

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF CHESAPEAKE)
SYSTEM SOLUTIONS, INC.)
) Docket No. MSBCA 2308
Under State of Maryland Treasurer's)
Office Request for Proposals (RFP))
#08082002)

November 18, 2002

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

Statutory Construction - Legislative Intent - The Appeals Board is of the opinion that it is the intention of the General Assembly that, in order for the Maryland Uniform Electronic Transaction Act to apply to the formation of a State Procurement Contract, consistent with the General Procurement Law, the receipt of email or other electronic bids or proposals must be specifically authorized in the solicitation.

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APPEARANCE FOR RESPONDENT: Steven W. Vanderbosch
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OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from the final decision of the Procurement Officer for the Maryland State Treasurer's Office (STO) denying its protest under the above captioned RFP that the STO was required to accept its electronic mail (email) proposal under the Maryland Uniform Electronic Transaction Act (UETA), §21-101 et. seq. of the Commercial Law Article, Annotated Code of Maryland.¹

¹ Appellant also alleged that because it had a prior contract with the STO wherein the STO had purchased a perpetual license from Appellant for account reconciliation software that the RFP was unnecessary and the STO should restore maintenance and support for the account reconciliation software with Appellant. As explained in the Findings of Fact, Appellant's previous contract had expired. Any protest on grounds that the instant RFP was improper was required to have been filed prior to the due date for receipt of proposals. COMAR 21.10.02.03. The protest on such grounds is therefore dismissed for lack of jurisdiction, see e.g. In Re Consolidated Appeals of ATI Systems and Federal Signal Corporation, MSBCA 1911, 1913, and 1918, 5 MSBCA ¶387 (1995), and will not be further discussed.

Findings of Fact

1. On June 18, 2002, the STO issued the above captioned RFP for an automated account reconciliation system to reconcile the State's bank accounts to its general ledger accounts.
2. The RFP provided that to be considered, an original and 6 paper copies of each proposal must arrive at the Issuing Office by 2:00 p.m. on August 8, 2002. The RFP defined the Issuing Office as State Treasurer of Maryland, Louis L. Goldstein Treasury Building, Room 109, 80 Calvert Street, Annapolis, Maryland 21401. By Amendment No. 1 to the RFP, dated August 5, 2002, the proposal submission deadline was extended to August 19, 2002 at 2:00 p.m.
3. A Pre-Proposal Conference for the RFP was held on July 25, 2002. There was no discussion concerning submission of proposals by email.
4. Answers to written questions about the RFP were prepared and distributed to potential proposers. No question addressed submission of proposals by email.
5. At the proposal submission deadline on August 19, 2002 at 2:00 p.m., the STO had received three (3) written proposals. Appellant's proposal was not among them.
6. At approximately 2:20 p.m. on August 19, 2002, Mr. William Bender attempted to deliver the written proposal of Appellant to the STO, but the STO Procurement Officer refused to accept the proposal on grounds it was late.
7. Appellant transmitted an electronic copy of its proposal by email addressed to the STO Procurement Officer on August 19, 2002. The time of receipt of this email by the STO is in dispute.
8. STO records and the affidavits of the Procurement Officer and of William A. Dye, Director of Enterprise Infrastructure Services, Maryland Department of Budget and Management, reflect that Appellant's email proposal was received by the STO after the proposal submission deadline of 2:00 p.m.
9. The STO Procurement Officer refused to accept Appellant's email proposal and notified Appellant's Mr. Bender by return email on August 19, 2002, prior to 4:00 p.m., that the STO had to reject Appellant's email proposal.
10. Following the STO Procurement Officer's refusal to accept Appellant's late written proposal and late email proposal, Appellant began arguing and lobbying by telephone, email, and correspondence for acceptance of its email proposal under UETA, asserting that its email proposal was timely received and must be accorded the same effect as a paper submission.²
11. By letter dated August 26, 2002, a protest of the STO's rejection of Appellant's email proposal was sent to the STO Procurement Officer by facsimile (fax), email and overnight delivery. In its protest, Appellant asserts that the STO must accept its email proposal under UETA.
12. The STO Procurement Officer received Appellant's protest, in all transmitted forms, on August 27, 2002. The overnight delivery actually arrived on August 27, 2002, and the fax and email were sent shortly after 4:30 p.m. on August 26, 2002. The STO Procurement Officer's regularly scheduled hours, however, were 7:30 a.m. to 4:00 p.m.

