BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Milani Construction, LLC		
	*	Docket No. MSBCA 3074
Under Maryland Department of		
Transportation	*	
State Highway Administration		
Contract No. CA4135370	*	

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ORDER AND OPINION BY CHAIRMAN BEAM

The Interested Party, Total Civil Construction & Engineering, LLC ("TCCE") and Respondent, Maryland Department of Transportation State Highway Administration ("SHA"), seek to dispose of the bid protest appeal filed by Appellant, Milani Construction, LLC, via summary decision on the grounds that the protest was not timely filed and that Appellant lacks standing to file a protest. For the reasons that follow, the Board hereby denies TCCE's and Respondent's Motions.

UNDISPUTED FACTS

On October 24, 2017, the SHA issued Invitation For Bids No. CA4135370 - MD 2/4 from Fox Run Boulevard to MD 231 (Phase II) in Calvert County (the "IFB"). The purpose of the IFB was to reconstruct MD 2/4 from Fox Run Boulevard to MD 231 by widening the road to provide three through lanes, a continuous auxiliary lane, and a bike lane in each direction with a raised median; a 5-foot sidewalk on both sides of MD 2/4; and signal upgrades at major intersections (the "Project").

To expedite work on the Project, which would minimize the inconvenience to and improve safety for the traveling public, the IFB requested that each bidder submit a two-part bid,

with Part A being the bidder's base bid for the work and Part B being the bidder's proposed schedule duration multiplied by a daily incentive/disincentive amount of $16,200.00. The evaluated bid price would combine Part A and Part B; thus, a lower base bid and a shorter schedule would be evaluated more favorably than a higher base bid and longer schedule. The incentive payment would be capped at $486,000.00, but there was no cap on the disincentive deduction.

The IFB provided that the Notice to Proceed date would be on or before April 24, 2018, and that the "Calendar days provided by the Contractor will be added to the Notice to Proceed date to determine the Contract Time." If the contractor completed the work earlier than the Contract Time, it would receive an incentive payment of $16,200.00 per day. Therefore, each bidder's schedule was a material part of the evaluation and would also affect the total compensation that the awardee would receive upon completion.

The Project would also require relocation of a number of utilities.[1] Verizon was included among those utilities, and the IFB identified David Metcalfe as the point of contact for Verizon.

Respondent conducted a pre-bid meeting on November 20, 2017, at which bidders were instructed to include all utility relocations in their project schedules. Bidders were advised that it would be the responsibility of each bidder to contact each utility company to obtain their anticipated duration of work. The bidders were concerned with the timing of the utility relocations because they would not be within the contractor's control but nevertheless had to be accounted for to develop a realistic schedule (and price) for the Project.

[1] The IFB notified bidders of the possible presence of water, sewer, gas mains, electrical wires, conduit, communications cables (both overhead and underground), poles and house service connections in the street or highway in which the construction would be performed.

Several questions and requests for additional information were submitted by bidders, which prompted SHA to issue several Addenda to the IFB. Addendum No. 3, issued on December 21, 2017, included the following question and answer:

> Q15: On sheet 316 of the specifications, the utility statement notes Verizon has 3,964 lf [sic] of underground cables and manholes to relocate or adjust. Is there a plan showing this relocation and potential conflicts between the existing location and the proposed contract work?
>
> A15: We do not have final relocation plans as of yet. Since the relocation work is being done by the utility companies and is not incorporated into the MDOT SHA contract, the plans should not be needed until the contract is awarded and then they will be made available to the awarded contractor.

Similarly, Addendum 5, issued on January 2, 2018, included the following questions and answers:

> Q28: We request clarification as to the specification "A+B Adjusted Bid with Incentive – Disincentive" as provided in Addendum 2. We recognize the intent is to complete this project as quickly as reasonably possible however in order to assess the risk the Contractor must have complete and accurate timelines relative to the utility relocations being done by others. The utilities statement requires we provide the utility companies with a copy of our schedule as well as a 15 day look ahead. This implies that the utilities will adhere to our schedule - which will be an absolute first, but is the information provided to bid on. We request confirmation that such agreements are in place with the utilities as their failure to adhere and any ensuing utility delays would have to be considered cause for a modification under this same section. Please confirm.
>
> Under the same specification "A+B Adjusted Bid with Incentive - Disincentive" - it is SHA's intent to fully close out this project within 60 days in order to receive the incentive. Based on prior experience it is extremely rare that approval of the required as-builts can be obtained within these 60 days as this includes agencies outside of SHA. Will submission of the as-builts within these timeframes suffice.
>
> A28: Utility relocations are scheduled to be completed by October 2018. The contractor shall coordinate directly with utility companies for a detailed schedule.

