

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Daycon Products Company, Inc.)
)
) Docket No. MSBCA 2947
Under)
University of Maryland,)
Baltimore RFP No. 87712VP)

APPEARANCE FOR APPELLANT: Philip M. Andrews, Esq.
Christopher Jeffries, Esq.
Kramon & Graham, P.A.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Melodie M. Mabanta
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Denise M. Bowman
Alexander & Cleaver, P.A.
Fort Washington, Maryland

OPINION BY BOARD MEMBER DOORY

This appeal was not filed in a timely manner and must be denied because the Board does not have jurisdiction.

Findings of Fact

1. On May 30, 2014 the University of Maryland, Baltimore ("UMB") issued a Request For Proposals (RFP) No. 87712VP soliciting proposals to provide janitorial supplies and a Vendor Managed Inventory (VMI) Contract (the "Contract").
2. Daycon Products Company, Inc. ("Daycon") and Fitch & Company ("Fitch") submitted bids. Fitch was awarded the Contract.

3. Daycon has filed four protests in response to UMB's decision to award the contract to Fitch. The first three protests, docketed as MSBCA No. 2919, were heard on July 28, 2015.
4. The Board granted UMB's motion to dismiss in a bench ruling on July 28, 2015.
5. The Board issued a Memorandum Order and Opinion on August 7, 2015 finding the actions taken by UMB to be reasonable and not arbitrary, capricious or otherwise an abuse of discretion.
6. On August 3, 2015 Daycon filed a fourth protest which Daycon titled its Third Supplemental Protest, just a few days after the Board found in UMB's favor in MSBCA No. 2919.
7. On August 28, 2015 UMB issued a final decision letter denying Daycon's Third Supplemental Protest.
8. On September 8, 2015 Daycon filed its appeal of UMB's final decision to the Board.
9. UMB filed a Motion to Dismiss Daycon's appeal, docketed as MSBCA No. 2947, and on November 19, 2015 the Board heard the parties' arguments and denied the Motion.
10. At the hearing Daycon requested and was granted time to brief issues discussed at the hearing. The parties agreed to submit post-hearing briefs.

Decision

The reason for Daycon's Third Supplemental Protest is that the Procurement Officer did not serve as a member of the Evaluation and Selection Committee ("Committee"). The language of the RFP in § IV.A states: "The Evaluation and Selection Committee shall be comprised of the Procurement Officer and any other individuals that the Procurement Officer may appoint." Appellant's Post-Hearing Brief, Exhibit A.

Because the procurement was issued by UMB, the University System of Maryland Procurement Policies and Procedures ("UPPP")

apply. The UPPP mandates that "protest shall be filed not later than seven (7) days after the basis for the protest is known or should have been known, whichever is earlier." UPPP at § X.B. 3 (c). "A protest filed after the prescribed time limits may not be considered." Id. at § X. B. 3 (d). A short time period for filing a protest assures a State goal of expediting awards of State contracts. The same seven (7) day rule in the Code of Maryland Regulations ("COMAR") 21.10.02.03B applies to other State agencies' procurements.

The seven (7) day rule as to whether an offeror knew or should have known the basis of the protest is also strictly construed. Civil Construction, LLC., MSBCA 2564 at 5 (March 8, 2007); see also Potowmac Engineers, MSBCA 2257 at 5, citing ISMART, LLC, MSBCA 1979 (1997), aff'd MSBCA v. ISMART, LLC, No.97-034415 (Cir. Ct. for Howard County) (Mar. 17, 1998) and Clear Venture, Inc., MSBCA 2198 (October, 2000).

A protest filed after seven (7) days bars the Maryland State Board of Contract Appeals ("Board") jurisdiction. Pile Foundation Construction Company, Inc., MSBCA No. 2224 at 13 (2001).

In Pile, the Board ruled the protestor had the opportunity to review documents made available to it to discover the grounds for a protest but waited and chose not to review information until it was delivered to it directly. Id. Because the protestor should have known the basis for a protest by looking through the bids, the date for filing a protest began running from the date the information was made available to it. Id. at 14.

