

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DP SERVICE BUREAU, )  
INC. )  
 ) Docket No. MSBCA 1297  
Under DET RFP-DET/IP86502 )

October 10, 1986

Bid Protest - Timeliness - A letter dated on the seventh day after the basis for a protest is known but postmarked on the eighth day and received at the agency sometime thereafter is not a timely filed bid protest and may not be considered by the procurement officer pursuant to COMAR 21.10.02.03.

Bid Protest - Waiver of Procedural Regulations - A procurement officer may insist upon strict compliance with an agency's procedural regulations for filing a bid protest. However, they may be waived, in the absence of prejudice, where the ends of justice require it. Thus, an oral notice of bid protest may be timely where a party relies on its statements and actions to convey the protest and is able to show a reaction to those statements and actions by the procurement officer which indicates his understanding that a protest has been made.

Bid Protest - Waiver of Procedural Regulations - There was no waiver of the agency's procedural bid protest regulations where Appellant's filing of an appeal with this Board was inconsistent with its position that it had orally protested and there was neither a pattern of action between Appellant and the procurement officer to reflect a waiver nor the issuance of the necessary final written decision by him.

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APPEARANCE FOR RESPONDENT: Alexander Wright, Jr., Esq.  
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MEMORANDUM OPINION ON DET'S MOTION TO DISMISS

This is an appeal of actions taken by the Department of Employment and Training (DET), in its procurement of services for production of microfiche. DET has requested the appeal be dismissed since Appellant has neither filed an appropriate protest with DET nor has the procurement officer issued a final decision. This opinion is based on the written record and a telephone conference held to discuss DET's Motion To Dismiss.

### Findings of Fact

1. DET, Information Processing Division issued a request for proposals (RFP), DET/IP86502, for microfiche services on May 9, 1986. Proposals were due June 9, 1986.

2. Timely proposals were received from Midcom, Inc., Anacomp, Inc. and Appellant. After they were opened they were distributed to an evaluation committee for review which issued its recommendation of award to Midcom, Inc. on June 19, 1986.

3. Appellant was informed on July 1, 1986 of the award to Midcom, Inc. Appellant requested and was given a debriefing on July 10, 1986 where principals of Appellant met with Mr. Fred Hamilton, Deputy Director, Information Processing Division and others of his staff. Here, Appellant's representatives learned why it had not been recommended for contract award. This meeting formed the basis of this appeal.

4. Appellant filed an appeal of DET's proposed award with this Board by letter dated Thursday, July 17, 1986. The envelope bears a postmark of Friday, July 18, 1986 and was received and stamped in at the Board on Monday, July 21, 1986. The appeal letter indicates that a copy was sent to "Frederick A. Hamilton, DET," but there is no indication in the record when it was received at DET.

5. DET has filed a Motion To Dismiss alleging that Appellant has never properly protested the award of the contract pursuant to COMAR 21.10.02.02 and that the procurement officer has never rendered a final decision pursuant to COMAR 21.10.02.08.

6. No hearing having been requested, a telephone conference was held on September 11, 1986 to hear arguments on the motion from both parties.

### Decision

DET's Motion To Dismiss alleges that Appellant has neither filed an appropriate bid protest nor has the procurement officer issued a final decision. In essence, DET argues that this Board does not have jurisdiction to hear this appeal. The Appellant maintains, on the other hand, that it satisfied the formal requirements of filing a protest with DET by sending a copy of its July 17, 1986 letter addressed to this Board to Mr. Hamilton at DET. Alternatively, Appellant argues that it properly protested the award of the contract by its statements and actions at the July 10, 1986 debriefing meeting.

This Board has previously discussed how the Legislature created a two-tiered administrative disputes procedure which affords a party the opportunity to appeal a procurement officer's adverse decision to this Board. Jorge Company, Inc., MSBCA 1047 (July 7, 1982), 1 MSBCA ¶20. Likewise, we have discussed how this Board's jurisdiction is specifically conferred upon it by the Legislature. The Driggs Corporation, MSBCA 1262 (January 17, 1986), 2 MSBCA ¶121, at 4. This two-tiered procedure and the Board's jurisdiction are currently set forth in the State Finance and Procurement Article, Annotated Code of Maryland as follows:

(d) Review of procurement officer's decision.—The decision of the procurement officer to resolve or not to resolve a dispute shall be reviewed by the agency head unless otherwise provided by regulation. If the agency is part of one of the principal departments or an equivalent unit of government, the decision shall be reviewed by the Secretary or his equivalent unless delegated to the agency head by regulation. The reviewing authority may approve or disapprove the procurement officer's decision. In disapproving a decision not to resolve the dispute, the reviewing authority may order the procurement officer to effect a resolution. The decision of the reviewing authority is deemed final action by the agency, department, or its equivalent, as the case may be. (§17-201(d)).

