

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AEPCO, INCORPORATED)
)
) Docket No. MSBCA 1844
Under DGS RFP No. Q-75686)
State Highway Administration)
Video Routing & Control System)
)

November 29, 1994

Bid Protest - Timeliness - A protest must be filed no later than seven (7) calendar days after the basis for the protest is known or should have been known. The protest must be written. The seven day requirement is not waived where the Procurement Officer considers an untimely protest filed by another bidder where such protest is based on information obtained through an unauthorized disclosure of the confidential portions of the Appellant's bid.

APPEARANCES FOR APPELLANT:

Louis L.S. Tao, Esq.
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Washington, D.C.

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APPEARANCE FOR RESPONDENT:

William A. Kahn
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OPINION BY CHAIRMAN HARRISON

Respondent moves to dismiss Appellant's appeal on grounds that Appellant's bid protest was not timely filed such that the Board lacks jurisdiction to entertain the instant appeal from the denial of the protest.

Findings of Fact

1. The appeal pertains to a procurement by the Department of General Services ("DGS") on behalf of the State Highway Administration ("SHA") of the Video System component of SHA's Statewide Operations Center ("SOC"). The SOC performs a variety of functions relating to traffic monitoring and control.

2. The instant solicitation was issued on May 23, 1994. Bids were to be received and opened at 2:00 p.m. on June 3, 1994. As depicted on the standard DGS Request for Quotation (sometimes herein RFQ) Form, the System is comprised of 25 line items numbered 2-001 through 2-025.
3. The Specification for the Video System are set forth in a document attached to the Request for Quotation Form and captioned "Statewide Operations Center, Traffic Operations Centers, Video Systems Specifications, Maryland State Highway Administration, May 6, 1994."
4. The Specifications contain the following sections that are pertinent to resolution of the DGS motion for summary disposition.
Section 2.2 provides that "[t]he successful BIDDER shall be selected based upon the total low price bid which meets the specified requirements."
Section 4.7 concerns the Projection Subsystem (Items 2-011 through 2-017). This subsystem is described, in Section 4.7.1, as consisting of four large rear-projection systems, three 120" diagonal assemblies, and one 9' x 12' (nominal) video wall assembly. Sections 4.7.4 and 4.7.5 provide greater detail.

Section 4.7.4 states in relevant part:

4.7.4 - Multiscan Projector - Video Wall System
(Item 2-013)

The CONTRACTOR shall furnish and install one (1) rear-projection video system to be arranged in 4 x 4 array which forms a 9' x 12' display area. The video wall shall consist of 16 multiscan projectors, 15 fresnel rear-projection screens, necessary baffling to prevent washover of one light source onto an adjacent screen, and necessary shrouding to diffuse ambient lighting between the projectors and the screens. The video wall assembly shall be mounted through an existing wall at the SOC as directed by the ENGINEER. The arrayed video wall shall be installed at a sufficient forward tilt from vertical in order to accommodate a desired vertical field of view in the control room. Each individual display area shall have a diagonal measurement of 45" and a frame width between adjacent screens of no more than to 1/4". The CONTRACTOR shall provide baffles to prevent washover of one light source onto an adjacent screen. Specifications regarding the video wall screens are provided in Section 4.7.[5] of these specifications.

The projectors shall have 7" lenses with electrostatic focus CRT's, and be stand-alone, coupled

with 45" (diagonal) screens specified herein. The projectors shall be identical

Section 4.7.5 provides in relevant part:

4.7.5. - Video Wall Rear Projection Screen (Item 2-014)

The CONTRACTOR shall furnish and install sixteen (16) 45" rear-projection fresnel/lenticular screen assemblies to form a 4 x 4 projection array of 9' x 12' (nominal) in area. The screen assemblies shall be mounted in the SOC as directed by the ENGINEER. The multiscan projectors, specified in Section 4.7.[4] shall be mounted within the assemblies, in order to provide a complete and functional rear-screen projection subsystem. Screens shall have factory prepared mounting hardware and framing. The frame around the screen shall not exceed 1/8", so as to limit the maximum distance between the screens' display area to 1/4". The CONTRACTOR shall supply all necessary baffles to prevent washover of one projector onto an adjacent screen, and shrouding to diffuse ambient light between the projector and the screen. The screens shall be single piece, and meet the following minimum requirements:

* * *

The Screens shall be installed through the projection wall, and shall be framed in a flat black anodized finish. The CONTRACTOR shall provide proper shrouding to diffuse ambient light between the projectors and the screen. The projectors and screens for the video wall shall not be enclosed in a single container.