The 60 days pertains to the request for Incentive payment by the contractor. This 60 days starts upon MDOT SHA issuing Final Acceptance of the project.

Q29: On page 47 of the IFB where it discusses the A+B Bid with Incentive — Disincentive. Is the contractor to include in our time proposal the amount of time it will take for the Utility Companies (SMECO, Verizon, Comcast etc.) to relocate their utilities? If this is the case what is the estimated time frame for the relocation of all Utilities seeing if we lose approximately $19,000 per day for every day we are over on our Time Proposal.

A29: Yes, the utility relocations should be accounted for in the contractor's time proposal. Utility relocations are scheduled to be completed by October 2018. The contractor shall coordinate directly with utility companies for a detailed schedule.

Q30: On addendum 4, Question 20 and Answer 20, SHA states Yes, B is the number of days to complete the project. Is relocation for the Utility Companies (SMECO, Verizon, Comcast etc.) included in the number of days to complete the project?

A30: Yes. Relocations for utility companies shall be included in the number of days to complete the project.

Bid opening was scheduled to occur on January 18, 2018. On January 4, 2018, Appellant telephoned and emailed Mr. Metcalfe of Verizon and requested a copy of Verizon's plan and schedule for its utility relocation work. Appellant did not receive a response to these communications. Therefore, in preparing its bid, Appellant relied on Respondent's representations that the utility work would be completed by October 2018, which was six months after the April 24, 2018 Notice to Proceed deadline.

On January 18, 2018, eight bids were opened, and Appellant was notified that it was the apparent low bidder. Appellant submitted the shortest construction schedule (256 days) and had the least expensive evaluated bid price ($27,711,900.00). TCCE was the next lowest bidder, with a schedule of 463 days, at a price of $29,614,481.36. On the same day that it learned that it was the apparent low bidder, Appellant contacted all the utility companies, including Verizon,

regarding their utility schedules. Appellant sent a letter to Verizon on January 18, 2018, advising that the Contract Documents indicated that Verizon would relocate 3,964 feet of cable and two manholes by October 2018 and requested a meeting to discuss this work.

On January 19, 2018, Mr. Metcalfe emailed both Appellant and Respondent and stated:

> I've read the attached letter and I believe the letter expresses some information and assumptions that may not be accurate. I do not believe Verizon will have our utility relocation efforts completed by the October of 2018 timeframe mentioned in your letter. I estimate our relocation work duration will take approx. 10-13 months and some work can only begin AFTER grading is complete along Commerce Drive. Please call me to discuss in more detail.

Appellant met with Mr. Metcalfe on January 24, 2018 and learned that the Verizon relocation work would not be complete by October 2018. Mr. Metcalf informed Appellant that Verizon's utility relocation work schedule would take 60 days for procurement, 60 days for conduit installation, and eight (8) to ten (10) months for cable switchover and splicing, for a total of between 12 and 14 months.

On January 25, 2018, TCCE filed a bid protest with the procurement officer ("PO") contending that Appellant's bid was non-responsive for failing to satisfy the IFB's Minority Business Enterprise ("MBE") participation goal or to request a waiver. On January 29, 2018, Appellant filed a bid protest contending that the solicitation should be cancelled and reissued because:

> [T]he IFB provides incorrect information that does not accurately inform bidders of the requirements and risks of this Project. Bidders relied upon the incorrect information contained in Addendum No. 5 in order to develop the time component of their bids. Those bids are no longer reliable and do not fairly identify the contractor who can provide the most favorable evaluated price when combing A + B (or Cost + Time) to SHA. Accordingly, the IFB is defective and must be amended and re-issued for bid.
>
> It is also in the best interest of the State to re-bid this Project with accurate information regarding the utility relocations. SHA desires to expedite construction of this Project to minimize the inconvenience to the public. SHA used an A+B evaluation method to identify the most innovative and efficient contractor who

> could perform the Project Contractors surely invested considerable time and energy developing the most efficient schedules based on the information available. Those schedules, however, are now based on incorrect information and likely no longer represent the best and most efficient options available. Accordingly, it is in the State's best interest to provide the accurate utility relocation dates to the bidders so bidders can evaluate the Project based on accurate information and develop bid proposals that are the most efficient for the State and its traveling public.

