

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of A.D. JACKSON)
CONSULTANTS, INC.)
) Docket No. MSBCA 1817
Under Request for Proposals for)
Contract No. MDOT-MBE-93-01)
)

August 11, 1994

Bid Protest - Timeliness - The time requirements set forth in COMAR §21.10.02.03 are mandatory and must be strictly construed.

APPEARANCE FOR APPELLANT: Adrian R. Gardner, Esq.
Rifkin, Evans, Silver &
Rozner
Greenbelt, MD

APPEARANCES FOR RESPONDENT: Mark S. Dachille
Thomas G. Peter
Asst. Attorneys General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

The Maryland Department of Transportation (MDOT) moved to partially dismiss the above captioned appeal on grounds that Appellant failed to timely protest its original elimination from competition. Following the granting of this motion, Appellant withdrew the remaining elements of its appeal.

Findings of Fact

1. On September 14, 1993 MDOT issued a Request for Proposals (RFP) for Contract No. MDOT-MBE-93-01 to conduct the study required by Chapter 708 of the Laws of Maryland 1990. The offeror was required to propose a study which would demonstrate whether the State MBE Program remains in compliance with the requirements set forth in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and later decisions. The study is intended to determine whether there is a continuing need for the MBE Program and, if so, whether any changes should be made. The solicitation provided that the selected contractor would be required to determine, through statistical (and other) techniques, the extent of discrimination against Minority Business Enterprises in the public and private sector.

2. Proposals were due on November 1, 1993. MDOT received proposals from six vendors: Coopers & Lybrand, Exico, Inc., Appellant, MGT of America, Inc., Morgan Management Systems, Inc., and National Economic Research Associates, Inc.
3. The procurement process included several steps: 1) an initial classification of proposals as "reasonably susceptible of being selected for award" and "not reasonably susceptible of being selected for award," 2) oral presentations from vendors whose proposals were initially classified as reasonably susceptible of being selected for award, 3) best and final offers, 4) an evaluation of technical proposals, 5) an evaluation of price proposals, 6) award to the responsible offeror whose proposal was determined to be the most advantageous to the State considering the technical evaluation and price.
4. On November 19, 1993 the MDOT Evaluation Committee met to discuss the initial evaluation of the technical proposals. The consensus of the Committee was that National Economic Research Associates, Inc. (NERA) and MGT of America, Inc. (MGT) were clearly within the competitive range; Exico, Inc. (Exico) and Morgan Management Systems, Inc. (MMS) were clearly out of the competitive range and Coopers & Lybrand (Coopers) and Appellant were questionable.
5. By letters dated November 23, 1993 MDOT notified Exico and MMS that their technical proposals had been classified as unacceptable. Coopers, Appellant, MGT and NERA were invited to make oral presentations and to respond to questions from the Committee. Oral presentations were conducted on November 29 (Coopers), November 30 (Appellant and NERA), and December 1, 1993 (MGT). Each of the presentations lasted for several hours and involved extensive questioning by the committee.
6. By letters dated December 2, 1993 NERA, MGT, Coopers and appellant were each asked to submit best and final offers (technical and price). The best and final offers were due on December 7, 1993. Each of the four offerors submitted a best and final offer.
7. On December 8, 1993 MDOT'S Evaluation Committee met to evaluate the offers which had been submitted by NERA, MGT, Coopers and Appellant. The Committee found the technical proposals of NERA and MGT to be within the competitive range and that the proposals of Coopers and Appellant were clearly out of the competitive range. After consideration of the price proposals, the Committee selected NERA for award.
8. By letter dated December 14, 1993 MDOT notified Appellant that it had selected NERA for award and that Appellant could request a debriefing. That letter also provided as follows:

Prior to the completion of its deliberations, the Technical Evaluation Committee made a determination to limit final consideration to those proposals found based on their overall technical merit, to be within a competitive range and therefore reasonably susceptible of being selected for award. Your proposal was not one of those which received final consideration.

9. Appellant responded on the same day and requested a debriefing. Appellant's letter requesting a debriefing also noted that:

In particular, we would be interested in the rationale for requesting a "best and final offer" from our firm if our proposal was not among those that received final consideration.