²To the extent that some of these arguments and lobbying efforts were in writing, they did not constitute a protest meeting the requirements of COMAR.

13. By letter dated September 12, 2002, the STO Procurement Officer issued the Procurement Officer's Final Decision rejecting Appellant's protest on timeliness grounds and on the merits. Thereafter, Appellant appealed to this Board.
14. The STO and Appellant were parties to a Contract for Account Reconciliation Solution Services dated April 1, 1997 (Prior Contract).
15. As of September 30, 2001, the term of the Prior Contract, as amended, had expired, and Appellant was directed to cease work and destroy certain State files and transaction data in Appellant's possession.
16. The parties waived their right to a hearing and requested that the Board decide the appeal on the written record (Agency Report, Response to Agency Report and Agency Reply).

Decision

The Procurement Officer denied Appellant's bid protest on grounds it was untimely, having been filed on August 27, 2002, eight (8) days after the basis for the protest was allegedly known by Appellant. This is a preliminary, jurisdictional issue. Because the Board finds that the protest was in fact untimely filed, it also must find that the protest was properly denied, and the Board must dismiss this appeal.

In accordance with Title 15, Subtitle 2, Part III of the State Finance and Procurement Article of the Annotated Code of Maryland and COMAR 21, Subtitle 10, a protest must be in writing, filed with the Procurement Officer within seven (7) days after the reason for the protest is known or should have been known, and it must contain the information specified by COMAR 21.10.02.04. COMAR 21.10.02.03C defines the term "filed" to mean receipt by the procurement officer, and it cautions protesters to transmit or deliver protests in the manner that assures earliest receipt.³ The RFP included a standard provision relating to protests at Section II. General Information, Paragraph J. Protests, which tracks the requirements of COMAR 21.10.02. The seven(7)-day filing requirement is mandatory, and it must be strictly construed; if a protest is not timely filed it may not be considered by the procurement officer or by the Board. A.D. Jackson Consultants, Inc., MSBCA 1817, 4 MSBCA ¶366 (1994) and cases cited at p.5. Because this is a requirement imposed by law, it cannot be waived by a State agency. See Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 40-41 (1984).

In this case, Appellant's protest was sent "BY FAX, EMAIL AND OVERNIGHT DELIVERY" to the Procurement Officer late in the day on August 26, 2002. The Procurement Officer's regular working hours are 7:30 a.m. to 4:00 p.m., Monday through Friday. We find nothing out of the ordinary concerning these hours and no public inconvenience attaching to such working

³There is no provision in COMAR 21.10.02 permitting a protest to be filed in any manner other than in writing. This regulation does not address the propriety of filing of a protest by facsimile or by email, and there is almost no case law from the Board regarding filing a protest by facsimile or by email. The Board recently denied an appeal where an offeror attempted to file a bid protest by email but neglected to supply any reason for the protest. When the reasons were supplied in writing more than seven (7) days had elapsed from when the reasons should have been known, and thus the appeal was denied. The Board specifically denied the protest on timeliness grounds and did not address the propriety of use of email in the bid protest process under the General Procurement Law and COMAR. NumbersOnly-NuSource JV, MSBCA 2303, 6 MSBCA ¶520.

hours. The fax copy of the protest has a date/time imprint of 8-26-02 16:35 PM; the email copy of the protest was sent to the STO on August 26, 2002 at 4:33 PM; both were received by the Procurement Officer when he reported to work on August 27, 2002. According to the STO's date stamp, the Procurement Officer received the written, overnight delivery copy of the protest on August 27, 2002 at 3:39 p.m.