At the time that Appellant's bid protest was filed, the PO had not yet issued a decision regarding TCCE's bid protest.

On February 15, 2018, the PO issued its final decision denying Appellant's bid protest. The PO determined that Appellant did not have standing as an interested party (i.e., a "contractor aggrieved by the...award of a contract") to file a protest under COMAR 21.10.02.01B(1) because Appellant's bid was rejected as non-responsive for failure to meet the MBE requirements. The PO noted that Appellant was informed of this decision by separate letter also dated February 15, 2018.

The PO also determined that Appellant's protest was untimely. The PO asserted that there was no reason to believe that the October 2018 utility relocation date was not feasible. The PO further asserted that even if the date were to change, bidders had been informed by the express language of the IFB that the risk of any delays, including delays to the Project schedule caused by utility relocations, were to be borne by the contractor. "By submitting a bid, the bidders acknowledged and accepted the risk." The PO stated that Appellant's protest sought to "rewrite the specifications after bid opening to shift the risk of a schedule change from the contract to SHA," concluding that this was a protest of alleged improprieties in a solicitation that were apparent before bid opening," which is required to be filed before bid opening under COMAR 21.10.02.03A.

On February 26, 2018, Appellant filed its Notice of Appeal ("Appeal"). In its Appeal, Appellant contends that the PO's final decision that the IFB was not materially defective was arbitrary, capricious, and unreasonable. Appellant referenced the January 19, 2018 email from Mr. Metcalfe as providing "substantial evidence that Verizon cannot complete its utility relocations by the stated October 2018 date...." Appellant further contends that it did have standing to file a protest, and that its protest had been timely filed.

On March 5, 2018, TCCE filed a Motion to Dismiss and Shorten Time[2] for Responses, alleging that it was the lowest responsive and responsible bidder to the IFB. TCCE argues that the Board should dismiss Appellant's Appeal because Appellant lacks standing, its protest was untimely filed because it failed to protest the alleged improprieties in the IFB prior to bid opening, and its Appeal raises issues not raised in its protest.[3]

On March 19, 2018, Respondent filed a Motion to Dismiss or, in the Alternative, Summary Decision, and its Response to TCCE's Motion to Dismiss. Respondent argues that Appellant's protest was untimely because Appellant knew on January 19, 2018, when it received the email from Mr. Metcalfe, that Verizon could not meet the October 2018 utility relocation schedule, yet it failed to file its protest until January 29, 2018, 10 days later. Respondent also argues that Appellant lacked standing to file a protest because Appellant is

[2] None of the parties objected to TCCE's request to shorten time to file responses. Therefore, on March 5, 2018, the request to shorten time was granted, and the Board ordered that Appellant and Respondent file their responses to TCCE's Motion by 4:00 p.m. on March 19, 2018, that TCCE and Respondent file their Replies to Appellant's Response by 4:00 p.m. on March 21, 2018, and that TCCE and Appellant file their Replies to Respondent's Response by 4:00 on March 22, 2018. All parties filed timely Responses and Replies.

[3] TCCE's Motion is captioned as a Motion to Dismiss and asks the Board to dismiss the Appeal. Notwithstanding the caption, TCCE alleges that there is no genuine dispute of material fact, and the proposed order accompanying the Motion requests that the Board grant summary decision in its favor. At the hearing, the Board asked TCCE to clarify the confusion, whereupon counsel for TCCE acknowledged that its Motion was intended to be a motion to dismiss, or in the alternative, for summary decision. Counsel then withdrew its request for dismissal and asked the Board to proceed on its Motion for Summary Decision.

not an interested party aggrieved by the solicitation per COMAR 21.10.02.02A and 21.10.02.01B(1).

