BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	)
Masabi LLC	)
	)
	) **Docket No. MSBCA 3039**
Under Maryland Transit Administration	)
Solicitation No. OPS-15-069-RV	)
	)

Appearance for Appellant: **None**

Appearance for Respondent: **T. Bryon Smith, Esq.**
Damon A. Brown, Esq.
Assistant Attorneys General
Maryland Transit Administration
Baltimore, Maryland

OPINION BY MEMBER STEWART

The Board denies this appeal on the grounds that Appellant failed to file a timely bid protest and failed to retain an attorney to represent it in the proceedings before this Board.

FINDINGS OF FACTS

1. On November 14, 2016, the Maryland Transit Administration ("MTA") issued Request for Proposals (RFP) Solicitation No. OPS-15-069-RV ("the RFP"). The purpose of the RFP was to obtain MTA MARC and Commuter Bus Mobile Ticketing Services with an option to include MTA Local Services (Local Bus, Metro Subway, and Light Rail). The Mobile Ticketing Services to be provided included a Mobile Ticketing Application (App) and Customer Web Portal for selling mobile tickets and a Customer Service Call Center to support MTA customers using the Mobile Ticketing Application and Customer Web

Portal. MTA intended to make a single award to the successful offeror to provide the services for five (5) years with two (2) option years.

2. The RFP in Section 1.21 Protest/Disputes states:

> Any protest or dispute related, respectively, to this solicitation or resulting Contract shall be subject to the provisions of COMAR 21.10 (Administrative and Civil Remedies).

3. The RFP in Section 1.32 Electronic Procurements Authorized states:

> E. The following transactions related to this procurement and any Contract awarded pursuant to it are *not authorized* to be conducted by electronic means:
> 1. submission of initial Bids or Proposals;
> 2. **filing of Bid Protests**;
> 3. filing of Contract Claims;
> 4. submission of documents determined by the Department to require original signatures (e.g., Contract execution, Contract modifications, etc.); or
> 5. any transaction, submission, or communication where the Procurement Officer has specifically directed that a response from the Contractor or Bidder/Offeror be provided in writing or hard copy. (Emphasis added).

4. The RFP closing date was January 6, 2017. MTA asked for Best and Final Offers ("BAFO") via letter dated March 27, 2017, and evaluated the bids of Masabi LLC ("Masabi"), moovel North America, LLC ("moovel") and several others. MTA determined that moovel offered the most advantageous proposal to the State, and recommended that it be awarded the Contract.

5. On April 17, 2017, MTA notified Masabi via letter that moovel had been selected for award. On April 18, 2017, Masabi requested a formal debriefing from the MTA concerning the award of the Contract. The debriefing was held via telephone on April 27, 2017. During the debriefing MTA's evaluation team outlined the strengths and weaknesses of Masabi's proposal. Masabi attempted to question moovel's compliance with the minimum qualification criteria set forth in Section 2.1.1 of the RFP, but MTA informed Masabi that it could only discuss its proposal.

6. On April 28, 2017, Josh Nicklin, Head of Business Development, EMEA, Masabi, sent an email to the Procurement Officer ("PO"), Cheryll Brewton, stating in part:

> Thank you for taking the time to speak with us about your decision-making process for the MTA MARC and Commuter Bus Mobile Ticketing Services RFP yesterday.
>
> As we discussed over the phone we have concerns with regards to whether the vendor you have selected has met the minimum qualifications established for vendors responding to the RFP.
>
> Namely, it is our understanding that to be qualified to provide mobile ticketing services in response to this RFP, a vendor needed at least "5 years experience providing fare collection services to public transit agencies." By this criterion, we do not believe the vendor which you have selected to provide mobile ticketing services is qualified for selection.
>
> Moreover, judging by the response to our question in the call, it sounds like the criteria, understood to be pass/fail, was relaxed (to include "in development" 5 years ago and only live in 2013 (as stated by Scott and Dave)) and this meant including the awarded vendor in question. Had we been aware of any amendment to this criterion, we would have amended our proposal; price, etc., accordingly. As such, without any public notice of an amendment to the minimum qualifications, we do not feel satisfied that the procurement process was administered fairly, and we feel the minimum qualifications must be upheld. In light of these concerns, we are weighing the necessity of an appeal to your decision.

7. On May 2, 2017, Ms. Brewton sent an email to Mr. Nicklin stating that she had reviewed Masabi's concerns and determined that moovel had met the minimum qualifications set forth in the RFP, that MTA would not be disqualifying moovel, and that there would not be a need for further discussion with Masabi.

