

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AMERICAN AIR FILTER)
CO.) Docket No. MSBCA 1199
Under University of Maryland)
Bid Request No. 50802-P)

November 19, 1984

Bid Protest - Timeliness - By waiting until after bid opening to file a bid protest alleging a deficiency in the time allowed for preparation of bids, Appellant waived its right to protest since COMAR 21.10.02.03A requires a protest on such grounds to be filed prior to bid opening.

Contract Award - Late Bid - A late, hand delivered bid was not acceptable where Appellant failed to establish that the State's improper action in giving it an incorrect address for delivery of its bid by commercial carrier was solely responsible for the bid's late receipt. Appellant had the burden of showing that its bid would have been delivered on time but for the State's erroneous guidance.

Contract Award - Late Bid - A bid that is delayed due to the effects of adverse weather is not acceptable since the resultant delay is not chargeable to any improper State action.

APPEARANCE FOR APPELLANT:

Mr. Dale A. Barnstable
National Sales Manager
Louisville, KY

APPEARANCE FOR RESPONDENT:

Frederick G. Savage
Assistant Attorney General
Baltimore, MD

OPINION BY MR. KETCHEN

This is a timely appeal from a University of Maryland at College Park (University) procurement officer's final decision denying Appellant's bid protest. Appellant maintains that its apparent low bid was submitted late because of actions attributable to University personnel and that it should have been accepted and a contract award made. Since neither party requested a hearing, this appeal will be resolved on the record.

Findings of Fact

1. The University issued Bid Request No 50802-P1 on March 13, 1984 for the supply of air conditioning filters as required by the University.

2. Bids initially were due on April 10, 1984. An envelope was included in the invitation for bids (IFB) to facilitate the submission of bids. This envelope was preaddressed as follows:

Buyers Clerk Six
Purchasing Department
University of Maryland
College Park, MD 20742.

The upper left-hand corner of the bid envelope contained space for bidders to indicate the bid number, the date when the bid was due and the name and address of the firm submitting the bid. The words "Confirming" and "South Administration" were contained on the lower left side of the bid envelope.

3. The University issued five addenda to the IFB which, among other things, extended the bid opening date three times. Addendum No. 3, issued on April 26, 1984, extended the bid opening date for the final time to May 8, 1984 at 11:00 a.m.² The final addendum, No. 4, was issued on April 30, 1984. Appellant did not object prior to bid opening that the time allowed for submitting bids after issuance of the final addendum was unreasonably short.

4. The University sent copies of the IFB and the addenda to Appellant's College Park offices. Appellant's representative at College Park, in turn, forwarded the IFB and the addenda, except for Addendum No. 4, to Appellant's offices in Louisville, Kentucky. Appellant received Addendum 4 at its College Park office on May 3 and it transmitted that information to its Louisville office by telephone.

5. Appellant elected to wait until the day before bids were due to transmit its bid from Louisville. It thought this to be a prudent action given the number of addenda that previously had been issued in this procurement.

6. The IFB contained the University Purchasing Department address and telephone number as follows:

¹A bid request in this competitive sealed bid procurement means invitation for bids (IFB). COMAR 21.01.02.37.

²Two addenda issued were identified as Addendum No. 3. Addendum No. 3, issued on April 18, 1984, furnished potential bidders with a copy of page 5 to Addendum No. 2.

"Purchasing Department
University of Maryland
College Park, Maryland

Telephone No. (301) 454-3232

Addendum No. 1 changed the IFB telephone number to (301) 454-4719.

On the day it transmitted its bid, Appellant called the University Purchasing Department using the telephone number shown in Addendum 1 to the IFB to obtain a more specific address than the one shown above. This was necessary for delivery of its bid by Federal Express Service courier (Federal). Appellant either did not receive or had misplaced the bid return envelope, containing the proper University address for bid opening, that was included with each bid package. Appellant's MCI bill shows that a call was made to the University telephone number shown in the IFB at 2:23 p.m. on May 7, 1984 and lasted for approximately one minute. Appellant was advised incorrectly by the person answering to deliver its bid to the University Purchasing Department's Central Receiving Warehouse, Building 005.