Also on March 19, 2018, Appellant filed its Opposition to TCCE's Motion to Dismiss in which it contends that its protest was timely, that it did have standing to file the protest, and that it had raised the same grounds in its Appeal as it did in its protest. On April 9, 2018, Appellant filed its Response in Opposition to Respondent's Motion to Dismiss, or in the Alternative, for Summary Decision, reasserting that its protest was timely filed and that it had standing to file the protest. On March 22, 2018, Respondent filed a Reply to Appellant's Opposition, and on March 23, 2018, TCCE filed a Reply to Appellant's Opposition. Both Replies reasserted the same grounds for dismissal and/or summary decision that had been asserted in their respective Motions. On April 26, 2018, a hearing was held on the Motions.

STANDARD OF REVIEW FOR SUMMARY DECISION MOTIONS

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2):

> The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), *superseded by statute on other grounds*, MD. CODE ANN., STATE GOVT., §12-101(a). To defeat a

motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Beatty*, 330 Md. at 737-38.

DECISION

In TCCE's and Respondent's Motions, we are asked to enter a summary decision in favor of the moving parties on two separate procedural grounds: timeliness and standing. In its Motion, TCCE asserts that Appellant failed to file its protest in a timely manner, specifically, in accordance with COMAR 21.10.02.03A, which requires "a protest based upon alleged improprieties in a solicitation apparent before bid opening...shall be filed before bid opening."[4] Respondent asserts that Appellant's protest was untimely pursuant to both COMAR 21.10.02.03A and COMAR 21.10.02.03B, which requires that a protest not known before bid opening must be filed "not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."

With regard to standing, TCCE argues that Appellant lacks standing to pursue this Appeal because its bid was non-responsive and it is not an "interested party" because it is not aggrieved by Respondent's alleged misrepresentation of Verizon's utility relocation schedule. Similarly, Respondent argues that Appellant lacked standing to file a protest because it is not an aggrieved party insofar as it is not next in line for award since its bid was ultimately determined by the PO to be non-responsive.

[4]TCCE changed its position on this issue at the hearing, arguing instead that under COMAR 21.10.02.03B, the protest was untimely filed because Appellant knew or should have known the basis of its claim as of January 19, 2018, when it received the email from Mr. Metcalfe, which was 10 days before it filed its protest.

I. Timeliness

We begin our analysis of these two procedural defenses by considering whether Appellant's protest was timely filed. The moving parties have asserted two separate grounds to support their assertions that Appellant's protest was not timely filed. COMAR 21.10.02.03A provides, in pertinent part, that

> [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.

COMAR 21.10.02.03B provides that:

> [i]n cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is knowns or should have been known, whichever is earlier.

Relying on COMAR 21.10.02.03A, in his final decision letter, the PO stated that "[b]idders were warned within the IFB that the risk of delays would be upon the contractor" and that the time for utility relocation should be built into bidder's schedules." The PO concluded that Appellant's protest "seeks to rewrite the specifications after bid opening to shift the risk of a schedule change from the contractor to [Respondent]," thereby rendering the protest untimely because the alleged improprieties in the solicitation complained of by Appellant should have been protested prior to bid opening.

TCCE adopts the PO's conclusions and further asserts that Appellant "knew prior to bid opening that it could not count on the availability of the Incentive Payment in formulating its bid prices and contract duration" and that Appellant "knew the risk of delays concerning the Incentive Payment—including those caused by Verizon's utility work—was transferred to the Contractor." TCCE concludes that "if [Appellant] believed these provisions were improper, the time to protest them was *prior to bid opening*" (emphasis in original).

At the hearing, however, TCCE abandoned this argument and instead asserted that a reasonably diligent bidder knew or should have known the basis for this protest (i.e., the alleged material misrepresentation in the IFB) on receipt of the January 19 email from Mr. Metcalfe, which is the day the time-clock started ticking, and a protest should have been filed within seven (7) days thereafter.

In response, however, Appellant argues that the "risk transfer terms are not the grounds for [Appellant's] protest." Rather, Appellant's protest "is based on its discovery, after bid opening, of [Respondent's] misrepresentation of the utility relocation schedule." Appellant concludes that "this matter is covered by COMAR 21.10.02.03B." Thus, Appellant does not contend that there were any improprieties in the IFB that were apparent before bid opening.

It does not appear that there is a genuine dispute as to whether there were any improprieties on the face of the solicitation. Appellant concedes this fact, asserting instead that the basis of its protest is that Respondent misrepresented a material fact—the utility relocation schedule—which Appellant reasonably relied upon in preparing its bid. Appellant contends that this misrepresentation was not apparent on the face of the solicitation and that it was not known, and could not have been known, until January 24, 2018, when Appellant met with Mr. Metcalfe at Verizon and learned that Verizon would not be able to complete its utility work for approximately 12-14 months.