In its appeal, Appellant admits that its protest was filed on August 27, 2002. Appellant argues, however, that the time for filing a protest began to run on August 20, 2002, the day Appellant received an email message from the Procurement Officer stating his decision to reject Appellant's email proposal was final. This argument ignores the fact that the Procurement Officer notified Appellant on August 19, 2002, in responding to Appellant's email proposal, that its email proposal and hard copy proposal were both rejected. Appellant acknowledged this email proposal rejection in another email dated August 19, 2002, 5:10 p.m., with Mr. Bender stating, "I received your email stating that you were rejecting our proposal," but nonetheless lobbied for acceptance. Appellant was clearly on notice and recognized on August 19, 2002, that its email proposal was rejected by the Procurement Officer. Moreover, the Procurement Officer's email the next day, August 20, 2002, 8:47 a.m., upon which Appellant relies, does no more than explain the rationale for the Procurement Officer's decision to reject Chesapeake's proposal on August 19, 2002, and states "my decision stands."

Appellant's protest was not received by the Procurement Officer until August 27, 2002, eight (8) days after Appellant knew or should have known of the rejections of its written proposal and email proposal. Therefore, the protest was properly denied as untimely; the Board lacks jurisdiction over the appeal, and the appeal must be dismissed. A.D. Jackson Consultants, Inc., supra; Reliable Reproduction Supply, Inc., MSBCA 2232, 5 MSBCA ¶495 (2001) and cases cited at p.5; ISMAART, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997).

Notwithstanding that Appellant's protest was not timely filed, the Board will discuss the question of whether the Maryland Uniform Electronic Transaction Act (UETA) applies to this transaction, i.e. Appellant's submission of an email proposal in response to RFP #08082002. We recognize that our comments are dicta, but we believe that comment regarding this matter may be helpful in future procurements.

In its protest, Appellant argues that UETA applies to this transaction, with the result that Appellant's proposal submitted by email on August 19, 2002 must be accorded the same effect as a paper submission. The STO rejected Appellant's argument and denied its protest.

UETA originated as Senate Bill 3 of the 2000 Session of the Maryland General Assembly, and it was enacted as Chapter 8, Acts of 2000, with an effective date of June 1, 2000. UETA is codified in Title 21 of the Commercial Law Article (CL), Annotated Code of Maryland. Maryland's UETA was modeled on the Uniform Electronic Transaction Act (Model Act) (1999) which was drafted by the National Conference of Commissioners on Uniform State Laws, and which was approved and recommended for enactment in all the States. A majority of States have adopted some form of the Model Act. The excellent pleadings filed by counsel for the State and for Appellant suggest that there is little law interpreting the reach of the Model Act or Maryland's implementation

thereof. Counsel for the STO advises that there are to date no administrative or judicial decisions of which the STO is aware, either in Maryland or any other jurisdiction, interpreting UETA or the Model Act.

The question for the Board appears to be whether and how to harmonize UETA and the State's General Procurement Law, and give effect to both.⁴ The General Assembly provided some guidance with the enactment in 2001 of §13-226 of the State Finance and Procurement Article (SFP).

Subsection (a) of SFP §13-226 states, in part, "...a primary procurement unit may conduct procurement ... by electronic means as provided in... [UETA]." Both SFP §13-226 and, as discussed further below, CL §21-104 make it clear that UETA is permissive, not mandatory.

Subsection (b) of SFP §13-226 states, "Bidding on a procurement contract by electronic means shall constitute consent by the bidder to conduct by electronic means all elements of the procurement of that contract which the unit agrees to conduct by electronic means." It is clear from this not only that electronic bidding commits the bidder, but also that there must be agreement by the procuring unit to conduct elements of the procurement by electronic means. These procurement elements, enumerated in SFP §13-226(a), include solicitation, bidding, award, execution and administration of a contract.

It seems clear to the Board that it was the intent of the General Assembly that the overall statutory scheme should be interpreted such that a procurement unit's agreement to conduct the procurement element of bidding (or proposing) by electronic means must be explicit. That is, it must be clearly and directly stated in the RFP or Invitation for Bids.

The purpose of UETA is "to remove barriers to electronic commerce by validating and effectuating electronic records and signatures." UETA permits the use of electronic media to comply with legal requirements for writings, signatures, and retention of records. It provides that an electronic record, signature, or contract shall not be denied enforceability solely because it is in electronic form. UETA's focus is to "remove legal barriers to electronic commerce by placing electronic commerce and paper-based commerce on the same legal footing, allowing transactions to be memorialized electronically, rather than solely on paper." See Floor Report Senate Bill 3, prepared by the Department of Legislative Services for the Economic Matters Committee of the Maryland House of Delegates.

