

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of A.J. Billig & Co., LLC
t/a A.J. Billig & Co.**

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Under DHCD RFP No. S00R8400008

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Docket No. MSBCA 3096

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OPINION AND ORDER BY BOARD MEMBER STEWART

The Procurement Officer (“PO”) properly determined that Appellant’s bid protest was untimely and not filed in accordance with COMAR and the terms of the solicitation.

UNDISPUTED MATERIAL FACTS

Appellant, A.J. Billig & Co., LLC, trading as A.J. Billig & Co. (“A.J. Billig”), provides auctioneering services for Respondent, Maryland Department of Housing and Community Development (“DHCD”) for real property acquired by Respondent through its Division of Credit Assurance, known as the Real Estate Owned (“REO”) portfolio, under a contract entered into August 27, 2013, which was scheduled to terminate on June 30, 2018. The parties modified their contract on June 18, 2018, to extend the termination date thereof to October 31, 2018, to allow Respondent sufficient time to conduct a new procurement.

On June 7, 2018, Respondent issued Request for Proposals No. S00R8400008 (“RFP”) for up to two offerors for auctioneering services currently being performed by Appellant for a term of five years from award of the contract. The due date for proposals was July 10, 2018. The RFP, in Section 4.2, required offerors to indicate their eMaryland Marketplace (“eMM”)¹ vendor number in their Transmittal Letter submitted with their proposal. Section 4.2 also provided that

¹ eMM is an electronic commerce system administered by the Maryland Department of General Services.

offeror questions and the PO's responses, addenda, and other solicitation-related information would be provided via eMM. Section 4.2 further provided that "[i]n order to receive a contract award, a vendor must be registered on eMM."

The RFP, in Section 4.15 Protests/Disputes, mandated that any protest related to the solicitation was subject to the provisions of COMAR 21.10. Section 4.25.5(b) provided that the filing of protests related to the procurement were not authorized to be conducted by electronic means.

The RFP was posted on eMM and twenty-eight registered vendors received notice of the RFP via eMM. Amanda L. Sadler, Procurement Director for Respondent and the PO for the solicitation, also emailed nine vendors on July 5, 2018, including Appellant, when Respondent issued Amendment No. 1 to the RFP. The PO attached a copy of the RFP and instructions on where to find it on eMM, and also instructions on how to register as a new user on eMM. The PO's email was sent to Appellant at "andy@ajbillig.com" instead of to the correct address – "andy@ajbillig.com."²

Three proposals were received in response to the RFP. On July 19, 2018, Steven Wilson, REO manager with Respondent, asked the PO whether Appellant had submitted a proposal. When he was informed that Appellant had not, he called Appellant and discovered that Appellant was not registered with eMM and had not received the PO's July 5, 2018 email. On July 26, 2018, Daniel M. Billig, a member of Appellant, sent a letter via email to the PO. In his letter, Mr. Billig confirmed the conversation with Mr. Wilson, and stated that Appellant should have been notified that Respondent was requesting new bids and further stated: "In fairness and in order to foster competition, we request that you reopen the bid process to give us a chance to

² Even if the PO's email had not contained a typographical error, the Appellant still would have not received notice of or a copy of the RFP because the addressee, Andrew L. ("Andy") Billig, passed away on April 6, 2016.

submit a proposal. Please consider this protest our request to receive the captioned RFP and allow a sufficient extension of the closing deadline.”

On August 9, 2018, the PO sent Appellant a letter transmitting her final decision denying Appellant’s protest. The PO determined, based on the conversation between Mr. Wilson and Appellant, that Appellant knew or should have known the basis for its protest on July 19, 2018, and that pursuant to COMAR 21.10.02.03, Appellant was required to file a written protest on or before July 26, 2018. The PO determined that Appellant’s email on July 26, 2018, did not comply with COMAR 21.10.02.02C³ and RFP Section 4.25.5.

The PO further stated that COMAR 21.05.03.02B requires that public notice for requests for proposals be given in the same manner provided for invitation for bids under COMAR 21.05.02.04. The PO noted that COMAR 21.05.02.04 provides that an RFP shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition, and that if it is expected to exceed \$25,000, notice thereof shall be published in eMaryland Marketplace. The PO concluded that Respondent had complied with the notice requirements of COMAR 21.05.02.04 by emailing the RFP to multiple vendors in addition to Appellant and by posting it on eMM.⁴ The PO explained that although COMAR 21.05.02.06 permits the compilation of vendor lists, it does not require it.⁵ The PO concluded that the only way a vendor can ensure it will receive notice of a solicitation is to either register with eMM or to regularly search the open procurement opportunities listed on eMM.

³ COMAR 21.10.02.02C provides that: “A protest may be filed by electronic means only if expressly permitted and in the manner specified by the solicitation.”