The University has not been able to determine the identity of the person to whom Appellant spoke at the Purchasing Department. The two procurement personnel assigned to the telephone with the number shown in the IFB deny receiving a call from Appellant for instructions regarding hand delivery of its bid. Appellant likewise has not been able to identify the person who gave the erroneous information. Accordingly, we find that the person to whom Appellant spoke was not the procurement officer or any other person authorized to respond on his behalf to questions regarding the instant IFB.

7. Appellant transmitted its bid by Federal on May 7, 1984 to the University Purchasing Department's Central Receiving Warehouse Building - Building 005 located on the College Park campus. The record does not indicate when the courier arrived at this location. Bid opening, however, occurred elsewhere. The precise location has not been identified by either party.

8. On Tuesday, May 8, 1984, the University opened the bids at the scheduled time of 11:00 a.m. with the following results:

Air Filters, Inc.	\$34,079.17
Filter Service Corp., Inc.	37,915.53
Complete Air Filter Co., Inc.	38,358.88
Quality Air, Inc.	39,702.10
Cambridge Filter Corp.	42,373.72

The apparent low bid of Air Filters, Inc. did not meet the requirements of the specifications and subsequently was rejected as nonresponsive.

9. At 11:53 a.m. on May 8, 1984, Appellant's bid was delivered by Federal to University procurement officials responsible for opening bids. The University determined that Appellant's bid in the amount of \$36,168.83, received after the time set for bid opening, was late and thus would not be considered for award.

10. By letter dated May 17, 1984, Appellant protested the award of a contract. Appellant maintained that its late bid should be excused because of: (1) the short time allowed for the preparation of bids after the final addendum was issued; (2) the adverse weather conditions resulting in the closure of airports that delayed Federal; and (3) the incorrect delivery information given to Appellant that delayed Federal after reaching the University campus.

11. In a final decision issued on June 18, 1984, the University procurement officer denied Appellant's protest. He determined that Appellant's bid was inexcusably late. While the University procurement officer indicated that his decision was based on the unreasonable amount of time it took Federal to get to the bid opening location after its arrival on campus at 8:30 a.m., the only evidence in the record concerning Federal's arrival on campus was the date and time stamp on the Federal envelope. This showed that Appellant's bid was delivered at 11:53 a.m. on May 8, 1984 to University procurement officials at the place where the bids were opened.

12. The University awarded a contract to Filter Service, Inc. on June 28, 1984.

13. A timely appeal was filed with this Board on June 28, 1984.

Decision

Appellant's bid clearly was late since it was not received by the University until after the time set for receipt of bids. COMAR 21.05.02.10A. Under Maryland's procurement regulations, Appellant's bid is required to be treated in the following manner:

". . . A late bid, . . . may not be considered. Exceptions may be made when a late bid is received before contract award, and the bid . . . would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees . . . COMAR 21.05.02.10B. (Underscoring added).

Since there is no dispute concerning the tardiness of Appellant's bid, the central issue before us concerns whether its lateness is excusable.

Appellant initially maintains that the State is responsible for its late bid because of the insufficient time allowed to prepare and transmit a bid between the time of issuance of Addendum 4 and the date set for bid opening. In this regard, COMAR 21.05.02.08C provides that amendments to invitations for bids "shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids."

Protests based on alleged improprieties in any type of solicitation which are apparent before bid opening must be raised prior to that time. COMAR 21.10.02.03A; Decision Planning Corp., Comp. Gen. Dec. B-202536, July 8, 1981, 81-2 CPD ¶20. Here the alleged deficiency in the time allowed for Appellant to prepare its bid after issuance of the final addendum raises an impropriety in the solicitation which was apparent prior to bid opening. By submitting a bid and waiting until after bid opening to raise this issue, Appellant waived its right to protest on this ground. DASI Industries, Inc.,

MSBCA 1112 (May 5, 1983); Delmarva Drilling Co., MSBCA 1096 (January 26, 1983); International Business Machines Corp., MSBCA 1071 (August 18, 1982). Compare William F. Wilke, Inc., MSBCA 1162 (October 3, 1983); Neoplan USA Corp., MSBCA 1186 & 1202 (September 18, 1984).