However, it is clear from the ordinary and natural (plain) language of the statute that, in this case, UETA should not be construed to apply to Appellant's submission of an email proposal in

⁴In this attempt the Board is guided by the principle that as noted in Engineering Technologies Associates, Inc., MSBCA 1362, 2 MSBCA ¶174 (1988) at p.5:

The cardinal rule in interpretation of a Maryland statute is to ascertain the intention of the Legislature. Maryland cases hold that in gleaning such intent a statute should be construed according to the ordinary and natural import of its language, unless a different meaning is clearly indicated by the context, without resort to subtle or forced interpretation for the purpose of extending or limiting its operation. See Smelser v. Criterion Ins. Co., 293 Md. 384, 388-389 (1982); James Julian, Inc., MSBCA 1222, 1 MSBCA ¶100 at pp. 6-7 (1985).

response to RFP #08082002.

CL §21-104(a) states:

This title does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

The plain meaning of this section is that the State is not required to receive a record by electronic means.

CL § 21-104(b)(1) states:

This title applies only to transactions between parties, each of which has agreed to conduct transactions by electronic means.

The plain meaning of this section is that if the State has not agreed to conduct a transaction by electronic means, UETA does not apply.

Any doubt about the permissive nature of UETA is dispelled by referring to the comments of the National Conference of Commissioners on Uniform State Laws accompanying Section 5 of the Model Act:

This section limits the applicability of this Act to transactions which parties have agreed to conduct electronically. Broad interpretation of the term agreement is necessary to assure that this Act has the widest possible application consistent with its purpose of removing barriers to electronic commerce.

1. This section makes clear that this Act is intended to facilitate the use of electronic means, but does not require the use of electronic records and signatures. This fundamental principle is set forth in subsection (a) and elaborated by subsections (b) and (c), which require an intention to conduct transactions electronically and preserve the right of a party to refuse to use electronics in any subsequent transaction.

2. The paradigm of this Act is two willing parties doing transactions electronically. It is therefore appropriate that the Act is voluntary and preserves the greatest possible party autonomy to refuse electronic transactions. The requirement that party agreement be found from all the surrounding circumstances is a limitation on the scope of this Act.

It seems clear to the Board that based on a plain reading of UETA it may not be held to apply where the circumstances and evidence reflect that the State is not willing to conduct a transaction by electronic means.

Thus we believe that an essential requirement for the applicability of UETA to State procurement is agreement by the State to conduct a transaction by electronic means. CL §21-104(b)(1). We acknowledge that UETA provides that such an agreement may be express or implied. In this case there is clearly no express agreement by the STO to receive proposals by email.⁵ The express direction of the STO concerning proposal submission is found in the RFP at Section I. Procurement Objective, Paragraph F. Submission Deadline, which required delivery of an original and six (6) paper copies. While it is the Board's opinion that the proper, harmonious reading of UETA and the General Procurement Law requires that the public solicitation clearly and directly state that bidding or proposing may be conducted by electronic means, we will assess Appellant's argument that an agreement to receive proposals by electronic means may be implied and that under the circumstances surrounding this procurement such implied agreement should be found to exist.

Assuming arguendo that UETA applies (as we must for Appellant's argument to have any merit), and in the absence of an express agreement between willing parties, CL §21-104(b)(2) comes into play, which would allow for an implied agreement:

Whether the parties have agreed to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

The Model Act commentary on this matter is instructive:

Finally, recognition that the paradigm for the Act involves two willing parties conducting a transaction electronically, makes it necessary to expressly provide that some form of acquiescence or intent on the part of a person to conduct transactions electronically is necessary before the Act can be invoked. Accordingly, Section 5 specifically provides that the Act only applies between parties that have agreed to conduct transactions electronically. In this context, the construction of the term agreement must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, regardless of whether the intent rises to the level of a formal agreement.

Do the totality of circumstances herein demonstrate an implied agreement to conduct business electronically? UETA assumes a broad definition of "transaction" to include a "set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs." CL §21-102(q). As such, the party's entire conduct related to the bid process must be analyzed for evidence of an agreement between the parties to conduct business electronically. Moreover, because UETA must be construed and applied to be "consistent with reasonable practices and with continued expansion of those practices," CL §21-105(2), application must be considered in the context of Maryland State government's efforts to do business

⁵Indeed, in this case the record reflects that the STO was not willing to receive proposals by email.

electronically.