⁴ The PO, in her final decision, stated that Respondent sent the RFP via email to eleven vendors other than Appellant. The record shows that the email was sent to eight vendors other than Appellant.

⁵ COMAR 21.05.02.06 provides that: “Vendor lists may be compiled by the procurement agency to provide State agencies with the names of businesses that may be interested in competing for various types of State procurement contracts.”

Appellant filed this Appeal on August 14, 2018. No contract has been awarded as of this date.

SUMMARY DECISION STANDARD

In deciding whether to grant a Motion for Summary Decision, the Board must follow COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

DECISION

This Appeal was filed by Appellant due to a series of unfortunate events that resulted in Appellant, the incumbent provider of real estate auctioneering services to Respondent, being unable to bid on the follow-up solicitation to its contract and have a chance to continue to provide what Respondent acknowledges has been admirable service to the State. However, the Board is constrained by the dictates of the undisputed material facts and the requirements of the Procurement Law in reviewing the PO's denial of Appellant's bid protest. The undisputed material facts demonstrate that Appellant knew the basis for its protest on July 19, 2018, after the telephone conversation with Respondent's REO Manager, Mr. Wilson. Appellant had seven days, or until

July 26, 2018, per COMAR 21.10.02.03B, to file its written protest with the PO. COMAR 21.10.02.02C only allows protests to be filed by email if permitted by the applicable solicitation. The RFP, in Section 4.25.5, specifically prohibits the filing of protests via email. It is undisputed that Appellant transmitted its protest on July 26, 2018, only by email. The Board must, therefore, conclude that Appellant failed to file a timely protest per COMAR and the RFP.

COMAR 21.10.02.03C provides that a protest that is not filed within “the time limits prescribed in §A or §B [of Regulation .03] may not be considered.” The Board has held repeatedly that the timeliness requirements of COMAR are substantive in nature and must be strictly construed since the rights and interests of the parties are at stake. *General Elevator Co., Inc.*, MSBCA No. 1253, 2 MICPEL ¶ 111 at 3 (1985); *Chesapeake Systems Solutions, Inc.*, MSBCA No. 2308, 5 MICPEL ¶ 525 at 3 (2002); *Affiliated Computer Services, Inc.*, MSBCA No. 2717 at 3 (2010). The seven-day filing requirement is imposed by law, and it cannot be waived by a State agency. *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984).

The Board has also held that submission of a protest via email does not constitute filing under 21.10.02.03 unless permitted by the terms of the solicitation. *Masabi LLC*, MSBCA No. 3039 at 5 (2017); *Aunt Hattie’s Place, Inc.*, MSBCA No. 2852 at 4 (2013); *Southern Maryland Cable, Inc.*, MSBCA No. 2538 at 7-8 (2006).

Given that Appellant failed to file a timely protest, the Board need not address the issue of whether Respondent was required to provide an incumbent contractor notice of a new solicitation. However, the Board notes that no statute or regulation requires a procuring agency to furnish notice or a copy of a solicitation to a vendor, including an incumbent contractor presently providing services to the State. The undisputed facts are that Respondent complied with the requirements of COMAR 21.05.02.04 by emailing the RFP to eight vendors in addition to

Appellant and by posting the RFP on eMM.⁶ The Board concurs with the advice of the PO that a vendor wishing to do or continue to do business with the State should register with eMM, or, failing that, diligently search eMM on a regular basis for open procurements. There are times when the Board sorely wishes it had equitable power to provide a remedy to a bidder such as Appellant, particularly when the State is satisfied with an incumbent's performance, but the Board is limited to only those powers expressly granted by statute and is precluded from granting such equitable relief. *See, James W. Ancel, Inc.*, MSBCA No. 2976 (2017); *PHP Healthcare Corp.*, MSBCA No. 2159 (2000); *Scanna MSC, Inc.*, MSBCA No. 2096 (1998); *Arundel Engineering Corp.*, MSBCA Nos. 1929, 1940 & 1957 (1997).

ORDER

Based on the foregoing, it is this 11th day of October, 2018, hereby:

ORDERED that Respondent's Motion for Summary Decision is GRANTED.

/s/
Michael J. Stewart Jr., Esq., Member

I concur:

/s/
Bethamy N. Beam, Esq., Chairman

/s/
Ann Marie Doory, Esq., Member

⁶ Before the advent of eMM, notices of bids and awards announced for Maryland state contracts valued above \$25,000 were published in the *Maryland Contract Weekly*, a supplement of the *Maryland Register*. Publication ceased on July 5, 2006, after requests for proposals and invitations for bids were required to be posted electronically.

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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3096, A.J. Billig & Co., LLC, t/a A.J. Billig & Co., under Maryland Department of Housing and Community Development RFP No. S00R8400008.

Dated: October 11, 2018

/s/
Ruth W. Foy
Deputy Clerk