

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF)
AQUACULTURE SYSTEMS)
TECHNOLOGIES, L.L.C.)
) Docket No. MSBCA 2141
Under University of Maryland)
at College Park Bid Request No. 79472-N)

September 8, 1999

Bid Protest - Timeliness - A protest that is not filed within the time limits set forth in COMAR 21.10.02.03 must be dismissed.

APPEARANCE FOR APPELLANT: Jennifer L. Forrence
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Mary Hassinger Schmidt, Esq.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre, L.L.P.
New Orleans, Louisiana

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the decision of the Respondent's Procurement Officer denying its protest on timeliness grounds. Respondent has moved to dismiss on grounds that the protest was untimely and thus the Board must dismiss the appeal.¹

Findings of Fact²

1. On January 28, 1999, the University of Maryland at College Park (the University) issued the above captioned bid request for the turnkey provision of an aquatic holding system to house fish used in the research of developmental mechanisms. The solicitation contained specifications regarding certain components necessary for the system.
2. Bids were opened on March 2, 1999. Three bids were received. Appellant was the low

¹ The Board assumes jurisdiction to issue this decision, notwithstanding the provisions of Chapter 515 of the Acts of 1999 (Act) which exempts the Respondent from the provisions of the General Procurement Law dealing with contract formation disputes, because the Procurement Officer's decision, which advised Appellant of its rights to appeal his decision to this Board, was issued prior to July 1, 1999, the effective date of the Act. On June 23, 1999, the Board of Public Works approved an interim procurement procedure pursuant to which the University System Board of Regents elected to have this Board "to have authority over protests . . . related to procurement contracts awarded by the University System of Maryland."

² In the absence of any response to the Respondent's Motion to Dismiss, the Board has accepted the accuracy of factual assertions in the Motion not directly or inferentially contested in the Appellant's Notice of Appeal.

- bidder.
3. Thereafter, Appellant was notified orally by Ms. Yanulevich, a University employee, on or about April 1, 1999, "that the project had been awarded to Marine Biotech [one of the other three bidders] and that the reason for foregoing the lowest bid was the [alleged] extra manpower and operator intervention necessary to operate Aquaculture Systems' system."
 4. On April 8, 1999, Ms. Zimmerman, a University procurement official, faxed Appellant a written summary regarding Appellant's alleged failure to meet specifications, i.e. "not meeting a key specification for submerged media for the Main Life Support."
 5. On or about April 23, 1999, the University received a bid protest dated April 23, 1999 from Appellant's counsel complaining about the rejection of Appellant's bid and the award to Marine Biotech.
 6. By letter dated June 30, 1999, the University's Procurement Officer rejected Appellant's bid protest on timeliness grounds and Appellant filed a Notice of Appeal with this Board on July 16, 1999. The instant Motion to Dismiss was filed on July 29, 1999. Appellant has not responded to this Motion.

Decision

The Board's jurisdiction is initially dependent on whether the Appellant's protest was timely filed with the Procurement Officer. If the protest was not timely filed, this Board has no jurisdiction to hear the appeal. COMAR 21.10.02.03; AEPCO, Inc., MSBCA 1844, 4 MSBCA ¶370 (1994) at P. 9; Kennedy Temporaries v. Comptroller, 57 Md. App. 22, 468 A.2b 1026(1989); ATI Systems and Federal Signal Corp., MSBCA 1911, 1913 and 1918, 5 MSBCA ¶387(1995); Spear Window & Glass, Inc., MSBCA 1955, 5 MSBCA ¶399(1996) and cases cited at p.3.

COMAR sets forth the time limitations for filing a protest: "In cases [other than those involving improprieties in the solicitation apparent before bid opening], protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03.B. COMAR 21.10.02.03.C provides that a "protest received . . . after the time limits prescribed . . . may not be considered." This Board has strictly enforced this jurisdictional requirement, even if the protest was only a day late. ISMART, LLC, MSBCA 1979, 5 MSBCA ¶417(1997).

Here, Appellant knew (actually or constructively) that it was the low bidder after bids were open on March 2, 1999³. On April 1, 1999 Appellant learned that its bid was rejected, that the project had been awarded to Marine Biotech, and that the reason for rejection of Appellant's lowest bid was the alleged extra manpower and operator intervention necessary to operate Appellant's system. The record also reflects that a written summary of the reason for rejection was faxed to Appellant on April 8, 1999. However, despite the fact that Appellant had been notified that its bid was rejected and the reason therefore on April 1 and April 8, 1999 it did not protest until April 23, 1999, beyond the seven days allowed by COMAR.

³ See footnote 3 below.

In response to the Procurement Officer's assertion that the protest was untimely, Appellant asserts that it has never been "clearly and honestly notified of the reasons that its bid was rejected" and thus its protest is still timely. Assuming the truth of such assertion, that does not relieve Appellant of its obligation to follow COMAR and protest in a timely fashion.