In this broader context, what evidence points to the parties' agreement to conduct business electronically? From the outset, the RFP was available electronically. Additionally, appendices to the RFP, including the Bid/Proposal Affidavit, the Contract Affidavit, and the Standard Contract, were made available electronically to make them easier for proposers to complete. The STO requested the email address for the proposers at the Pre-Proposal Conference, and each proposer supplied an email address. The Procurement Officer supplied his email address in the RFP and encouraged proposers to contact him by this means. The Procurement Officer communicated with proposers electronically. Mr. Caldwell agreed to receive an electronic copy of the proposal from Appellant in addition to the required original and six (6) paper copies. The RFP information on the "Proposal Form" specifically prohibits certain proposal formats, but it makes no mention of electronic delivery. The RFP states:

Proposals should be prepared simply and economically, providing a straightforward, concise description of the Offeror's proposal for meeting the requirements of this procurement. Oral, telegraphic, or mailgram proposals will not be accepted.

Appellant thus argues for the finding of such an implied agreement to conduct business electronically given the totality of circumstances surrounding the proposals, including (1) Maryland's efforts to do business electronically, (2) the STO's communication and delivery of important documents via electronic means, (3) the Procurement Officer's agreement to receive an electronic copy, (4) the failure of the RFP to mention electronic delivery as an unacceptable format along with other unacceptable formats and (5) the provision of the Procurement Officer's email address in the RFP for purposes of communicating with the Procurement Officer and the solicitation of email addresses from the proposers at the Pre-Proposal Conference. The Board, however, disagrees that an implied agreement to conduct business electronically may be found through consideration of all or any of the above circumstances.

The Procurement Officer did agree to receive both an electronic record and a paper record from Appellant. In an email dated July 15, 2002, Appellant's Mr. Bender stated, "By the way, I noticed that the RFP calls for one original and 6 copies of the response. Would you also like to get an electronic response in addition?" On July 16, 2002, by email the Procurement Officer replied, "If it is possible I wouldn't mind getting a electronically (sic) response from you along with the hard copies." And on July 16, 2002, Mr. Bender replied by email, "Thanks. I'll be sure to email a copy of the response, as well as provide the requested hard copies."

The Board finds that this series of emails between Appellant's Mr. Bender and the Procurement Officer concerned the provision of a courtesy email copy of Appellant's proposal. These actions do not constitute a declaration of intent by the STO to accept an email proposal pursuant to UETA or to waive the time of delivery requirement for the paper copies of the proposal.

It must be observed that a procurement officer has no authority to change or waive any requirements of an RFP relating to place, time or manner of delivery of proposals, except by amending the RFP. Any reliance by Appellant upon alleged private representations by the

Procurement Officer, in emails or otherwise, is misplaced. Maryland's General Procurement Law requires that all offerors be afforded the same opportunity to compete on an equal footing such that a communication of any significance with one requires conveyance of the substance of such communication with all. See COMAR 21.05.03.02E and COMAR 21.05.02.08.

The context and surrounding circumstances of this procurement clearly indicate the absence of any agreement by the STO to receive proposals by email. The provision of the Procurement Officer's email address in Section I. Procurement Objective, Paragraph B. Issuing Office: Procurement Officer, and Paragraph D. Pre-proposal Conference of the RFP indicate an intent and agreement to be contacted by email. Appendices to the RFP were also made available electronically. Nowhere in the RFP, however, is it stated, suggested or implied that proposals may be submitted by email.

The record reflects that the agreement (whether express or implied) required between willing parties to receive proposals by email, and thus trigger the applicability of UETA, is absent from this procurement, and UETA does not apply.

While we have addressed Appellant's argument that an implied agreement to receive proposals electronically exists herein, we state again that the Board is of the opinion that in order for UETA to apply to a State procurement, consistent with the General Procurement Law, the receipt of email or other electronic bids or proposals must be specifically authorized in the solicitation.⁶ No such specific authorization appears in this RFP.

