

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AMERICAN SANITARY)
PRODUCTS, INC.)
) Docket No. MSBCA 2110
Under DGS Invitation to Bid)
No. 001IT809935)

January 11, 1999

Bid Protest - Timeliness - Pursuant to COMAR 21.10.02.03, a bidder must file a protest within seven days of when he knew or should have known of the grounds of the protest. Where a protest is not timely filed it may not be considered.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Richard S. Patterson, Esq.
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the product offered by Appellant's competitor, LP Manufacturing Co., Inc. (LP), was too expensive and otherwise inappropriate for use as intended.

Findings of Fact

1. On or about September 14, 1998, the Department of General Services (DGS) issued the captioned Invitation to Bid (ITB) seeking competitive sealed bids for a twelve month, statewide requirements contract for "odor counteractants with dispensers (installed)." The ITB further described the State's requirements as follows:

Deodorant: All purpose odor counteractants, solid tube or solid bar, to control unwanted odors indoors, all ingredients must be environmentally safe. Must be non-spillable concentrate gel. Must be non-toxic, non-irritating, [sic] non-flammable, 3 oz., deodorant tube or bar. Tube/bar must come with wall mountable dispensers to be supplied as needed. Material safety data sheets must be furnished. 12/per case, dispensers to be installed. Provide assorted fragrances.

- Five bids were received and were opened publicly on Tuesday, October 6, 1998 at the 2:00 p.m. bid opening. The bids were as follows:

<u>Bidder</u>	<u>Unit Price (per case)</u>		<u>Estimated Quantity</u>	<u>Total Bid</u>
Dixon Pest Control	\$ 8.25	X	800	\$ 6,000
LP Manufacturing Co., Inc.	\$ 36.00	X	800	\$ 28,800
American Sanitary Products, Inc.	\$ 37.48	X	800	\$ 29,984
Bruins International	\$538.00	X	800	\$430,424
Cox and Cox Associates	\$800.00	X	800	\$640,000

Bids were available for public inspection at all times after bid opening.

- The apparent low bid of Dixon Pest Control was withdrawn on October 9, 1998, leaving LP as the apparent low bidder.
- L.P. offered its product #LP512 and submitted with the bid a sample of the product sealed securely in a foil envelope. The contract was awarded to LP on October 15, 1998.
- On or about October 20, 1998, Appellant sent to the DGS Procurement Officer, Delores Coleman, by facsimile transmission a protest dated October 20, 1998 against award of a contract to LP. The exact date of receipt of the faxed protest is not certain since the faxed copy itself bears a transmission date of "03/10/94." The original (hard copy) of the protest was received by Ms. Coleman on October 23, 1998.
- The protest said:

The product provided by L&P on the current bid is not sealed in poly-paper, vapor-flex barrier bags that prevent the product from drying out and becoming ineffective before it is placed into the equipment. The L&P bar is wrapped in aluminum foil and is not wrapped very well. It is not labeled nor does it contain a warning "Caution: Keep out of reach of children." Neither OSHA, MOSHA or JCHA would approve of an unlabeled chemical in a hospital environment.

A material data sheet must be provided with the bid, but the bid also specifies that the product must be non-toxic, non-irritating and non-flammable. Back in the 70s I arrived at Deer's Head right after an attempted suicide. The dispensing equipment is not locked and access would be easy for a patient or child visitor. I have provided independent laboratory tests and request that this information also be requested for L&P. (A company can claim anything, but it is common practice in the industry to provide the independent laboratory tests.) The bid calls for 12 solidbars per case. In the past L&P sent loose, poorly-wrapped products with some bars half the proper size.

The previous contractor, L&P, used an average of 67 cases per month. When looking at the equipment with Mr. J.D. Murray, to properly prepare my bid, I found one electric unit in the rehab unit with 12 bars in it. Five of my bars would have done the same work. Judging from the amount of equipment, 40 cases of my Solidbar a month would do the entire job, making my bid considerably less than L&P.

7. By final decision dated November 16, 1998, the DGS Procurement Officer denied Appellant's protest on the grounds that the protest was late and it lacked merit. From that decision Appellant filed an appeal with this Board on November 30, 1998.
8. Appellant did not request a hearing and did not comment on the Agency Report.

