

APPEARANCE FOR RESPONDENT:

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MEMORANDUM OPINION AND ORDER BY MR. LEVY ON
RESPONDENT'S MOTION TO DISMISS

This is an appeal from a University of Maryland, College Park (University) procurement officer's final decision denying Appellant's bid protest because it was untimely filed pursuant to the provisions of COMAR 21.10.02.03. The University has filed a Motion To Dismiss the appeal based on the same ground. Appellant maintains that its bid protest has merit, that it was timely filed, and that this Board does not have the authority to consider the University's motion. While a hearing was scheduled to consider the motion, Appellant elected not to attend. Therefore, this opinion is based on the written record furnished pursuant to COMAR 21.10.07.

Findings of Fact

For the purpose of resolving the University's Motion To Dismiss the following factual allegations are assumed by the Board to be true:

1. Under the provisions of an October 1973 cooperative agreement with the University, Appellant installed its patented sterilizing system at the University dairy. This agreement, and a subsequent one in 1977, provided that the University would not transfer or assign rights licensed under the agreements and would not cause the sterilization system or other apparatus covered by Appellant's patents to be manufactured without Appellant's consent. The University also agreed not to disclose to third parties proprietary information supplied by Appellant during the terms of the agreements or any time thereafter.
2. On May 28, 1982 the University advertised a Request For Bids (RFB) #36364-M for the design, fabrication and installation of a Steam Infusion Milk and Fluid Food Production Sterilizer System for the University's Department of Dairy Science. Bids were due June 29, 1982.
3. On June 15, 1982 the University issued Addendum No. 3 to the specification which provided that "[t]he University shall not consider any bids incorporating any modified and/or used equipment into the final system." Such bids would be considered non-responsive.
4. After reviewing the specification, Appellant's president, Dr. John E. Nahra, wrote a letter on June 23, 1982 to Dr. Filmore Bender, Associate Director of the University's Agricultural Experiment Station, expressing his concern that this procurement, if from someone other than Appellant, would infringe on its patents. Attached to his letter was a copy of a letter from Appellant's patent attorney outlining his similar opinion. Appellant's letter further stated that "[w]e plan to protect and enforce our patent rights, [and] . . . we are planning to respond to the bid." Appellant did not indicate that its letter was a protest and it has not asserted before this Board that it constituted the written notice required by COMAR 21.10.02.04.

5. Bids were opened on June 29, 1982 with the following results:

Crepaco - \$142,500
FLOE - \$177,500
Appellant - \$179,095

Appellant's representatives who were present at the bid opening maintain that the University's Mr. Armstrong declared Crepaco's bid non-responsive because it failed to include several required documents with its bid.¹ They came away from the bid opening believing that Crepaco was non-responsive and that Appellant would get the award since it was entitled to a 5% small business preference and FLOE was not.²

6. On the same day bids were opened, Appellant sent a letter to Mr. Ronald Jones, Director of University Procurement and Supply, noting deficiencies in the Crepaco and FLOE bids which Appellant's representatives had discussed at the bid opening with University representatives. Appellant again does not maintain that this letter constituted a formal protest and the University did not consider it as one.

7. The University subsequently determined that Crepaco was the low responsive and responsible bidder and sent a contract to that company on June 30, 1982. It was returned executed on July 20, 1982.

8. On July 7, 1982, the University returned Appellant's bid security with the following note:

Enclosed is your certified check, number 667510. The certified check is in connection with Request to Bid number: 36364M

The certified check is in the amount of eight thousand nine hundred fifty-four dollars and seventy-five cents. (\$8,954.75)

Thank you very much for your interest, plus, being a responsive bidder to the University's requirements.

¹This appears to be the University's only substantive objection to Appellant's statement of the facts. The University maintains that Mr. Armstrong only noted that Crepaco did not have certain documents with its bid. For the purpose of considering Respondent's Motion To Dismiss we will adopt Appellant's version.