Assuming arguendo both that Appellant's protest was timely and that UETA applied to Appellant's response to the RFP, the next issue is whether Appellant's email proposal was received on time, as Appellant asserts, or was received late and thus could not be considered, as the Procurement Officer contends. The STO argues that because Appellant's email proposal was not received by the Procurement Officer at the place and time designated in the RFP for submission of proposals, Appellant's email proposal was also properly rejected as late.⁷ We agree with the STO.

In accordance with COMAR 21.05.03.02F, any proposal received after the established due date and time at the place designated for receipt of proposals is late. COMAR 21.05.02.10 concerning late bids is substantively the same, providing that any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late.

The RFP contained specific instructions for the submission of proposals in Section I. Procurement Objective, Paragraph F. Submission Deadline:

⁶There are presently no general regulations in COMAR Title 21 addressing requirements or procedures for the receipt of email or other electronic bids or proposals. However, Maryland has established eMarylandMarketplace as its electronic procurement portal, providing for online interactive bidding and catalog purchasing for all State agencies.

⁷As previously noted, Appellant's written proposal was delivered late and was not accepted by the Procurement Officer pursuant to COMAR 21.05.03.02F and COMAR 21.05.02.10.

To be considered, an original and 6 copies of each proposal must arrive at the Issuing Office by 2:00 p.m. on August 8, 2002,⁸ in order to be considered. Requests for an extension of this date or time will not be granted. Offerors mailing proposals should allow sufficient mail and internal delivery time to ensure timely receipt at the STO. Proposals or unsolicited amendments to proposals arriving after the closing date and time will not be considered.

This Board has strictly enforced the timeliness requirement for the submission of bids and proposals as established by the Board of Public Works. In American Asphalt Paving Company, Inc., MSBCA 1655, 4 MSBCA ¶307 (1992), the Board held that the rule requiring the rejection of late bids is absolute, and that the contractor bears the burden of demonstrating with reasonable certainty that a bid is on time. In Viron Energy Services, MSBCA 2122, 5 MSBCA ¶463 (1999), the Board held the offeror accountable for a private courier's delivery error, which resulted in a proposal being just a few minutes late, noting it was the offeror's responsibility to make sure the proposal was delivered on time to the correct location. As observed by the Board in American Air Filter, MSBCA 1119, 1 MSBCA ¶89 (1984), bidders are responsible for choosing the method and manner in which they transmit their bids. And most recently in K & K Painting and Construction Co., MSBCA 2260, 6 MSBCA ¶511, the Board reaffirmed its strict enforcement of the timeliness requirement and held that a late bid should not have been considered under the limited exception provided in COMAR 21.05.02.10B, where the alleged action or inaction of State employees was not the sole or paramount cause of the late receipt of a bid.

In this case the record reflects that Appellant sent its proposal in response to the RFP by email, from Mr. Bender's computer, on August 19, 2002 at 13:56 (1:56 p.m.), four (4) minutes before the deadline for receipts of proposals. The record also reflects that Appellant's email proposal was sent by its internet service provider (which opened a socket connection to transfer the email at 13:58 (1:58 p.m.)) to "cyclopes.dbm.state.md.us", a computer owned or under the control of the State of Maryland, on August 19, 2002, and received by "cyclopes.dbm.state.md.us" at 13:58 (1:58 p.m.), two (2) minutes before the deadline for the receipt of proposals. Appellant has not presented any evidence demonstrating the time its email proposal was received by the STO, and it relies on CL §21-114(b) to establish time of receipt by the STO as the time its email proposal was received at "cyclopes.dbm.state.md.us" at 13:58 (1:58 p.m.).

The RFP specified that proposals must arrive at the Issuing Office by 2:00 p.m. on August 19, 2002. As set forth in the RFP, the Issuing Office location is State Treasurer of Maryland, Louis L. Goldstein Treasury Building, Room 109, 80 Calvert Street, Annapolis, Maryland 21401.

