February 12, 2014, Morgan State University (Morgan State) issued a certain Request for Proposals (RFP) for specified dining services to be provided at its facilities in Baltimore, Maryland.
2. The RFP set forth seven (7) categories for evaluating technical proposals, each of which carried weighted factors of between five (5) and twenty (20) points, for a total of seventy (70) points possible.
3. In order for any financial proposal to be considered, the associated technical proposal was required to achieve a minimum score of at least fifty-five (55) of the seventy (70) total points possible.

4. Three (3) proposals were submitted in response to the RFP, including one from appellant Sodexo USA, LLC (Sodexo).
5. Before opening financial proposals, each of the submitted technical proposals was evaluated.
6. Sodexo's technical proposal was criticized by Morgan State for several perceived shortcomings, including failure to fulfill the mandatory program requirement of enabling students to use the University's "flex dollars" on the North Campus, failure to identify a food truck to serve the North Campus, and failure to provide thorough details on certain other more subjective aspects of its proposal.
7. Because Sodexo failed to achieve the minimum score of fifty-five (55) points required for further consideration of its proposal, Morgan State notified Sodexo by correspondence dated April 29, 2014 and received May 1, 2014, that it had not been selected for award, and at the same time its financial proposal was returned unopened.
8. Appellant e-mailed to Morgan State on May 20, 2014 and subsequently hand-delivered a bid protest on May 22, 2014.
9. By final determination dated June 5, 2014, Morgan State denied Sodexo's protest.
10. On June 16, 2014, Sodexo noted a formal protest with the Maryland State Board of Contract Appeals (Board) which is docketed as the instant appeal.
11. Morgan State filed its Agency Report on July 9, 2014, in response to which appellant filed a Rebuttal on July 21, 2014.
12. No hearing was requested.

Decision

It is undisputed that Sodexo was informed on May 1, 2014 that it was not selected for award of this contract. As a result, it had only seven (7) days from that date to note its bid protest, until May 8, 2014. MSUPP §X.B(3)(c). Morgan State's Procurement Policies and Procedures mirror the Code of Maryland

Regulations (COMAR) 21.10.02.03 in this regard. In accordance with the applicable procurement regulation, any protest filed after that rigidly fixed and strict deadline "may not be considered." MSUPP §X.B(3)(d). As a consequence, appellant's bid protest to Morgan State was untimely and therefore may not be considered.

Sodexo argues that it did submit a bid protest within seven (7) days of the date that the contract award to a competitor was an action item on the agenda of the Board of Public Works (BPW) on May 14, 2014. But Sodexo had actual knowledge that it had not been selected for award two (2) weeks prior to that date. That knowledge came from written correspondence that Sodexo acknowledges it received on May 1, 2014. In addition, initial public notice was made May 2, 2014 that the BPW meeting scheduled for May 14, 2014 would include final approval and award of the contract to a competing vendor. Had Sodexo never been informed by Morgan State that it had not been selected for award, appellant still should have known as of May 2, 2014 that the contract award to another vendor had been placed as an action item on the BPW agenda.

Appellant appears to contend that the date scheduled for BPW contract approval triggers the demanding seven-day limitations on filing bid protests. But that is not what the pertinent procurement regulation provides, nor would that make any sense. What would be the purpose of a bid protest if it were permitted to be filed *after* final contract award and approval contrary to the complaint of the party filing the protest? The operative date is when a vendor first receives actual or constructive knowledge that it has not been recommended for contract award. This juncture ordinarily occurs when a vendor is notified that its proposal has not been selected, often by simultaneous notice that a competitor has been recommended for award. Here, that occurred on May 1 and again on May 2, 2014.

Furthermore, Sodexo failed to comply with the seven-day filing rule even if one were to use the May 14, 2014 BPW meeting as the date triggering the statute of limitations for noting an appeal. Sodexo claims to have sent an e-mail to Morgan State on May 20, 2014, but protest by e-mail was not authorized for this procurement and is therefore prohibited. See COMAR 21.03.05.03 and 21.10.02.02(D). Appellant did not deliver its bid protest to Morgan State until May 22, 2014, which was eight (8) days after the BPW meeting for which contract award was scheduled as an action item on the agenda; twenty (20) days after Sodexo had constructive notice of the basis of a bid protest derived from official public notice of the BPW meeting which included the proposed contract award to a competing vendor; and twenty-one (21) days after actual specific notice to Sodexo that it had not been selected for contract award. Sodexo's bid protest was plainly untimely.

Assuming hypothetically that appellant's protest had been timely filed, Sodexo may still have faced an insurmountable barrier to consideration of its financial proposal. Not only did Morgan State view Sodexo's proposal as deficient in subjective elements of its evaluation, at least according to the procuring agency, appellant failed to submit to Morgan State an offer to meet the minimum program requirements for the dining services it sought to procure. Sodexo claims in its Rebuttal to the Agency Report that "Sodexo's campus plan included the use of flex dollars at every location on campus." But in reviewing its proposal, Morgan State came to a completely different conclusion, namely, that Sodexo did not offer to agree to accept the University's "flex dollars" program for receipt of payment for dining services on the North Campus. It was Sodexo's burden to assure that the proposal it submitted to Morgan State made very clear that it was offering to comply with all contract obligations. For reasons unexplained, this did not take place.

Meeting "Programmatic Requirements" was the heaviest weighted factor in technical proposal evaluation. Assuming Sodexo understood all of the obligations included in the RFP, it should not have come as a surprise that its proposal might be disqualified at the initial stage of technical evaluation for the deficiency of being unwilling to comply with minimum contract requirements.

The Board is sympathetic to Sodexo's complaint that Morgan State will never even know the cost that was offered by two of the three vendors that submitted proposals in response to this solicitation. Morgan State apparently chose to open only a single one of the financial proposals, rejecting the other two proposals on the basis of inadequate scores on the technical evaluation. While it is unusual and regrettable for only a single financial proposal to be opened, it is not unusual at all for technical and financial proposals to be required to be submitted together but under separate seal, permitting financial proposals to be returned unopened when a proposal is deemed unsatisfactory following review of the technical proposal. That is what happened here, and it is not for the Board to dictate to the procurement authorities at Morgan State what evaluation factors to include in its RFPs nor what scoring level may be required for a proposal to advance from evaluation of the technical proposal to review of the associated financial proposal.

In its appeal to the Board, appellant has shown no reason why Morgan State's procurement officials acted arbitrarily or unreasonably in rejecting Sodexo's proposal. More importantly, because appellant did not timely appeal from the adverse decision that was sent to it on April 29, 2014 and received on May 1, 2014, the Board, like Morgan State, cannot even reach the merits of Sodexo's bid protest, which by applicable regulation may not be considered.

For all of these reasons, it is Ordered this _____ day of July, 2014 that the instant Appeal be and hereby is DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

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 2895, appeal of Sodexo USA, LLC Under Morgan State University Contract No. 14/PRO-2019-S.

Dated:

Michael L. Carnahan
Deputy Clerk