This brings us to the application of COMAR 21.10.02.03B: was Appellant's protest filed within seven (7) days of when it knew, or should have known, that the utility relocation schedule set forth in the IFB (and Addenda thereto) was inaccurate? In the context of a motion for summary decision, we must consider whether there is a genuine dispute of material fact regarding when

Appellant knew, or should have known, the basis for its protest. If there is a genuine dispute of material fact, then summary decision is not appropriate, and the case must proceed to the merits.

It is well-settled in Maryland that summary judgment is generally inappropriate when matters such as knowledge, intent, or motive, that ordinarily are reserved for resolution by the fact-finder, are essential elements of the plaintiff's case or the defense. *Hicks v. Gilbert*, 135 Md. App. 394 (2000); *Okwa v. Harper*, 360 Md. 161 (2000); *Brown v. Dermer*, 357 Md. 344 (2000). Here we must determine whether there is a genuine dispute as to when Appellant knew, or when it should have known, that Respondent's representation in the IFB was not accurate. In making this determination, we must view the facts and reasonable inferences therefrom in the light most favorable to the party opposing the motion. *Delia v. Berkely*, 41 Md. App. 47 (1978), *aff'd*, 287 Md. 302 (1980).

The moving parties contend that the operative date when Appellant knew, or should have known, the basis of its protest, was January 19, 2018, which is the date when Appellant received the email from Mr. Metcalfe stating that "I do not believe Verizon will have our utility relocation efforts completed by the October of 2018 timeframe mentioned in your letter." They contend that this is the date when Appellant knew or, at the least, should have known, that the utility work could not be completed in the timeframe stated in the IFB. They conclude that the protest must have been filed by January 26, 2018.

Appellant disagrees and contends that it did not conclusively determine that Verizon would be unable to complete its utility relocation work within the timeframe stated in the IFB until the meeting with Mr. Metcalfe on January 24, 2018. In Appellant's view, this became the operative date when the 7-day clock for filing its protest began. Appellant contends that after receiving the email on January 19, it contacted Mr. Metcalfe by telephone and explained to Mr. Metcalfe that

Appellant "took a unique approach to the schedule and that [Appellant] could accommodate Verizon by performing early grading activities..., installing temporary sleeves to facilitate Verizon work during grading operations, and providing work-arounds such as the temporary or permanent realignment of other underground utilities." Appellant further contends that it believed at that time that it could "facilitate Verizon's early completion of the installation of the conduit pathway, and Mr. Metcalfe also seemed interested in finding a way to work with [Appellant] to complete Verizon's work in October 2018."

In short, Appellant argues that as of January 19, after this telephone conversation with Mr. Metcalfe, Appellant was awaiting additional information regarding Verizon's utility relocation schedule, and reasonably believed that by working together with Verizon, it could facilitate Verizon's completion of conduit relocation by October 2018. It was only at the meeting on January 24, 2018, that Appellant received a copy of Verizon's detailed relocation plans and learned additional information from Verizon, which convinced Appellant that the Verizon work could not possibly be completed by October 2018.[5]

The question, of course, is whether, prior to the January 24th meeting, Appellant's belief that the Verizon work could still be completed by October 2018 was reasonable in light of the January 19 email clearly stating that it could not. The reasonableness of Appellant's belief, and whether Appellant should have known the work could not be completed by October 2018 after receiving the January 19 email, are questions for the fact-finder. *See*, e.g., *Dett v. State*, 161 Md. App. 429 (2005), *aff'd*, 391 Md. 81 (2006)(stating that "[g]enerally, issues of good faith and reasonable belief...are factual questions not suitable for resolution on summary judgment.").

[5]We pause here to note that the Appellant's allegations are supported by the Affidavit of Ira Kaplan, the Vice President for Appellant and the person who prepared Appellant's bid in response to the IFB. Neither TCCE nor Respondent submitted a countervailing affidavit to refute Mr. Kaplan's allegations.

Viewing the facts in the light most favorable to Appellant, as we are required to do, it appears there is a genuine dispute of material fact among the parties as to when Appellant knew, or should have known, that the Verizon work could not be completed by October 2018. We cannot make a determination regarding the reasonableness of Appellant's belief in the context of a motion for summary decision. It is a decision that can only be made after the hearing on the merits, once all the admissible evidence has been brought to light. As such, we cannot say, at this juncture, whether Appellant's protest was timely filed.