In interpreting the time constraints of COMAR 21.10.02.03, the Board has made it clear that when an apparent low bidder learns that its bid is rejected, it must protest within seven days. In DASI Industries, Inc., MSBCA 1112, 1 MSBCA ¶49(1983), this Board ruled on the timeliness of contentions by a disappointed bidder similar to those made by Appellant here. Representatives of DASI attended the bid opening⁴ under a University of Maryland (University) procurement and maintained that the Procurement Officer had then and there declared the low bidder non-responsive; they left believing that DASI would be awarded the contract. However, shortly thereafter, DASI received a letter from the University returning its bid security and thanking it for its interest in the University's requirements. Nine days later, DASI reviewed the Procurement Officer's file and "discovered" a variety of grounds for protest. DASI's protest was lodged two weeks after its bid security was returned. This Board dismissed the appeal because the protest was untimely filed:

Certain aspects of the grounds for protest dealing with the alleged collusive communications with Crepaco may not have been known until Appellant reviewed the University's record. However, when Appellant received the returned bid security on July 13, 1982 without a contract for execution, it should have known that it was not going to get the award. Even if Appellant as it alleges, did not realize this, at a minimum the letter should have put it on notice that something may have gone wrong and that it should make a prompt inquiry. See Mayor and City Council of Baltimore v. Amil Perticone, 171 Md. 268, 274, 188 Atl. 797, 800(1936); Policy Research, Inc., Comp. Gen. B-200386, March 5, 1981, 81-1 CPD ¶172, at p. 3. By waiting more than 7 days after receipt of this letter to review the Authority's procurement record and protest, Appellant again waived its right to protest concerning the alleged collusive communications between Crepaco and the University.

DASI Industries, *supra*, at p. 7.

Similarly in AEPCO, Inc., *supra*, the Board considered a case where the apparent low bidder was found non-responsive following a protest by the second low bidder. On August 24, 1994, Appellant (AEPCO), the apparent low bidder, received written notice that its bid was rejected as non-responsive, and on August 29, 1994, received the final action on the second low bidder's bid protest in which the Procurement Officer found that AEPCO's bid did not meet certain specifications and stated his intention to award the contract to the second low bidder. AEPCO then requested a meeting with the agency, which was held on September 2, 1994, and in which it orally protested the rejection of its bid. A written bid protest from AEPCO was received

⁴ The record does not reflect whether Appellant attended the bid opening. Because bid openings are public and bids may be inspected following the opening, persons are held to constructive knowledge of matters that would be revealed by an inspection of bids after the bids are opened. See The Traffic Group Incorporated, MSBCA 1883 & 1888, 4 MSBCA ¶381(1995); Grady & Grady, Inc., MSBCA 1455, 3 MSBCA ¶217(1989).

by the agency on September 9, 1994. This Board rejected the argument that the oral protest could be considered (because protests must be written) and found that the September 9, 1994 written protest was untimely because inter alia, any protest regarding non-responsiveness was due within seven days of August 24, 1994 when AEPCO was first notified that its bid was found non-responsive. AEPCO, Inc., at p. 12. See also ISMART, LLC, supra (protest untimely when filed eight days after Appellant learned that its bid was found non-responsive and that the contract was being awarded to another bidder).

Here, Appellant was notified orally on April 1, 1999 that its bid was rejected. That information was reiterated in writing on April 8, 1999. Whether Appellant's bid was in fact non-responsive as alleged by the University is not material to our decision. What is material is that Appellant was advised that its bid was rejected. Matters of clarity and honesty of such determination do not toll COMAR 21.10.02.03B whose provisions must be strictly construed since an untimely objection to a contract award necessarily prejudices the rights and interests of other parties. Spear Window & Glass, Inc., supra at p. 3. Appellant's bid protest dated April 23, 1999 complaining that its bid was improperly rejected for failure to comply with the specifications, was untimely. Pursuant to COMAR 21.10.02.03C, a Procurement Officer may not consider an untimely protest and, accordingly, this Board lacks jurisdiction to consider such untimely protest on an appeal. See Spear Window & Glass, Inc., supra; Scanna MSC, Inc., MSBCA 2096, 5 MSBCA ¶452 (December 2, 1998) and cases cited at p. 7.

Accordingly, it is Ordered this 8th day of September, 1999 that the Respondent's Motion to Dismiss is granted and the appeal is dismissed with prejudice.

Dated: September 8, 1999

Robert B. Harrison III
Chairman

I concur:

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 decision in MSBCA 2141, appeal of Aquaculture Systems Technologies, L.L.C. under University of Maryland at College Park Bid Request No. 79472-N.

Dated: September 8, 1999

Mary F. Priscilla
Recorder

