

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF )  
 )  
CAM CONSTRUCTION CO., INC. ) Docket No. MSBCA 2018  
 )  
Under UMBC Procurement )  
No. BS95-951VR )

July 28, 1997

Bid Protest -- Language Constituting -- While no specific words of protest are required, the writing must reach a level of specificity to put the procurement officer on reasonable notice that a bid protest is intended.

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 protest.

APPEARANCE FOR APPELLANT William M. Huddles, Esq.  
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Columbia, MD

APPEARANCES FOR RESPONDENT Mark Dachille  
Julia P. Davis  
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OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the appeal of CAM Construction Co., Inc., (CAM) on the denial of its bid protest on timeliness grounds.

Findings of Fact

1. On January 24, 1997, the University of Maryland at Baltimore (UMAB) issued Request No. BS95-951VR for multi-step bids for the construction of the Physics Building, including technically advanced laboratories, such as laser laboratories, at the University of Maryland Baltimore County (University).
2. According to the solicitation's multi-step bidding procedure, the bidders initially were to submit only technical offers for evaluation. Those bidders whose technical offers were determined to be reasonably susceptible of being selected for award (i.e., according to the solicitation, those which received a score of 75% or better) would then be requested to make

oral presentations during which they would be questioned and given the opportunity to clarify certain aspects of their technical offers. After the oral evaluations, all qualified offerors would be invited to submit a price bid.

3. CAM submitted its Technical Offer on February 27, 1997. The University evaluated all Technical Offers submitted. By telephone on March 21, 1997, the University notified CAM that its Technical Offer had not received a score of 75% or better (in fact it received a score of 69%) and that it would not be further considering CAM for the Contract. In response to questions from CAM, the University stated 1) that debriefing would occur only after contract award and 2) that CAM could not supplement its Technical Offer.
4. By letter of March 25, 1997, CAM protested the provision of the Solicitation requiring that the debriefing of unacceptable bidders will be conducted after award. The letter stated:

Re: Technical Offer -- Bid No.: BS-95-951VR, Physics Building at  
UMBC Notice of Protest

\* \* \*

CAM formally submits this Notice of Protest to the decision to deny CAM a debriefing until after contract award.

CAM requests an immediate debriefing in which those areas in which its Technical Offer is alleged to be weak or deficient are identified. By not allowing an immediate debriefing, the Office of Procurement and Supply is denying CAM the right to cure any such alleged weakness or deficiency. Furthermore, CAM will be unjustly precluded from the entire bidding process even though its Technical Offer is, in fact, or may be easily amended to be, completely acceptable.

Section 00100, Paragraph AA., of the Request for Multi-Step Bid is not a proper ground to deny an immediate debriefing. Although Paragraph AA. states that a debriefing will not be scheduled until after contract award, it is inapplicable. In particular, Paragraph AA. is drawn from COMAR 21.04.03.05, which relates to "Procurement by Competitive Sealed *Proposals*." In contrast, in this case, the State is engaged in multi-step sealed bidding under Chapter 02 of COMAR, which is "Procurement by Competitive Sealed *Bidding*." As such, debriefing as contemplated in Paragraph AA. does not apply to this type of procurement and is therefore inapplicable. In fact, there is no statute or regulation that prohibits the immediate release of the information that explains why CAM's Technical Offer was not acceptable.<sup>1</sup>

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<sup>1</sup> The Appellant argues that a debriefing may be conducted prior to contract award in a multi-step procurement. The State argues that a debriefing in a multi-step procurement is governed by COMAR 21.05.03.06 pertaining to Procurement by Competitive Sealed Proposals. In this particular appeal, the Board may not address such issue due to lack of jurisdiction. We note however, that the State in this instance conducted a debriefing prior to Contract award.

Because the Office of Procurement and Supply's decision to refuse an immediate debriefing is denying CAM the right to cure what may otherwise be an acceptable Technical Offer, and because no statute or regulation prohibits the release of such information, CAM is filing this protest. CAM requests an immediate debriefing in which the reasons for CAM's Technical Offer being deemed unacceptable are disclosed.

5. By letter of March 28, 1997, received by Appellant on the same day, the University Procurement Officer responded:

We find that the bid documents are consistent with COMAR in regard to debriefings and should your client have had problems with this language they were required to bring it to our attention prior to the due date.

We will, however, agree to conduct a debriefing session with CAM Construction . . . . We note, however, that in accordance with the bid documents there is not an opportunity for deficiencies in CAM's technical offer to be cured or the offer supplemented.

6. On March 31, 1997, a debriefing was held.
7. On April 11, 1997 CAM wrote a letter to the Procurement Officer stating that it had become clear at the debriefing that CAM's Technical Offer was rejected due to a misunderstanding of CAM's experience with complex construction and higher educational facilities, available bonding capacity, and CPM scheduling. In a letter dated April 9, 1997 attached to the April 11 letter, CAM forwarded supplemental information and attachments which CAM hoped would cure the alleged deficiencies in the Technical Offer. Finally, in the April 11 letter, CAM argued that case law required that the supplemental information be considered. The last sentence of the April 11 letter read:

In the event this supplemental information is not considered and CAM's technical proposal is not found acceptable, then our client has instructed us to file a formal bid protest.
8. On April 15, 1997 the University responded that, as confirmed in their March 28 letter, and at the debriefing on March 31, CAM's Technical Offer could not be supplemented, and that any protest stemming from the March 28 letter or the debriefing should have been protested by April 4 or April 7 at the latest. On April 16, 1997, CAM sent a letter "formally" protesting the April 15, 1997 determination.
9. On May 12, 1997, the Procurement Officer issued a final decision finding that the March 25, 1997 protest of the initial decision not to allow a debriefing was moot, and that the protest seeking review of supplemental information was untimely. Timely appeal of that decision to this Board followed.