Daycon filed its Third Supplemental Protest on August 3, 2015, contending that it did not know that the Procurement Officer, Joseph Evans, was not a member of the Committee until he testified at the hearing on July 28, 2015. However, Daycon knew or should have known that the Procurement Officer did not personally serve on the Evaluation Committee. From the beginning of this procurement process Daycon received numerous e-mails from

the Contract Specialist and the Associate Director of Procurement. Respondent's Post-Hearing Brief, Exhibit 5.

All members of the Evaluation Committee were required to attend the Oral Presentations and sign a Sign-In Sheet with their names and titles. The un-redacted Sign-In Sheet was provided to Daycon on August 4, 2014. Respondent's Post-Hearing Brief, Exhibit 5, UMB-D114 to UMB-D116 and Interested Party's Post-Hearing Brief, Exhibit A. Nowhere on the Sign-In Sheet is Mr. Evans' name or title as Procurement Officer. When Daycon received the Sign-In Sheet and did not see the title of Procurement Officer with a name on the Sheet, that information put it on notice that it needed to ask a question about that omission. Having received the Sign-In Sheet August 4, 2014, Daycon should have filed a protest within seven (7) days which would have been no later than August 11, 2014.

In Daycon's first Protest, a final decision letter, dated February 2, 2015, was issued and signed by Mr. Evans, Procurement Officer. Respondent's Post-Hearing Brief, Exhibit 6, Interested Party's Post-Hearing Brief, Exhibit B. Daycon had actual knowledge of who the Procurement Officer was not later than February 3, 2015 when it received the final decision letter. Daycon knew or should have known that the Procurement Officer did not serve on the Evaluation Committee because it was in possession of the Sign-In Sheet and the final decision letter with the signature of the Procurement Officer on it. A Protest based on the ground that the Procurement Officer did not serve on the Evaluation Committee should have been filed at this time, seven (7) days after the date Daycon received the final decision letter.

In addition to receiving the Sign-In Sheet with names and titles of the Evaluation Committee on August 4, 2014 and receiving UMB's final decision letter on February 3, 2015, Daycon

received UMB's Agency Report along with an Affidavit signed by the Procurement Officer, Mr. Evans, on March 11, 2015.

In the Affidavit, Mr. Evans swore and affirmed that he was the Director of Procurement Services and the Procurement Officer for this procurement. Respondent's Post-Hearing Brief, Exhibit 7, Interested Party's Post-Hearing Brief, Exhibit C.

He stated:

31. Upon making this determination, the Evaluation Committee recommended to me that Fitch be awarded the Contract.

32. As the Procurement Officer, I independently reviewed and examined the procurement process undertaken by the Evaluation Committee.

33. First, I determined that the Evaluation Committee treated Daycon and Fitch as fairly and equally as possible, and performed a proper evaluation overall.

34. Second, I determined that the Evaluation Committee conducted a proper cost benefit analysis, and that Fitch is capable of doing the same work for less money and its Proposal is the most advantageous to and in best interest of the University.

35. Weighing both the technical and financial proposals, I determined that the additional features of the Daycon proposal were not worth the approximately one million additional dollars in cost and that the Fitch Proposal was most advantageous and in the best interests of the University. I simply could not justify spending the additional money to award this Contract, which does not involve highly sophisticated procedures, to Daycon.

36. As Procurement Officer, I made the final decision to award the Contract to Fitch.

Upon receipt of the Agency Report and the Procurement Officer's Affidavit, Daycon was on notice that if there was a question of the Procurement Officer's role, a bid protest should have been filed no later than March 18, 2015.

If Daycon had taken the time to read Mr. Evans' words in the Affidavit, Daycon would have known that the Procurement Officer did not serve on the Evaluation Committee. His own statements explain his role. Daycon had enough information and at least three (3) prior opportunities to have filed a bid protest regarding the role and participation of the Procurement Officer in this procurement.

Daycon's Third Supplemental Protest was filed August 3, 2015. However, because Daycon knew or should have known the Procurement Officer did not serve on the Evaluation Committee before August 3, 2015, the protest is late.

The Third Supplement protest is untimely under the rules. As a result, the Board lacks jurisdiction, and this appeal is denied.

So ORDERED this 26th day of February, 2016.

Dated:

2/26/16

Ann Marie Doory
Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
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 2947, appeal of Daycon Products Company, Inc. Under University of Maryland, Baltimore RFP No. 87712VP.

Dated: 2/26/16


Michael L. Carnahan
Clerk