The Specifications, at Sections 4.7.2 and 4.7.4 specified requirements for frequency response, horizontal and vertical deflection, and resolution which dictated a necessary scan rate.

5. Page 5-11 is a "Bid Price Submission Form" which contained pre-printed columns listing the line items by number, descriptions, and quantities, and two blank columns, one for unit bid

price and the other for the corresponding extension. Below the extensions is a space for the Total Bid Price. Each bidder is instructed to complete this bid table.

6. Bid opening was held as scheduled at 2:00 p.m. on June 3, 1994. Four bids were received. Appellant submitted the apparent low bid of \$1,259,181 and Peirce-Phelps, Inc. submitted the second low bid of \$1,608,990.
7. The Appellant's bid was hand-delivered on June 3 by a representative of Appellant who remained to attend the bid opening.
8. In addition to the documents that were required to be included with its bid, Appellant submitted a Proposal that contained a proprietary legend¹ on the inside front cover and an Executive Summary that states, "Our analysis and selection of equipment has caused us to take exception to one area of the specification. This exception is addressed in the Approach Section."
9. The exception is described in the Approach Section of the proposal as follows:

AEPCO has taken exception to the specification for the video wall projector. AEPCO is proposing the Sony RVP400Q projection cube for the video wall projector. AEPCO is aware that the Sony does not meet the scan rate and the like manufacturer specifications set forth in the statement of work. AEPCO was not able to locate a manufacturer that produced a projector or projector module that would supply the required resolution at the specified image size. If the SOW was written

¹The text of the legend provided in part:

This document contains commercial, financial information or trade secrets of AEPCO, Inc. which are confidential and exempt from disclosure to the public under the Freedom of Information Act, 5 U.S.C. 552(b) (4), and unlawful disclosure thereof is a violation of the Trade Secrets Act, 18 U.S.C. 1905. Public disclosure of any such information or trade secrets shall not be made without the prior written permission of AEPCO, Inc.

to a specific manufacturer AEPCO would revise our submission to reflect the change. We believe that the proposed solution meets the intent of the SOW if not the letter and presents a cost effective design solution. After processing by the display controller, an image of the required resolution can be displayed on the proposed RVP400Qs.

10. Apparently, Appellant prepared a computer-generated copy of the Bid Price Submission Form on which was added Appellant's proposal designation number, unit prices and extensions and this legend: "Use or disclosure of information contained on this page is subject to the restriction on the Title page of this Proposal."
11. Appellant also submitted an altered version of the Bid Price Submission Form containing the same item number, description, and quantity columns. In place of the two pricing columns, Appellant substituted a "Manufacturer" column in which it listed the source and model number for almost all of the equipment.² For items 2-013 and 2-014, the form contained:
2-013 Sony RVP-400Q
2-014 Included in Item 2-013³
12. As attachment 13, Appellant included a copy of Sony's published descriptive literature for its Model RVP-400Q Multiscan Rear Projector. This material describes the Sony as "a one piece unit combining a projector head and a 40-inch

²The solicitation did not call for this information with the bid. However, this information and other related detail are required of the successful bidder after the award of the contract pursuant to Specifications Sections 2.12 and 5.2.1.

³Appellant's bids for line items 2-013 and 2-014 appeared as follows:

	<u>Unit Price</u>	<u>Extension</u>
2-013	\$12,069	\$193,108
2-014	\$0	\$0

rear screen" and able "to accept signals over a range of horizontal scanning frequencies from 15 Khz to 50 Khz and vertical frequencies from 38Hz to 150 Hz. Appellant's title page for Attachment 13 also includes the same legend that it placed on the bottom of its two Bid Price Submission Forms.