10. The debriefing was held on December 21, 1993. The parties specifically addressed the reasons why Appellant's proposal had been classified as not reasonably susceptible of being selected for award and Appellant's query about why it was first invited to submit a best and final offer and was then subsequently eliminated from the competition.
11. By letter dated December 30, 1993 Appellant indicated that although it disagreed with the Committee's determination, it would not file a protest.
12. Three months later, on March 29, 1994, Appellant filed the protest which is the subject of this appeal shortly after learning that award has not been made to NERA pending evalua-

tion of the responses of NERA and MGT to revisions to the RFP's scope of work that had been issued by MDOT on February 11, 1994.¹ Appellant's protest letter acknowledged that its complaint relative to the RFP as originally issued prior to the February 11, 1994 revisions was untimely:

MDOT contends that these were the only technically acceptable proposals. This is not true. Any objective review of the facts relating to the qualifications of our firm in the conduct of similar Post-Croson studies provided evidence of the defect in the MDOT position. We failed, however, to protect our rights under COMAR by not filing a protest to the earlier solicitation, MDOT-MBE-93-0.

13. By letter dated April 26, 1994 the Procurement Officer found this protest to be untimely on grounds that: "[s]ince you were given a thorough debriefing on December 21, 1993, concerning the Evaluation Committee's judgment that your firm's proposal was not in the competitive range and since your firm chose not to file a protest to that decision, any attempt now to protest issues as to which you were then on notice is untimely."
14. On May 6, 1994 Appellant appealed the Procurement Officer's decision to this Board on grounds that MDOT should not have classified Appellant's proposal as not reasonably susceptible of being selected for award and that even though its proposal had been rejected on such grounds in December, 1993, MDOT should have reopened discussions with Appellant because of the amendment of the scope of work in February, 1994.
15. On August 1, 1994 MDOT filed a Motion to Dismiss relating to Appellant's protest that MDOT should not have originally classified Appellant's proposal as not reasonably susceptible

¹ The Board of Public Works (BPW) declined to approve award of a contract to NERA having voiced certain concerns about the procurement. The issuance of revisions to the scope of work on February 11, 1994 by MDOT was undertaken to address the concerns of the BPW.

of being selected for award and eliminated it from competition in December 1993, which Motion was granted at the hearing on August 8, 1994.

Decision

COMAR §21.10.02.03 provides the following rules regarding the time for filing a bid protest.

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposal shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in §A or §B means receipt by the Procurement Officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest received by the Procurement Officer after the time limits prescribed in §A or §B may not be considered.

These time requirements are mandatory and must be strictly construed. See e.g., Innovative Integration, Inc., MSBCA 1730, 4 MICPEL ¶ (1993). If an offeror fails to file its protest in a timely fashion, the protest may not be considered by the Procurement Officer or by the Board. COMAR §21.10.02.03C. See Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MICPEL ¶155 (1987) (motion to dismiss appeal granted by Board because protest was filed more than seven days after the grounds for protest were known or should have been known). See also Communication Management Systems, Inc., MSBCA 1625, 3 MICPEL ¶296 (1992).

In this case, the record reflects that Appellant knew upon receipt of MDOT's letter of December 14, 1993 that it had been excluded from the competitive range (i.e. that its proposal had

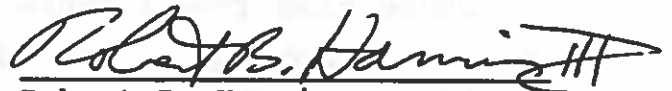
been found by MDOT to be not reasonably susceptible of being selected for award). It was debriefed regarding this matter on December 21, 1993. Accordingly, the latest date by which Appellant could have protested the grounds for exclusion was December 28, 1993. Since Appellant waited until March 29, 1994 to protest on this ground, its complaint regarding exclusion is time barred.

In reaching this conclusion the Board expresses no opinion on whether the request to Appellant to submit a best and final offer means that Appellant must have been deemed a "qualified offeror" relative to discussions, negotiation and clarification of proposals and that its proposal should thus have been deemed reasonably susceptible of being selected for award. While a plain reading of COMAR 21.05.03.03 B and C may suggest this result, Appellant was advised otherwise in the letter of December 14, 1993 and at the December 21, 1993 debriefing and the duty to protest commenced upon receipt of such advice. Accordingly, the Board granted the Motion to Dismiss at the hearing. Upon the granting of the Motion to Dismiss Appellant withdrew the remaining grounds of appeal.

Accordingly, the appeal is dismissed.

Wherefore, it is Ordered this 11th day of August, 1994 that the appeal is dismissed.

Dated: August 11, 1994


Robert B. Harrison III
Chairman

I concur:

Candida Steel
Candida S. Steel
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 1817, appeal of A.D. JACKSON CONSULTANTS, INC. under Request for Proposals for Contract No. MDOT-MBE-93-01.

Dated: August 11, 1994

Mary J. Priscilla
Mary J. Priscilla
Recorder

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