²The record does not reflect if this was a small business set aside procurement pursuant to Article 21, §8-101 and COMAR 21.11.01 or if Appellant even qualified as a small business. If this was not a designated small business set aside procurement, Appellant could not prevail over FLOE since the 5% advantage is not automatic.

The certified mail receipt indicated that Appellant received the letter on July 13, 1982.

9. Appellant's president, Dr. Nahra, was out of the country when this letter was received. Therefore, Appellant took no action until July 20, 1982 when Dr. Nahra called the University upon his return. It was during this phone conversation that he learned for the first time that Crepaco was awarded the contract.

10. Appellant reviewed the University's procurement file on July 22, 1982 and subsequently filed a letter of protest on July 27, 1982. A supplement to the protest was filed August 3, 1982. The following summarizes Appellant's grounds of protest.

1. Crepaco's bid was declared non-responsive at the bid opening since it did not contain a design of the proposed system.
2. Crepaco's bid did not contain the required anti-bribery affidavit, non-collusion certificate, certification of corporation registration and tax payment, contractor's qualification questionnaire for sterilizer system, proposed system design including flow charts, process description, equipment and material technical specifications and scope of work description.
3. University personnel secretly met with Crepaco and consulted, designed and modified a Crepaco infusion heater and system based on information acquired from working with Appellant's existing system at the University.
4. University personnel met with Crepaco to prepare a specification to favor Crepaco in violation of Article 21, §4-101. The specification was based on a modified Crepaco infusion system.
5. The specification made it impossible for Appellant to offer the University its existing equipment located at the University dairy. The University could have saved in excess of \$75,000.
6. The University may have violated secrecy and confidentiality agreements it had with Appellant by providing certain information to Crepaco.
7. Crepaco plans to provide its system below cost in return for information on Appellant's system.
8. The Crepaco bid violates the provisions of the required non-collusion certificate.
9. Crepaco's Infusion Heater and System would infringe one or more of Appellant's existing or pending patents.

10. The University acted in bad faith in administering this procurement and with respect to existing agreements.

11. On September 9, 1982 the procurement officer, Mr. Ronald Jones, issued his written final decision denying Appellant's protest since it was not filed timely pursuant to COMAR 21.10.02.03. While the record does not reflect when Appellant received its copy of the procurement officer's final decision, for purposes of deciding the University's motion, we will assume that Appellant filed a timely appeal with this Board on September 29, 1982.

12. The University filed a Motion To Dismiss on the ground that the bid protest was not filed with the procurement officer in a timely manner pursuant to COMAR 21.10.02.03. It maintains that all grounds for protest either were apparent before bid opening, at bid opening, or should have been known within seven days of receipt of the returned bid security on July 13, 1982.

13. Appellant maintains that this Board cannot consider the University's motion as a separate matter, without considering the substantive issues raised by this Appeal because:

- A. Article 41, §244 (Md. Administrative Procedure Act) requires the Board to adopt and publish rules and regulations governing its formal and informal procedures.
- B. The Board's rules and regulations for bid protest appeal procedures do not contemplate consideration of preliminary matters such as motions to dismiss.
- C. COMAR 21.10.07.06(A) provides that a hearing will be conducted on the merits at the request of the parties.

OPINION

We initially must address whether this Board has the authority to consider the University's Motion To Dismiss. The Board considered a similar question in Intercounty Construction Corporation, MDOT 1036, Memorandum Opinion And Order, February 8, 1982. There we acknowledged that the Board's rules did not provide for motions for summary dispositions in contract dispute appeals. We concluded however, that the Legislature did not intend for formal evidentiary hearings to be mandated by The Administrative Procedure Act (APA). We stated the following, at p. 2:

"As long as a party is permitted a hearing on a motion for summary disposition to show that material facts are in dispute, or that he is entitled to a decision as a matter of law, the due process provisions of the APA are satisfied. Accordingly, in those appeals where one party clearly is entitled to a decision as a matter of law, we find no reason to require a formal evidentiary proceeding."