II. Standing

We turn now to the issue of standing. Relying on COMAR 21.10.02.01B(1), the PO determined that Appellant lacked standing to protest the award or request re-solicitation because on February 15, 2018, Appellant's bid was rejected as non-responsive for failure to meet the MBE participation goal or request a waiver. The PO concluded that Appellant did not have standing because "[a] protest may only be filed by an interested party, which is a "contractor aggrieved…by the award of a contract."[6]

TCCE takes up Respondent's mantle and goes one step further, arguing that not only was Appellant's bid non-responsive, thereby depriving it of standing to complain about the alleged misrepresentation, but also that Appellant failed to demonstrate that it was aggrieved by the solicitation. TCCE contends that Appellant cannot show that it detrimentally and reasonably relied on the Incentive Payment in determining its bid price or schedule. TCCE explains that by the terms of the IFB, no bidder was entitled to such reliance, that all bidders were in the same competitive

[6] We must note that this is not the correct recitation of the regulation. COMAR 21.10.02.01B(1) provides that an "interested party means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by a protest."

position as to the knowledge of the utility relocation schedule and the availability of equitable adjustments in the event of any unforeseen delays.

Appellant does not dispute that its bid was non-responsive. Instead, Appellant contends that when a protest seeks cancellation and re-solicitation, Maryland law does not require that a protestor be next in line for award, or that it be a responsive bidder. Relying on the Board's decisions in *Honeywell, Inc.*, MSBCA No. 1317, 2 MSBCA ¶148 (1987); *Johnson Controls, Inc.*, MSBCA No. 1155, 1 MSBCA ¶¶60 & 65 (1983); and *Machinery and Equipment Sales, Inc.*, MSBCA No. 1171, 1 MICPEL ¶70 (1984), Appellant argues that it is irrelevant whether a protestor is a responsive bidder where the basis of the protest is a flawed solicitation because defective solicitations impact all bidders equally.[7] As support for its position, Appellant cites the Board's conclusion in *Machinery and Equipment Sales, Inc.*, wherein the Board stated that "[w]here the basis of protest, if valid, would produce [a re-solicitation of bids], a protestor has standing even if his bid was non-responsive or his proposal unacceptable." *Id.* at 4. Appellant concludes that "[a]s the bidder with the lowest evaluated price on the instant solicitation, and as a prospective bidder on a re-solicitation, [Appellant] is aggrieved by [Respondent's] issuance of the defective IFB and refusal to rebid the Project with accurate information provided to all bidders."

For purposes of these Motions, we must agree with Appellant. Viewing the facts in the light most favorable to Appellant, if indeed the IFB is determined to have been flawed and such flaw was not apparent on its face, then the flawed IFB would have affected all bidders equally, in which case all bidders would be interested parties with standing to protest the defective IFB.

[7] The flaw complained of here is that the IFB contained a material misrepresentation regarding the October 2018 utility relocation schedule.

It appears there is a genuine dispute of fact as to whether the IFB was defective, whether the IFB contained a material misrepresentation regarding the utility relocation schedule, and whether Appellant had a reasonable right to rely on Respondent's representation. With respect to these Motions, viewing the facts in the light most favorable to Appellant, we conclude that (1) Appellant is an interested party, and thus has standing, because it is a party aggrieved by the alleged defective solicitation, and (2) a genuine dispute of material fact exists as to whether Appellant knew, *or reasonably should have known*, the basis of its protest upon receipt of the January 19 email, which would have required that a timely protest be filed by January 26, 2018.

Accordingly, based on the foregoing, it is this _____ day of May, 2018, hereby:

ORDERED that Respondent's Motion to Dismiss or in the Alternative for Summary Decision is denied; and it is further

ORDERED that TCCE's Motion to Dismiss is hereby denied.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Ann Marie Doory, Esq.

/s/
Michael J. Stewart, Esq.

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 Order and Opinion in MSBCA No. 3074, Appeal of Milani Construction, LLC, under Maryland Department of Transportation State Highway Administration Contract No. CA4135370.

Date: May 15, 2018

/s/
Ruth Foy
Deputy Clerk