13. Appellant's proposal contains a title page for Attachment 14 that also includes a legend identical to the one on the title page for Attachment 13. However, there is no Attachment 14, apparently since Appellant proposed to include line item 2-014 as an integral part of line item 2-013.⁴
14. At the hearing on the Motion to Dismiss Appellant's appeal, one of Appellant's attorneys stated that Appellant had been advised prior to bid opening by an "official over at the DGS" that the aforementioned exception to the specifications contained in its bid would not create a problem. (Tr. p. 34).
15. On June 24, 1994, the second low bidder, Peirce-Phelps, Inc. protested the award of a contract to Appellant on grounds that Appellant did not comply with the requirements of the RFQ. Specifically, Peirce-Phelps objected to Appellant's failure to include unit prices on the Request for Quotation Form and use of an altered version of the form. Objection was also taken to Appellant's proposed substitution for item 2-013, Multiscan projector, since it did not meet the required scan rate or screen diagonal.
16. By certified letter dated August 16, 1994, DGS advised Appellant that DGS was rejecting its bid as non-responsive. This letter stated:

Specifications advertised in the above-mentioned bid request are minimum for the end user's requirement.

Your firm took exception on line Item 2-013 & 2-014 by offering a Sony projector, Model RVP400Q, which does not meet the scan

⁴ Specifications Section 4.7.5 required that the projectors and screens be separate units.

rate specified, nor the square foot requirement.

Item 2-014, as specified in Section 4.7.6, calls for 16 projectors of a 45" Diagonal that would result in a total image display of 108 sq. ft.(9' x 12'). The Sony 40" Diagonal Display would result in a total image of only 85.28 sq. ft. Section 4.7.6 also states that the projector and screen can not be contained in a single unit. The RVP400Q is a single unit.

Therefore, you are advised by this letter that your bid received to this Request for Quotation has been determined to be non-responsive and is rejected.

17. Appellant received the DGS rejection letter on August 24, 1994.
18. On August 23, 1994, the Procurement Officer sent Peirce-Phelps the final agency action on its protest. The Procurement Officer denied the protest based on grounds that Appellant's bid was materially defective because unit prices were not included on the Request for Quotation Form. However, he found merit in the claim that Appellant's bid did not meet the scan rate required for the projector or the image size requirements for the wall screen. Since he found Peirce-Phelps' bid responsive, the Procurement Officer stated his intention to award the contract to Peirce-Phelps.
19. Appellant was sent a copy of the Procurement Officer's final decision on the Peirce-Phelps protest and received it on August 29, 1994.
20. Prior to receipt of the Peirce-Phelps protest the Department of General Services had notified Peirce-Phelps and the two remaining bidders other than Appellant in writing that Appellant would be awarded the contract. Appellant did not receive this letter.
21. On August 26, 1994, after receipt of the DGS letter of August 16, 1994 rejecting Appellant's bid as being non-responsive, Appellant called the Procurement Officer's office. The

Procurement Officer was on vacation. However, a Ms. Adler, a State employee, advised Appellant that "there had been no award yet and it has not been re-solicited as of yet, so there still may be hope" and suggested that Appellant call back in a week. However, Ms. Adler offered no explanation as to why Appellant's bid had been found non-responsive.

22. At Appellant's request, made upon Appellant's receipt of the final Procurement Officer's decision on the Peirce-Phelps protest on August 29, 1994, a meeting was scheduled with the Department of General Services for September 2, 1994.
23. At the meeting with Department of General Services personnel (including the Procurement Officer) on September 2, 1994, Appellant orally protested the rejection of its bid.
24. By facsimile and hand-delivery on September 9, 1994, Appellant filed a protest with the Procurement Officer.
25. The Procurement Officer's final decision on Appellant's protest was issued on September 16, 1994 and received by Appellant on September 20, 1994. That decision held that Appellant's protest was untimely and also that Appellant was not in line for award because "nothing that you have proclaimed could transform [Appellant's] non-responsive bid into one that was responsive."
26. The instant appeal was filed on September 28, 1994.
27. The Board finds that the record does not support Appellant's assertion that personnel of DGS actually or constructively misled Appellant or withheld information during the period June 3, 1994 to September 2, 1994 concerning Appellant's grounds for protest.