We turn next to the issue of whether Appellant's bid would have been timely except for the alleged action of State procurement personnel. Bidders primarily are responsible for choosing the method and manner in which they transmit their bids to assure their timely arrival in accordance with the requirements of the solicitation. Compare Ferrotherm Co., Comp. Gen. Dec. B-203288, September 1, 1981, 81-2 CPD ¶194. Thus, the University may not consider a late bid delivered by commercial carrier unless improper State action is the sole or paramount cause of the late receipt. The Tower Building Corp., MSBCA 1057 (April 6, 1982); Olympia USA Inc., Comp. Gen. Dec. B-215139, May 21, 1984, 84-1 CPD ¶535; Viscar Co., Inc., Comp. Gen. Dec. B-208701, January 31, 1983, 83-1 CPD ¶100; Edison Electronics Division, Armtec Industries, Inc., Comp. Gen. Dec. B-202342, June 10, 1981, 81-1 CPD ¶478; Southern Oregon Aggregate, Inc., Comp. Gen. Dec. B-190159, December 16, 1977, 77-2 CPD ¶477. In this regard, a late bid is not excused if the bidder's unreasonable action or inaction is an intervening cause of the bid being delivered late, even where the lateness in part is attributable to improper State action or advice. Avantek, Inc., Comp. Gen. Dec. B-185248, February 5, 1976, 76-1 CPD ¶75; Empire Mechanical Contractors, Inc., Comp. Gen. Dec. B-202141, 81-1 CPD ¶471. Compare The Tower Building, supra.

Although the University alleges that Appellant contributed to the lateness of its bid by failing to ascertain the correct address from an authorized procurement representative, we can't agree. COMAR 21.05.02.01B(1) requires that an IFB set forth the address where bids are to be delivered. Here the IFB gave only an address suitable for the mailing of bids. Those wishing to hand deliver bids and/or attend the public opening were not given a room number or building name. Under such circumstances, a reasonable person would call the University's Purchasing Department at the phone number listed in the IFB. This phone number, incidentally, was considered important enough by University procurement officials, that they noted its correction by addendum to the IFB.

Appellant has established by telephone records that it called the phone number set forth in the addendum to the IFB on the day before bid opening and during normal office hours. There would be no logical reason for Appellant to have transmitted its bid to the Central Receiving Warehouse Building unless a University employee provided it with that address. Despite the fact that Appellant did not ask to speak with the University procurement officer or his authorized representative, we cannot say that his actions were negligent or that the University should not be held responsible for the confusion. Compare Department of General Services v. Cherry Hill Sand and Gravel Company, Inc., 51 Md. App. 299 (1982).

Notwithstanding the foregoing finding, Appellant has failed to establish that the lateness of its bid was attributable solely to the incorrect address given it by University employees. In this regard, Appellant presented no evidence showing when Federal arrived on campus. If Federal arrived at the wrong address after 11:00 a.m., the bid would have been late under any circumstances. Similarly, if Federal arrived on campus well before the 11:00 a.m. bid opening, Federal's actions may have contributed to the lateness of

the bid. The question becomes difficult only if Federal arrived at the wrong address shortly before 11:00 a.m. and did not have sufficient time to reach the correct site for bid opening by the appointed time. Given that the bid ultimately was not delivered properly until 11:53 a.m, however, it appears unlikely that Federal was at the erroneous address prior to 11:00 a.m. In any event, Appellant had the burden to establish this fact. Compare Parmatic Filter Corp., Comp. Gen. Dec. B-209296, March 8, 1983, 83-1 CPD ¶1234; Blount Brothers Corp., Comp. Gen. Dec. B-212788, October 21, 1983, 83-2 CPD ¶521.

Appellant also maintains that tornadoes and fog that resulted in the closing of airports delayed Federal in delivering its bid. Assuming, arguendo, that adverse weather did delay delivery, Appellant's late bid is not excused since a bidder assumes the risk that adverse weather conditions may result in a bid being received late. Compare Ferrotherm Co., Comp. Gen. Dec. B-203288, September 1, 1981, 81-2 CPD ¶194.

For the foregoing reasons, therefore, Appellant's appeal is denied.