For the same reasons we conclude that in the appeal of a bid protest there is no mandatory requirement that an evidentiary hearing be held under the provisions of the APA. If there is no genuine dispute as to the facts, motions for summary disposition may be considered even if not provided for in our regulations.

We also said in Intercounty Construction Corporation, supra, at p. 6, that "[i]n ruling on a motion for summary disposition, the function of the Board is not to decide disputed facts, but rather to determine whether any dispute as to material facts exists." Here, in considering the University's motion, we are concerned only with those facts that relate to the time requirements associated with filing bid protests and not with the substantive facts relating to the several grounds which constitute Appellant's protest. An examination of the record indicates that there is no dispute as to those facts that relate to the bid protest time requirements. The disagreement is in the interpretation of those facts under the requirements of COMAR 21.10.02.03, which provides:

A. Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in section A, bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in this regulation means receipt in the procurement agency. Protesters are cautioned that protests should be transmitted or delivered in the manner which shall assure earliest receipt. Any protest received in the procurement agency after the time limits prescribed in this regulation may not be considered. (Underscoring added.)

This Board repeatedly has held that the timeliness requirements of the foregoing regulation are substantive in nature and must be strictly construed since the rights and interests of so many interested parties are at stake. See Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at p. 5; International Business Machines, MSBCA 1071 (August 18, 1982) at p. 5; Rolm/Mid-Atlantic, MSBCA 1094 (January 21, 1983) at p.5; Pyramid Cleaning, Maintenance and Supply, Inc., MSBCA 1099 (March 7, 1983) at p. 4.

The grounds for protest raised by Appellant (Finding of Fact No. 10) either were apparent before bid opening, apparent at bid opening or were discoverable within the required protest time period after being notified of the award. It was abundantly clear to Appellant prior to the bid opening that the specification created what it thought were certain improprieties that needed to be brought to the attention of the University. It's letter of June 23, 1982 to Dr. Filmor Bender (Finding of Fact no. 4) discussed possible infringement of its patents if someone other than Appellant provided the equipment described in the specification. Additionally, several of the other

alleged grounds of protest should have been apparent to Appellant before the bid opening. A reading of the specification should have revealed that it was based on a modified Crepaco infusion system which itself may have been based on certain confidential information provided by the University. It was also apparent that Addendum No. 3 made it impossible for Appellant to offer the University its existing equipment located at the University dairy at a substantial savings to the University. COMAR 21.10.02.03A required that these alleged improprieties be raised with the University prior to bid opening. By waiting until July 22, 1982 to formally raise them with the procurement officer Appellant waived its right to protest. See Ronald Campbell Company, Comp. Gen. B-196424, 79-2 CPD ¶ 292 (October 24, 1979); Delmarva Drilling Company, MSBCA 1096 (January 26, 1983) at p. 4.

Grounds of protest that were apparent at the bid opening include those which concern the absence of required documents and responsibility questions raised by Crepaco allegedly offering its system below its cost. COMAR 21.10.02.03 B required that these alleged improprieties be raised not later than 7 days after the basis for protest was known. Again by waiting until July 22, 1982 to formally raise these with the University, the Appellant was untimely and its protest did not have to be considered by the procurement officer.

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.

Appellant further maintains that its protest was timely on July 27, 1982 since it was filed within 7 days of when it learned that it had a firm basis for protesting. However, the fact that Appellant's president was out of the City until July 20 does not toll the start of the protest period. Appellant's failure to open its president's mail was a matter of business judgment which does not relieve its obligation to file a protest in a timely manner. See Aunyx Manufacturing Corporation -Reconsideration, B 208002.2, August 17, 1982, 82-2 CPD ¶ 138.

For the above reasons we conclude that Appellant was not timely in filing its protest. The University's Motion To Dismiss is granted.