Decision

In its protest and on appeal, Appellant has raised issues relating to the treatment afforded Appellant prior to bid submission, disclosure of information in its bid, the rejection of Appellant's bid, and the proposed acceptance of Peirce-Phelps' bid.

On appeal, Appellant also complains about the form of the Procurement Officer's Decision,⁵ and contends that its protest was timely filed.

The threshold issue, upon which consideration of all the issues depends is whether Appellant's protest was timely filed with the Procurement Officer.⁶ If not, the Board lacks jurisdiction to hear the appeal. See COMAR 21.10.02.03C. See e.g. Frank W. Hake, Inc., MSBCA 1323, 2 MSBCA ¶151 (1987); Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MSBCA ¶154 (1987). COMAR 21.10.02.03 provides:

.03 Time for Filing

A. 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. 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.

⁵Appellant's contentions regarding the form of the Procurement Officer's decision are not discussed herein. The Board lacking jurisdiction over the appeal, these contentions do not afford an independent basis for hearing this appeal.

⁶ Appellant contends that it filed a timely, oral protest on September 2, 1994. However, only written bid protests may be considered. Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22 (1984). See also Micrographic Specialities, Inc., MSBCA 1331, 2 MSBCA §149 (1987).

Appellant asserts that its protest filed on September 9, 1994 was timely because the protest is based upon information that it allegedly first learned seven days earlier on September 2, 1994 in a meeting with the Procurement officer. We shall now discuss Appellant's various grounds of protest allegedly first discovered on September 2, 1994.

A. Pre-bid Activity

Appellant complains that, prior to bid opening, the Procurement Officer refused to entertain its questions pertaining to the solicitation, while answering questions of other bidders or potential bidders. COMAR 21.10.02.03B requires that a protest have been filed within seven days of when Appellant became aware that DGS refused to answer its questions. Assuming arguendo that it was improper for DGS to fail to respond to Appellant's pre-solicitation inquiries, such impropriety was not complained of within seven days of bid opening, the last day that such pre-bid opening refusal to answer Appellant's questions could have occurred. Bid opening bars complaint about pre-solicitation improprieties in the written solicitation itself that would be apparent to the protester. COMAR 21.10.02.03A. See Merjo Advertising and Sales Promotion Company, MSBCA 1466, 3 MSBCA ¶223 (1989). Whether the Board of Public Works intended the language of COMAR 21.10.02.03A, "[a] protest based upon alleged improprieties in a solicitation that are apparent before bid opening . . . shall be filed before bid opening" to apply to conduct as well as the written wording of a solicitation, we need not decide since more than seven days (indeed months) passed between the day of bid opening on June 3, 1994 and the filing of the bid protest on September 9, 1994.⁷

B. Disclosure of Confidential Portions of Appellant's Bid

Appellant's complaint concerning disclosure is two-fold. First, it asserts that Peirce-Phelps should not have been given

⁷We recognize that Appellant's position at the hearing that it was told it could submit its bid with exceptions (see Finding of Fact No. 14) is inconsistent with this issue as articulated by Appellant in its protest and appeal.

access to Appellant's bid documents or the information in those bid documents because the documents included confidentiality legends. Second, it alleges that, by allowing access, the Procurement Officer "assisted" Peirce-Phelps "in fashioning a protest targeting [Appellant's] proposal." While such charges are serious, this Board only has jurisdiction to consider them if complaint was made timely. COMAR 21.10.02.03B requires protests to be "filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." See EG&G Astrophysics, MSBCA 1468, 3 MSBCA ¶226 (1989).

