

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ADVANCE PRESORT SERVICE             )  
   )  
Under DGS RFQ # 79192                             )             MSBCA Docket No. 1891  
   )  
   )

September 12, 1995

Board of Contract Appeals - Jurisdiction - Absence of Final Decision - The Board of Contract Appeals lacks jurisdiction to hear an appeal where no agency final decision has been issued.

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APPEARANCE FOR RESPONDENT                             Michael P. Kenney  
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   Baltimore, MD

APPEARANCE FOR INTERESTED PARTY                     Louis J. Kozlakowski, Jr., Esq.  
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   Denick, P.A.  
   Baltimore, MD

MEMORANDUM OPINION

For the reasons that follow, the Board concludes that it lacks jurisdiction to entertain the above-captioned appeal.

Findings of Fact

1.       On or about February 7, 1995, bids were opened on the captioned procurement. Two bids were received. The Appellant was the apparent successful bidder.
2.       By letter dated March 16, 1995, Counsel for the interested party (Jetsort, Inc.), filed a protest with the Department of General Services (DGS) Procurement Officer alleging that the Appellant's bid was not responsive.

3. By letter dated March 29, 1995, DGS issued a final agency decision reciting the agency's determination to reject all bids and resolicit. The reasons given for this determination were:

In the course of reviewing this particular procurement, it became apparent to me that the State's actual requirements vary substantially from the manner in which they were depicted in the existing procurement. Bids under the procurement as presently configured are unsuitable to the State's needs. Necessary amendments to the solicitation are of such magnitude that a new solicitation is desirable.

Moreover, after drafting and issuing that solicitation in December 1994/January 1995 and post bid opening of February 7, 1995, the United States Postal Service issued a press release on March 13, 1995 previewing reclassification (new pricing/rate structures) characterized as "the most sweeping changes in mail rules ever." Pursuant to COMAR 21.06.02.02 C., the Department has determined that it is fiscally advantageous to reject all bids.

The decision went on to state that the protest was therefore moot, and did not address the allegations in the Jetsort protest that Appellant's bid was not responsive.

4. The Appellant received a copy of this letter and within 7 days thereafter, by letter dated April 5, 1995, filed a new protest with the DGS Procurement Officer specifically challenging the decision to reject all bids and requesting that Appellant be awarded the contract. This letter stated:

This letter is in response to the RFQ #79192 contract for Presort/Barcode Mail Services submitted by Advance Presort Services of Maryland, Inc. (APS) on February 7, 1995.

We understand that APS offers the maximum savings to the State of Maryland, and meets or exceeds the requirements listed in the RFQ as well.

We formally request that the award be presented to APS on the following points:

1. We believe that the quotes received from both vendors are bid on the same information. Reclassifying the mail into different categories within a new RFQ will not change the postage discount levels that the State of Maryland will receive. Both vendors who bid on the mail are aware that all readable mail will be posted at and processed to the 3-digit Barcode discount level.

2. Now that the APS bid is public information, a re-bid situation compromises our pricing structure. The fiscal advantage to the State of

Maryland in a re-bid is that Jetsort has the opportunity to reduce their rates below those of APS.

3. The issues that will arise from the U.S. Postal Service Reclassification program are not expected to be implemented within the next 12 months. Therefore, since the base contract is for a one year term, it will not affect the State of Maryland's contract.

In conclusion, APS should be awarded the contract to Presort and Barcode the State of Maryland's mail.

5. By letter dated April 14, 1995, the DGS Procurement Officer responded to the Appellant's protest as follows:

This letter is in response to your request dated April 5, 1995 that the State make award of the above procurement to your firm. As we advised you in my final Procurement Officer's decision letter of March 29, 1995 to Jetsort, all bids were rejected. We expect to request the Board of Public Works approval of a 14 month extension to the existing State presort contract on April 19, 1995. We hope that your firm will participate when the new procurement is issued.

6. Absent from this April 14 letter was the information required by COMAR 21.10.02.09C, to wit:

- (1) A description of the controversy;
- (2) A statement of the decision, with supporting material;
- (3) If the protest is not sustained, a paragraph substantially as follows: "This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals in accordance with COMAR 21.10.07.02. If you decide to take such an appeal, you must file written notice of appeal to the Appeals Board within 10 days from the date you receive this decision." . . . .

7. The determination by an agency to reject all bids is a protestable issue. See Fujitsu Business Communications Systems, MSBCA 1779, 4 MSBCA ¶351 (1994) (rejection of proposals); COMAR 21.06.02.02C. The Board finds that the Procurement Officer did not appreciate that the Appellant's letter of April 5, 1995 was a protest and therefore his April 14 response was not intended to be a new final agency decision on the Appellant's protest of the decision to reject all bids and resolicit. The parties stipulate that no further written communication

from DGS to Appellant exists. The record does not reflect that the Procurement Officer has ever substantively considered the grounds for protest set forth in Appellant's April 5 protest.

8. On May 24, 1995, more than 10 days following the Procurement Officer's letter of April 14, 1995, Appellant filed the instant appeal. Thereafter, the Board scheduled argument on the issue of whether it had jurisdiction to entertain this Appeal.

#### Decision

COMAR 21.10.02.10 states that "[p]rotesters are required to seek resolution of their complaints initially with the Procurement Agency. A subsequent appeal by an interested party to the Appeals Board shall be filed within 10 days of receipt of notice of the final Procurement Agency action." "Interested party" is defined by COMAR 21.10.02.01B to mean "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." We believe that properly interpreted, COMAR requires that both protesters and interested parties must file an appeal with the Appeals Board within 10 days of receipt of "final agency action" on a protest. Appellant first became aware of the decision of the Agency to reject all bids and resolicit when it received a copy of the Procurement Officer's final decision of March 29, 1995 on the Jetsort protest. Appellant, within 7 days of receipt of this information, filed a protest on new grounds differing from the Jetsort protest asserting that bids should not be rejected, and that award of the contract should be made to it. To date, no "final agency decision" has been issued on the Appellant's protest.

The response of the Procurement Officer dated April 14, 1995 does not, as we have noted, constitute a final agency decision because such communication did not contain a description of the controversy, a statement of the decision with supporting material and the required notice of the right to appeal to the Appeals Board. COMAR 21.10.02.09C. This Board only has jurisdiction over appeals from final agency decisions. Since there is no final agency decision, Appellant's appeal is premature, and the Board lacks jurisdiction. See Norman V. Crouse Co., 4 MSBCA 1752, 4 MSBCA ¶340 (1993); compare Midtown Stationery & Office Supply Co., Inc., MSBCA 1461, 3 MSBCA ¶255 (1990); R&E Consolidation Services, Inc., MSBCA 1375, 2 MSBCA ¶187 (1988) at p. 31; Maryland New Directions, Inc., MSBCA 1367, 2 MSBCA ¶179 (1988).

WHEREFORE, it is Ordered this 12th day of September, 1995, that the appeal is dismissed for lack of jurisdiction and remanded to the Department of General Services for appropriate action.

Dated: September 12, 1995

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Robert B. Harrison III  
Chairman

I concur:

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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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1891, appeal of Advance Presort Service, under DGS RFQ # 79192.

Dated: 9/12/95

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Mary F. Priscilla  
Recorder