8. On May 7, 2017, Mr. Nicklin emailed the PO and attached a letter dated May 5, 2017, that purported to be its "Formal Protest to Solicitation number OPS-15-069-RV" and stated the same grounds on which it objected to the award as it did in its April 28, 2017, email.

9. On May 10, 2017, the PO emailed Mr. Nicklin and acknowledged receipt of his May 7, 2017 email, and referred him to COMAR 21.10.02.10 regarding the time in which to file a formal protest.

10. On May 11, 2017, the PO received Masabi's bid protest (which consisted of the same letter attached to its email to the PO on May 7, 2017) in writing as evidenced by a copy of the FedEx envelope dated "THU – May 11 10:30A."

11. On June 30, 2017, the PO issued her Final Decision denying Masabi's bid protest as untimely. Masabi filed its appeal of the PO's Final Decision with this Board on July 10, 2017, which was docketed as MSBCA No. 3039. MTA filed the Agency Report on August 1, 2017. Appellant did not file comments on the Agency Report, nor did it request a hearing within the time for requesting one.

DECISION

The Board must deny this appeal on two grounds. First, Masabi failed to file a timely bid protest, thereby depriving the Board of jurisdiction to hear its appeal on the merits, and second, it failed to retain an attorney licensed to practice in Maryland to prosecute its appeal before this Board.

COMAR 21.10.02.03B requires bid protests "to be filed not later than 7 days after the basis for protest is known, or should have been known, whichever is earlier." COMAR 21.10.02.03C defines the term "filed" as used in §B as meaning "receipt by the procurement officer." The Board strictly construes these provisions of the State Procurement Regulations and has routinely held that it does not have jurisdiction to hear appeals not filed in accordance with the provisions thereof. *See*, *Aunt Hattie's Place, Inc.*, MSBCA No. 2852 (2013), *Daycon Products Co., Inc.*, MSBCA No. 2947 (2016).

COMAR 21.10.02.02B states that a "protest shall be in writing and addressed to the procurement officer." COMAR 21.02.02C states that "[a] protest may be filed by electronic means only if expressly permitted and in the manner specified in the solicitation."

The Board finds that the Appellant knew or should have known the basis for its protest on April 27, 2017, as evidenced by Mr. Nicklin's email of April 28, 2017, which recounted that Masabi had concerns whether moovel met the minimum qualifications of the RFP, and that it contended that the MTA unfairly relaxed the qualification requirements in favor of moovel. The Board further finds that Section 1.21 of the RFP clearly puts bidders on notice that protests are subject to the provisions of COMAR 21.10, and that Section 1.32 of the RFP clearly states that electronic filing of a protest of the award of the Contract pursuant to the RFP is not authorized. The Record in this appeal indicates receipt of Masabi's written bid protest by the PO on May 11, 2017, more than 7 days from when the Board finds that the Appellant knew or should have known of the basis of its protest. Accordingly, the Board does not have jurisdiction to hear the merits of this appeal.

COMAR 21.10.05.03A requires that a legal entity "shall be represented by an attorney at law licensed in Maryland." The Board has ruled that failure of an appellant to retain an attorney is adequate grounds for denial of an appeal. *See, Intelect Corp.*, MSBCA No. 2905 (2015), *Williamsport Cabinetry, LLC*, MSBCA No. 2664 (2009). As Board Chairman Burns aptly remarked in *Williamsport Cabinetry, LLC*: "The requirements of COMAR 21.10.05.03A, are not suggestions or hints; they are requirements." *Id.* at 7.

In addition, a review of the record reveals that no attorney entered his or her appearance for the Appellant in this appeal. The Board advised the Appellant of the requirements of §A in its letter dated July 10, 2017, notifying Masabi that its appeal had been docketed.

ORDER

For the foregoing reasons, the above-captioned appeal is hereby DENIED.

SO ORDERED this 5th day of October, 2017.

/s/
Michael J. Stewart Jr., Esq., Member

I Concur:

/s/
Bethamy N. Beam, Esq., Chairman

/s/
Ann Marie Doory, Esq., 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 Docket No. MSBCA 3039, Appeal of Masabi LLC, under Maryland Transit Administration Solicitation No. OPS-15-069-RV.

Dated: 10/5/17

/s/
Ruth W. Foy
Deputy Clerk