Appellant knew or should have known of these grounds on August 29, 1994 when it received a copy of the Procurement Officer's final decision on Peirce-Phelps' protest. That decision stated in pertinent part:

. . . This letter is in response to [Peirce-Phelps'] protest letter of June 24, 1994 that raised concerns about 1) the responsiveness of the apparent low bidder (AEPCO, Inc.) and 2) bid procedure/form and forms required to be submitted with the bid.

Regarding [Peirce-Phelps'] second concern first, AEPCO's alleged failure to utilize a particular form to show their unit prices and the alleged disregard to bid procedure in this instance would, at most, constitute technical irregularities and/or insubstantial defects which can be waived pursuant to COMAR 21.06.02.04 insofar as their price quotes can be readily determined. [Peirce-Phelps] protest in this respect is without merit.

Nevertheless, [Peirce-Phelps'] objections concerning the responsiveness of AEPCO, Inc. to the technical specifications vis-a-vis the scan rate of their proposed projector and image size requirement does have merit. AEPCO, Inc. has been advised that their bid is non-responsive and has been rejected. Consequently, [Peirce-Phelps'] bid has emerged as the apparent low bidder. [Peirce-Phelps'] bid has been evaluated and found responsive. It is our intention to make the award to [Peirce-Phelps].

It is apparent from the decision that Peirce-Phelps had complained about Appellant's bid forms, the scan rate of Appellant's projector and the size of the screen that Appellant had

proposed. Peirce-Phelps' knowledge had to have come from viewing Appellant's bid or from having been told of its content. Thus, on August 29, 1994, Appellant knew of the disclosure to Peirce-Phelps. A protest based on such disclosure should have been filed within seven days thereafter. The protest filed on September 9, 1994 was too late, and the Board lacks jurisdiction to consider the matter.

C. Non-Responsiveness of Appellant's Bid

DGS informed Appellant of the rejection of its bid by letter dated August 16, 1994. Appellant received that notice on August 24, 1994. The letter specifically advised Appellant that its bid was rejected as being non-responsive due to its exception to the minimum requirements of the RFQ relative to the scan rate and size of the screen that Appellant had proposed. Any complaint that Appellant had about the propriety of the rejection had to be raised by protest filed within seven days thereafter. The protest filed September 9, 1994 was untimely.

D. Proposed Award to Peirce-Phelps

Appellant alleges that the Peirce-Phelps bid is non-responsive and should not have been accepted. It also contends that the Procurement Officer should not have found Peirce-Phelps' responsible based on that firm's qualifications. However, when Appellant's bid was rejected, it was on notice that the Procurement Officer would probably award to the next low responsive and responsible bidder. Specifically, Appellant complains that Peirce-Phelps did not "respond to the requirements set forth in the RFQ. It merely stated that it would comply with all requirements without demonstrating how it would do so."

This information would have been available to Appellant upon inspection of the Peirce-Phelps bid at bid opening. Thus a challenge to the responsiveness of the Peirce-Phelps bid should have been lodged within seven days of bid opening. Likewise a challenge that Peirce-Phelps was not a responsible bidder based on the firm's qualifications should have been made within seven days

of bid opening.⁸ See Grady & Grady, Inc., MSBCA 1455, 3 MSBCA ¶217 (1989). In any event, on August 29, 1994 when Appellant received the Procurement Officer's decision on Peirce-Phelps' protest, Appellant knew or should have known that an award to Peirce-Phelps would be made. A complaint about acceptance of Peirce-Phelps' bid on responsibility or responsiveness grounds had to be made within seven days thereafter. The September 9, 1994 protest was not timely.

E. The State is Estopped from Finding Appellant's Protest Untimely Because it Considered the Untimely Peirce-Phelps Protest.