"Cyclopes.dbm.state.md.us" is not the Issuing Office. As explained in the Affidavit of William A. Dye, director of Enterprise Infrastructure Services at the Department of Budget and Management (DBM), "cyclopes.dbm.state.md.us" is the firewall through which internet traffic for State agencies is routed and filtered. Following firewall filtering, incoming email messages are

⁸The deadline for submission of proposals was changed to August 19, 2002 at 2:00 p.m. by Amendment No. 1 to the RFP.

delivered to the Simple Mail Transport Protocol (SMTP) Relay Cluster within the domain "dbm.state.md.us" for antivirus scanning and further processing. Finally, incoming emails are delivered to the using agency, in this case the STO computer server at "treasuremnt.treassrv001". Thus, contrary to Appellant's assertion, "cyclopes.dbm.state.md.us" is not the STO's computer server, and receipt by the "cyclopes.dbm.state.md.us" firewall does not constitute receipt at the Issuing Office.

According to the Affidavit of Mr. Dye, supported by the Return Path tracking report for Appellant's email proposal, Appellant's email proposal was received by the STO computer server, "treasuremnt.treassrv001", on August 19, 2002 at 14:11 (2:11 p.m.) This is consistent with the Procurement Officer's decision to reject Appellant's email proposal as late because Appellant's email proposal was not received at the Issuing Office (assuming arguendo that receipt by the STO computer server constitutes receipt at the Issuing Office) until after the deadline of 2:00 p.m. on August 19, 2002. We further find from the record that the apparent elapsed time of approximately ten (10) minutes, fifteen (15) seconds for the transmission of the Appellant's email from the DBM SMTP Relay Cluster to the STO's server is not unreasonable or excessive.

Appellant's reliance on CL §21-114(b) is misplaced in the context of the facts presented by this record. CL §21-114(b) provides:

(b) Unless otherwise agreed between the sender and the recipient, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

The record reflects that prior to the receipt of Appellant's email proposal by the STO computer server, "treasuremnt.treassrv001", at 14:11 (2:11 p.m.), the Procurement Officer was not able to retrieve the electronic message. Because ability to retrieve an electronic record is central to the concept of "receipt," CL §21-114(b) would only apply from the time Appellant's email proposal entered the STO computer server and was retrievable by the Procurement Officer.⁹

⁹Section 21-114 provides in its entirety as follows:

§ 21-114. Time and place of sending and receipt.

(a) *Time of sending.*- Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) Is in a form capable of being processed by that system; and

(3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) *Time of receipt.*- Unless otherwise agreed between the sender and the recipient, an electronic record is

Appellant is responsible for its choice of method and manner of delivery, and for delivery of the proposal to the right location, on time. American Air Filter, supra; Viron Energy Services, supra. In this case, Appellant, assuming arguendo that an emailed proposal was acceptable, did not allow sufficient delivery time to ensure timely receipt of its email proposal at the Issuing Office, as specified in the RFP. Appellant's proposal sent by email was not received at the STO computer server, where it could be retrieved by the Procurement Officer, until 2:11 p.m. on the due date. The Procurement Officer, therefore, properly rejected Appellant's email proposal as late and properly denied the protest.

For the foregoing reasons, the Appellant's appeal is dismissed on jurisdictional grounds.

Wherefore, it is Ordered this 18th day of November, 2002 that the appeal is dismissed.

Dated: November 18, 2002

Robert B. Harrison III
Board Member

received when:

(1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Place of information processing system.- Subsection (b) of this section applies even if the place where the information processing system is located is different from the place where the electronic record is deemed to be received under subsection (d) of this section.

(d) Place of sending and receipt.- Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) Awareness of receipt.- An electronic record is received under subsection (b) of this section even if no individual is aware of its receipt.

(f) Content.- Receipt of an electronic acknowledgment from an information processing system described in subsection (b) of this section establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) Other applicable law; variation by agreement.-

(1) If a person is aware that an electronic record purportedly sent under subsection (a) of this section, or purportedly received under subsection (b) of this section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law.

(2) Except to the extent allowed by the other law, the requirements of this subsection may not be varied by agreement.

We believe that as applied to the facts of this appeal the STO computer server would be the legal repository for the electronic record (Appellant's email proposal) based on a reading of all of the provisions of Section 21-114.

I Concur:

Michael J. Collins
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 2308, appeal of Chesapeake System Solutions, Inc. under State of Maryland Treasurer's Office Request for Proposals #08082002.

Dated: November 18, 2002

Loni Howe
Recorder

