

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of COMMUNICATION)
MANAGEMENT SYSTEMS, INC.) DOCKET NO. MSBCA 1625
Under DGS Project)
No. OTM-VPS-9115)

February 25, 1992

Bid Protest - A protest must be filed within the time limit set forth in COMAR 21.10.02.03.

APPEARANCE FOR APPELLANT: Mr. Jeffrey W. Dolan
Jessup, MD

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

APPEARANCE FOR INTERESTED PARTY: Mr. D. A. Stewart
Wil Tel Communications System, Savage, MD
Inc.

OPINION BY MR. MALONE

Communication Management Systems, Inc. (Appellant) filed a timely appeal from the Department of General Services Procurement Officer's decision which denied its protest as untimely and reaffirmed that Appellant was not a responsible bidder.

Findings of Fact

1. On August 13, 1991, the Office of Telecommunications Management ("OTM") of the Department of General Services ("DGS") issued Request for Proposals No. OTM-VPS-9115 (the "RFP") for the procurement of interactive voice processing equipment and related services for agencies across the State.
2. After reviewing Appellant's proposal, the evaluation committee had concerns about Appellant's ability to perform the contract. These concerns were particularly directed at Appellant's experience, size, and ability to furnish the necessary personnel. This issue was raised by DGS during Appellant's oral presentation on October 31, 1991. In response, Appellant sent the Procurement Officer, Mrs. Margaret O'Connell, a letter dated November 1, 1991. Included with this letter was a long list of references.

3. The Procurement Officer contacted some of the references given by Appellant and also contacted the Maryland State Lottery Agency concerning Appellant's responsibility. Appellant had previously been awarded a contract by the Lottery Agency for an interactive voice telephone system, to allow the public to obtain by telephone winning numbers, rules, and other information concerning the State lottery. The results of the Procurement Officer's contact were mixed but did result in several poor references for Appellant.

4. Based on the evaluation of Appellant's proposal, its oral presentation, follow-up letter and the information from Appellant's references, the Procurement Officer determined under COMAR 21.06.01.01 that Appellant lacked the capability in all respects to perform fully the contract requirements; i.e., she found that Appellant was not a responsible offeror.

5. By certified letter dated November 26, 1991, Appellant was notified as required¹ that the Procurement Officer found Appellant not to be responsible. This letter also informed Appellant that it had a right to a debriefing (if requested within thirty (30) days) but that COMAR 21.05.03.06A prohibits giving a debriefing until after an award is made.² Mrs. O'Connell's letter of November 26 was received by Appellant the next day, November 27, as shown by the receipt for certified mail.

6. On December 5, 1991, Appellant hand-delivered to Mrs. O'Connell a letter dated December 4, acknowledging receipt of her November 26 letter and requesting a debriefing. On December 9, 1991, before Mrs. O'Connell was able to answer the December 4

¹ See COMAR 21.05.03.03B(2).

² A request for debriefing does not toll the requirements to file a protest within the time allowed if the basis of protest is known or should have been known to a protester. However, if during a debriefing an unknown or unknowable ground for protest is revealed, then the period for protesting runs from the date that basis for protest is discovered.

letter, Mr. Dolan, president of Appellant, called Mrs. O'Connell about the status of his request for a debriefing. Mrs. O'Connell told him again that State Procurement Regulations clearly prohibit giving a debriefing until after award. Mrs. O'Connell did not debrief Mr. Dolan as to the basis for her determination that Appellant was not responsible. However, Appellant clearly knew that a determination of non-responsibility had been made by November 27, 1991 (the date of receipt of the Procurement Officer's November 26 letter) which framed the basis of the protest it filed by letter dated December 16, 1991.

7. DGS denied the protest, primarily on the grounds that it was late under COMAR 21.10.02.03, in that, the basis of the protest, a determination that Appellant was not responsible, was known to Appellant on November 27, 1991. It was on this date that Appellant received the Procurement Officer's letter of November 26, but the protest was not filed until nineteen (19) days later (December 16). As a secondary basis for denying the protest, the Procurement Officer's decision referred to Appellant's size, lack of experience,³ the defects in Appellant's proposal, and the poor references. Appellant then timely appealed to this Board.

8. A hearing was set for February 25, 1992 but the request for hearing was withdrawn and the parties requested the Board rule on the record.

Decision

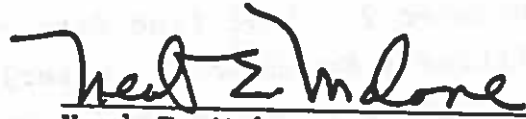
Appellant knew or should have known that it had a basis for protest when it received the Procurement Officer's determination of non-responsibility on November 27, 1991. The seven-day time limit for protesting a determination of non-responsibility begins to run when notice of the determination is received. RGS Enterprises, Inc., MSBCA 1106, 1 MSBCA 45 (1983). A protest filed more than seven days after such notice is received renders the protest late under COMAR 21.10.02.03. Id. Failure to file a

³ These items were essentially the same as those raised by DGS during Appellant's oral presentation of October 31, 1991.

protest within the required time limits operates as a waiver of the right to protest. Manolis Painting Co., Inc., MSBCA 1483, 3 MSBCA 233 (1989); EG&G Astrophysics, MSBCA 1468, 3 MSBCA 226 (1989). Appellant filed its protest on December 16, 1991, thirteen (13) days late. Therefore, the protest must be denied as untimely.

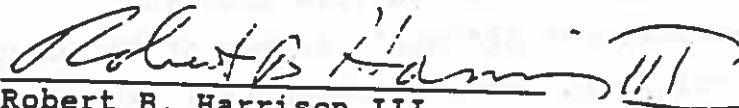
Dated:

2/25/92

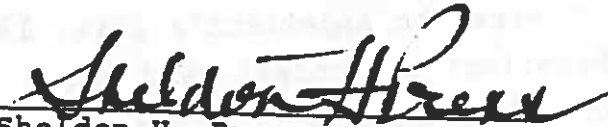


Neal E. Malone
Board Member

I concur:



Robert B. Harrison III
Chairman




Sheldon H. Press
Board Member

* * *

I certify that the following is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1625, appeal of COMMUNICATION MANAGEMENT SYSTEMS, INC., under DGS Project No. OTM-VPS-9115.

Dated: 2/25/92



Mary F. Priscilla
Recorder