#### Decision

Oral argument was heard by the Board on the issue of its jurisdiction, i.e., the timeliness of

the protests submitted to the Procurement Officer, that CAM be allowed an immediate debriefing and that it be permitted to supplement its Technical Offer.

Appellant argues that it noted its protest of the March 21, 1997 refusal of the State to allow it to supplement its offer by letter dated March 25, 1997, as set forth above. This letter by its express language only protests the refusal of the State as communicated to the Appellant on March 21, 1997 to have a pre-award debriefing. While it might subsequently follow, supplementation is not a subset of debriefing.

In fact, by letter dated April 11, 1997, the Appellant states that if its supplemental information is not reviewed then it will "file a formal protest". Clearly, this letter belies the argument that CAM protested the issue of allowing the supplementing of the proposal in the March 25, 1997 letter. CAM was not under the impression at the time of the submission of the initial protest letter on March 25, 1997 that it was protesting a future rejection of its request to perhaps supplement its proposal at some time in the future. CAM was told by the State on March 28, 1997 that no supplemental information would be considered. It did not file a protest within seven days of receipt of the March 28 letter.

Appellant relies upon this Board's opinion in the matter of Energy Management Systems, MSBCA 1769, 4 MSBCA ¶345 (1993), for the proposition that COMAR does not prescribe the use of any particular language that must be used to constitute a protest. We agree that no magic language is required. A protest means a complaint relating to the solicitation or award of a procurement contract. COMAR 21.10.02.01B(2). COMAR 21.10.02.04 requires that protests conform with a number of requirements, including "a statement of reasons for the protest."

However, A protest will normally indicate that it is a protest, and request some relief from a perceived error. As the Board stated in Energy Management Systems, *supra*, it is not unduly burdensome on a protestor to state with clarity its intent, since the rights of many parties are at stake. The protestor should not be timid in his protest but rather make formal accusations or state its displeasure in a manner calculated to clearly reflect that a correction must be made or some other remedy provided. It is clear from the April 11, 1997 correspondence that no protest regarding supplementation was intended to be conveyed in the March 25 letter.

A protest must be filed not later than 7 calendar days after the basis for protest is known or should have been known, whichever is earlier. COMAR 21.10.02.03B. While the letter of March 25, 1997 alluded to supplementation of CAM's offer, we find that it was anticipatory.<sup>2</sup> When the State on March 28, 1997 definitively stated that it would not allow supplementation, the clock started running.<sup>3</sup> Appellant thus had 7 days within which to protest.

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<sup>2</sup>Appellant claims that it was told on March 21, 1997 that the State would not permit supplementation of the offer, and that therefore its protest letter of March 25, 1997 was clearly and sufficiently inclusive of the supplementation issue. For the reasons set forth above, in particular the last sentence of the April 11, 1997 letter that CAM was still anticipating a future "formal protest" on the issue, we decline to accept this argument.

<sup>3</sup> Arguably, this time period may have been extended to 7 days following the March 31 debriefing, when Appellant first learned of which specific items, in its view, needed to be supplemented.

This Board in Energy Management Systems stated that although at first glance a strict reading of the requirements and timing of protests seems draconian, a bid protest effectively stops the procurement process. The Procurement Officer should not have to guess whether an issue has been protested. The Board continued,

Requiring the protestor to express its protest in language which places a reasonable reader on notice a complaint is intended is not unduly burdensome. Consequently a failure to file the protest within the time limits required operates as a waiver of the right to protest.

Citing, Communications Management Systems Inc., MSBCA 1625, 3 MSBCA ¶296 (1992).

Protests on grounds other than improprieties in a solicitation apparent before bid opening must 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.C. Such filing is jurisdictional, and failure to file in a timely manner deprives this Board of jurisdiction to hear the appeal. ISMART, LLC, MSBCA 1979, 5 MICPEL ¶417 (1997); J&J Reproduction & Drafting Supplies, Inc., MSBCA 1970, 5 MICPEL ¶409 (1996); Crystal Enterprises, MSBCA 1971, 5 MICPEL ¶407 (1996); Communication Management Systems, Inc., MSBCA 1625, 3 MICPEL ¶296 (1992); Transitional Technology, Inc., MSBCA 1527, 3 MSBCA ¶256 (1990); Kennedy Temporaries v. Comptroller, 57 Md. App. 22, 468 A.2d 1026 (1989); Manolis Painting Co., Inc., MSBCA 1483, 3 MSBCA ¶233 (1989).

CAM's protest of the refusal to allow supplementation of its technical offer was not timely, and the Board thus lacks jurisdiction to hear this appeal. Accordingly, the appeal must be dismissed.

Wherefore, it is this 28th day of July, 1997, hereby ORDERED, that the appeal be dismissed.

Dated: July 28, 1997

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Candida S. Steel  
Board Member

I concur:

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Robert B. Harrison III  
Chairman

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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 2018, appeal of CAM Construction Co., Inc., under UMBC No. BS95-951VR.

Dated:

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Mary F. Priscilla