

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN RE CONSOLIDATED APPEALS OF)
)
ATI SYSTEMS and) Docket Nos. MSBCA 1911,
) 1913 and 1918
FEDERAL SIGNAL CORPORATION)
)
Under DGS RFP No.)
CSEPP001)

November 15, 1995

Negotiated Contracts - Mandatory Requirements - Where an agency makes a mistake in determining one offeror's compliance with a checkoff or pass/fail mandatory requirement set forth in a request for proposals (in this Appeal a test to determine whether equipment was compliant with specifications) it is not necessary to re-test the equipment of the other offerors if the original test of the other offeror's equipment was done correctly.

Bid Protest - Timeliness - A protest based on alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals is required to be filed before the closing date for receipt of initial proposals.

APPEARANCES FOR APPELLANT
ATI SYSTEMS

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APPEARANCE FOR APPELLANT
FEDERAL SIGNAL CORPORATION

None

APPEARANCE FOR RESPONDENT

John H. Thornton,
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OPINION BY CHAIRMAN HARRISON

Appellants timely appeal the denial of their bid protests.

Findings of Fact

1. On December 1, 1994, the Department of General Services (DGS) issued the above-captioned Request for Proposals (RFP) to procure for the Maryland Emergency Management

Agency (MEMA) a public alert notification system in the event of leakage or escape of materials from the chemical stockpile at Aberdeen Proving Grounds.

2. The RFP required that an offeror's equipment meet the American National Standards Institute (ANSI) standards as set forth in ANSI S12.14 -1992 for field measurement of the sound output of audible public warning devices installed at field locations.

3. The due date for receipt of proposals was February 28, 1995. Prior to the due date for receipt of proposals, no written protest of the requirement that an offeror's equipment meet the ANSI standards set forth in ANSI S12.14 -1992 was filed.

4. Proposals were received from Appellants and M. C. Dean, Inc. (Dean). On April 6, 1995, each offeror's equipment was tested to determine if its equipment met the standard set forth in ANSI S12.14 -1992.

5. The wind speed during the test of the M.C. Dean equipment was 15-20 miles per hour, which exceeded the 10 miles per hour maximum wind speed for test conditions specified by ANSI S12.14 -1992.

6. On May 31, 1995, the Procurement Officer sent letters to ATI and Federal Signal informing them that their offers were not acceptable because their equipment failed the April 6 tests and providing them with copies of the test results.

7. ATI received the May 31 letter on June 5, 1995. Federal Signal also received the May 31 letter on June 5, 1995.

8. ATI filed a protest on June 9, 1995 challenging the use of the ANSI standard as well as asserting that the test of the M. C. Dean equipment was improper because it was conducted under a wind condition of 15-20 miles per hour. Federal Signal filed a protest on June 16, 1995 challenging use of the ANSI standard and asserting that there were flaws in the testing of Federal Signal's equipment on April 6. On August 21, 1995, DGS denied both protests. Appeals by ATI, MSBCA 1911, and Federal Signal, MSBCA 1913, followed.

9. By letter dated September 21, 1995, the Procurement Officer reversed his position, and sustained ATI's protest on the ground which asserted that the test of Dean's equipment was not conducted with a wind speed of less than 10 miles per hour as required by ANSI S12.14 -1992 and stated that the Dean equipment would be retested.

10. On September 27, 1995, Appellant ATI appealed the decision to retest Dean's equipment, requesting that every offeror's equipment be retested (MSBCA No. 1918).

11. The Board consolidated MSBCA No. 1918 with MSBCA Nos. 1911 and 1913, by letter of September 28, 1995.

Decision

DGS moved for summary disposition on grounds that the protests filed by Federal Signal and ATI were not timely. The Board granted these motions insofar as there was no protest of the requirement that offered equipment was to meet the ANSI standard filed by either Appellant prior to the due date for receipt of proposals pursuant to COMAR 21.10.02.03A, which requires 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. Here the ANSI standard was set forth in the request for proposals. Neither Appellant (nor any other person) filed a written protest as required by COMAR 21.10.02.04 of the requirement that offered equipment meet the ANSI standard prior to the February 28 date for receipt of initial proposals. The requirements for filing of a protest prior to the closing date for receipt of initial proposals is substantive, and may not be waived. Failure of an offeror to meet the substantive timeliness requirements of 21.10.02.03 deprives this Board of jurisdiction. See Delaware Elevator, Inc., MSBCA 1741, 4 MSBCA ¶333 (1993); Kennedy Temporaries v. Comptroller, 57 Md. App. 22 (1984).

The Board also dismissed as untimely the protest by Federal Signal that there were flaws in the April 6 test of its equipment. Federal Signal was advised of its test results on May 31, 1995 in sufficient detail to alert it to any alleged deficiencies in the test procedures. Accordingly, it had seven days to file a written protest pursuant to COMAR 21.10.02.03B and C. This Board lacks jurisdiction to consider the merits of an untimely protest. See Innovative Integration, Inc., MSBCA 1730, 4 MSBCA ¶330 (1993); Kennedy Temporaries, *supra*. In its appeals before the Board, ATI also asserts that its equipment was not tested properly. These assertions, raised for the first time on appeal, are untimely and may not be considered. *Id.*

Appellant ATI has timely asserted that because the Dean equipment is to be retested, that the equipment of the other offerors must likewise be retested. The Appellants' equipment failed to meet the ANSI standards. The Appellants' untimely assertions that their equipment failed to meet

the ANSI standards because the tests were not properly conducted may not be heard. However, at this juncture it is important to note that the RFP did not mandate a comparison between the results of the tests administered to the offerors' equipment under the ANSI standard. An offeror's equipment, in order to be acceptable, was required to meet the ANSI standards. An offeror's proposal whose equipment did not meet the ANSI standards would not be reasonably susceptible of being selected for award. While the Board might have concluded otherwise had the RFP established a comparative ranking of offerors based upon test scores, the Board is unable to find under the procedural posture of this case that there is any legal requirement in this pass/fail application of the ANSI standard that the Appellants' equipment be retested.

Accordingly, the appeals are denied.

Wherefore, it is ordered this 15th day of November, 1995 that the appeals are denied.

Dated: November 15, 1995

Robert B. Harrison III
Chairman

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 Memorandum Opinion in MSBCA Docket Nos. 1911, 1913 and 1918, consolidated appeals of ATI Systems and Federal Signal Corporation under DGS RFP No. CSEPP001.

Dated: November 15, 1995

Mary F. Priscilla
Recorder

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