Appellant's estoppel contention is founded upon the Procurement Officer's untimely consideration of Peirce-Phelps' protest.⁹ The essential elements of an estoppel are that the party claiming the benefit of the estoppel must have been misled to his injury and changed his position for the worse, having believed and relied on the representations of the party sought to be estopped. Eastern Shore Warehousing, Inc. v. Wallis, 87 Md. App. 141, 149, (1991). While it asserts that this conduct by the Procurement Officer was wrongful or unconscionable, it has not indicated how its position has been altered by its good faith reliance on that conduct.

As noted by counsel for DGS, Appellant might be heard to say that, if the Procurement Officer acted on Peirce-Phelps' untimely protest, Appellant could think that the Procurement Officer might do the same if Appellant filed an untimely protest. However, Appellant could not reasonably believe that the Procurement Officer

⁸ The Board assumes that Peirce-Phelps did not request that its bid or portions thereof be treated as confidential. The Peirce-Phelps bid was not made part of the record by the State.

⁹ The Board is aware from a timeliness standpoint that Peirce-Phelps could not have known of the non-responsiveness of Appellant's bid until it was told or shown the confidential portions thereof. For purposes of this issue, however, the Board will assume that the Peirce-Phelps protest was untimely.

was obligated to act on Appellant's protest regardless of timeliness and that is why it waited to file it.

In Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, (1984), the appellant therein asserted that, "by taking cognizance of his [untimely] complaint," the Procurement Officer "waived the seven-day-written-protest requirement." The Court of Special Appeals, however, observed:

We also would note that, even if regarded as merely procedural in nature, the [seven-day-written-protest] regulation was not that of the Comptroller. It was adopted by the Department of Budget and Fiscal Planning, with the approval of the Governor and the Board of Public Works, and was imposed by those agencies upon the Comptroller's office in the latter's capacity as a procurement agency. Whatever the procurement officer's authority might be to waive a procedural regulation of the Comptroller, we find no authority in law for him to waive a requirement externally imposed pursuant to clear statutory authority. Such a power would be inconsistent with the whole thrust and scheme of the law.

Kennedy Temporaries, supra, 57 Md. App. at p.41.

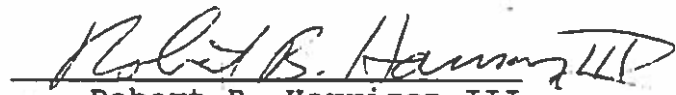
If the Procurement Officer was without authority to consider Peirce-Phelps' untimely protest, he was also without authority to consider an untimely protest from Appellant. The Procurement Regulations provide notice to Appellant of this basic tenet. Appellant may not legally rely upon the Procurement Officer's alleged unauthorized conduct, as Appellant is bound to know the law. We find there is no estoppel.

At the hearing, Appellant also argued that the Board should find that its protest was timely because the conversation with Ms. Adler (see Finding of Fact No. 21) and the fact that a letter was sent to the other bidders advising that Appellant would be awarded the Contract (see Finding of Fact No. 20) tolled the running of the seven day period. The Board disagrees. The record reflects that Appellant was not aware of the award letter until the State filed the Motion to Dismiss with this Board. Therefore Appellant could not have relied on such letter. The record does not reflect the extent of Ms. Adler's duties. However, assuming that Ms. Adler

could have been considered to be acting for the Procurement Officer, her remarks would not have afforded a reasonable bidder comfort that it need not protest the written finding that its bid was not responsive.

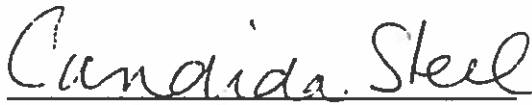
For the foregoing reasons, the Appellant's protest was untimely and this Board accordingly lacks jurisdiction to hear the instant appeal.

Therefore, it is Ordered this 29th day of November, 1994 that the Motion to Dismiss is granted. The appeal is dismissed.


Robert B. Harrison III
Chairman

Dated: November 29, 1994

I concur:


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 1844, appeal of AEPCO, INCORPORATED, under DGS RFQ No. Q-75686, State Highway Administration Video Routing and Control System.

Dated:

November 29, 1994

Mary F. Priscilla

Mary F. Priscilla
Recorder