Decision

A protest based upon alleged irregularities in a solicitation that are apparent before bid opening is required to be filed before bid opening. COMAR 21.10.02.03A. To the extent that Appellant's protest may be viewed as asserting that the ITB should have contained additional requirements (i.e., a provision for laboratory test data), such alleged defect was apparent on the face of the solicitation and thus a protest on that ground had to be filed no later than the deadline for receipt of bids, which was 2:00 p.m. on Tuesday, October 6, 1998. COMAR 21.10.02.03A. Assuming *arguendo* that Appellant's protest, which is dated October 20, 1998, was received on October 20, 1998 (rather than on October 23, 1998, the date the hard copy of the protest was received), the protest against the provisions of the ITB was late and may not be considered by the agency and the Board, thus, lacks jurisdiction to hear an appeal. COMAR 21.10.02.03C; Merjo Advertising & Sales Promotions Company, MSBCA 1948, 5 MSBCA ¶396 (1996).

Concerning Appellant's allegations that LP's product ultimately will not conform to the requirements of the solicitation we note that bids were opened publicly on Tuesday, October 6, 1998 and were available for public inspection at all times thereafter. The bid of Dixon Pest Control was obviously lower than other bids by an amount that cast doubt on its validity¹ (and it was withdrawn on October 9, 1998). LP's product was clearly identified in its bid and the bid was accompanied by a sample and safety data sheet. Therefore, the grounds for Appellant's protest were obvious on the face of LP's bid. Appellant stated in its appeal to this Board that it was advised in a conversation with Ms. Coleman and Ms. Linda Ruley (of DGS) on Monday, October 12, 1998 that one bidder was going to withdraw its bid due to mistake. Appellant was further advised in this conversation to protest an award to LP, Appellant having indicated its desire in this conversation to "protest if the intent to award was to LP Manufacturing Company, Inc. . . ."

Appellant's protest had to be filed within seven days of bid opening, or no later than Tuesday, October 13, 1998 and certainly no later than seven days from Monday, October 12, 1998

¹ The validity of the bids of Bruins International (\$430,424) and Cox and Cox Associates (\$640,000) might also be said to be in doubt since they are in amounts obviously higher than the bids of Dixon, LP and Appellant.

when it would or should have known that the Dixon bid had been or would be withdrawn.² COMAR 21.10.02.03B; The Traffic Group Incorporated, MSBCA 1883 & 1888, 4 MSBCA ¶381 (1995); Innovative Integration, Inc., MSBCA 1730, 4 MSBCA ¶330 (1993). Assuming *arguendo* that Appellant's protest, which is dated October 20, 1998, was filed on October 20 (rather than on October 23, 1998) the protest was filed more than seven days after bid opening on October 6, 1998 and more than seven days after Appellant's October 12 telephone conversation with DGS employees. Appellant's protest thus was late and may not be considered, and this Board lacks jurisdiction to hear this appeal. COMAR 21.10.02.03C; ISmart, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997), *affd.*, Maryland State Board of Contract Appeals v. ISmart, LLC., No. C-97-034415 (Cir. Ct. How. Co., March 17, 1998); PTC Corporation and Ion Track Instruments, Inc., MSBCA 2027, 5 MSBCA ¶430 (1998) at p. 6; JVC, Inc., MSBCA 2067, 5 MSBCA ¶445 (1998).

Accordingly, the appeal is dismissed with prejudice.

Wherefore, it is Ordered this 11th day of January, 1999 that the appeal is dismissed with prejudice.

Dated: January 11, 1999

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

² It may be argued that Appellant was not an interested party in line for award in view of its being the third low bidder until it was advised by Respondent to file its protest on Monday, October 12, 1998 as a result of withdrawal of the Dixon bid. We do not decide this issue since under either date, October 6 or October 12, Appellant's protest is late. See Erik K. Straub, Inc., MSBCA ¶1193, 1 MSBCA ¶83 (1984) concerning the issue of being an interested party in line for award.

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 2110, appeal of American Sanitary Products, Inc. under DGS Invitation to Bid No. 001IT809935.

Dated: January 11, 1999

Mary F. Priscilla
Recorder

EXHIBIT 2 (01:05) Exhibit 2 - 1998

1. Location of the physical plant is subject to judicial review. It is subject to review by the Administrative Tribunal and Government courts.

Administrative review of the Tribunal's decision is subject to judicial review.

2. The Tribunal's decision is subject to judicial review. It is subject to review by the Administrative Tribunal and Government courts.

- (1) The Tribunal's decision is subject to judicial review.
- (2) The Tribunal's decision is subject to judicial review.
- (3) The Tribunal's decision is subject to judicial review.

3. The Tribunal's decision is subject to judicial review. It is subject to review by the Administrative Tribunal and Government courts.

4. The Tribunal's decision is subject to judicial review. It is subject to review by the Administrative Tribunal and Government courts.

Date: 1998/11/19

Mary A. Smith
President