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(1) The Appeals Board shall have jurisdiction to hear and decide all appeals arising under the provisions of § 17-201(d) of this article. (§ 17-202(c)).

Thus, this Board's jurisdiction in all cases arises only after there has been a final decision by the agency procurement officer, which has been reviewed by the agency head. Additionally, the statutory scheme requires that the procurement officer's final decision be in writing. § 17-201(b), Md. Ann. Code, supra.

For the Appellant to prevail on this motion it must be able to establish that it properly filed a protest with the agency and that the procurement officer issued his final decision which was appropriately appealed to this Board. COMAR 21.10.02.02 addresses the filing of a protest with a procuring agency as follows:

"A. An interested party may protest to the respective procurement officer representing the State agency against the award or the proposed award of a contract for supplies, services, maintenance, or construction.

B. The protest shall be in writing and addressed to the respective procurement officer representing the State Agency." (Underscoring added.)

Of further import is COMAR 21.10.02.03 which requires that:

"A. A protest 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 §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.)

There is no assertion that Appellant filed a direct written protest addressed to the procurement officer within the seven day time period specified in COMAR 21.10.02.03B above. Appellant does assert that by sending a copy of the July 17, 1986 letter addressed to the Board of Contract Appeals to Mr. Hamilton at DET, it satisfied the above regulations. However, even if we were to hold that Appellant met the requirement for a written protest filed with the procurement officer, COMAR 21.10.02.02B., it is apparent from the record that Appellant's protest was not filed timely. While the letter is dated July 17, 1986, the envelope received at the Board is postmarked July 18, 1986 and was not in fact received at the Board until July 21, 1986. (Finding of Fact No. 5.) We will assume, having not been provided evidence to the contrary, that the copy of the letter to DET bore the same postmark and was received some time after that date. There is no evidence that the copy was hand delivered to DET on July 17th, the seventh day after the basis for the protest was known. We must conclude that the copy of the letter was not filed timely and may not be considered by the procurement officer, since we have consistently ruled the timeliness requirements of COMAR are substantive in nature and must be strictly construed. General Elevator Company, Inc., MSBCA 1253 (August 30, 1985), 1 MSBCA ¶111; David A. Bramble, Inc., MSBCA 1240 (July 9, 1985), 1 MSBCA ¶103; Dryden Oil Company, MSBCA 1150 (July 20, 1983), 1 MSBCA ¶55; Rolm/Mid-Atlantic, MSBCA 1094 (January 21, 1983), 1 MSBCA ¶35; Kennedy Temporaries, MSBCA 1061 (July 20, 1982), 1 MSBCA ¶21, rev'd on other grounds, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984).

Appellant's alternative argument relies on our opinion in Kennedy Temporaries, supra, at 5 where we held that an agency's procedural regulations may be waived, in the absence of prejudice, where the ends of justice require it. We distinguished, in Kennedy, between substantive requirements, such as timeliness of filing a protest and procedural requirements, such as the protest being written. The former as noted above must be strictly enforced while the latter may be relaxed where neither the rights of the State nor any interested party would be prejudiced. In Kennedy we found that an oral notice of protest was timely and properly made and that the State agency had waived compliance with its procedural requirements under the facts of that case. Appellant maintains that its actions and statements at the July 10, 1986 debriefing meeting with Mr. Hamilton also established an oral communication of its bid protest and that DET waived compliance with the writing requirement of COMAR 21.10.02.02B.

We disagree with Appellant's conclusion with regard to its actions and those of the procurement officer in this appeal. In Kennedy the Appellant was able to establish that the procurement officer, after orally learning of Appellant's grounds for protest, immediately acted to resolve the dispute; specifically kept Appellant apprised of his investigation and ultimate conclusion; and generally communicated with the Appellant as if a written protest had been filed. That certainly is not the case in the instant appeal.

While the record does not reflect what statements were made or actions taken by Appellant at the July 10, 1986 meeting, it also does not reflect that the procurement officer reacted in any way to indicate that he thought a bid protest had been orally made by Appellant. The record only reflects that a meeting was held on July 10th and then an appeal subsequently taken to this Board. Appellant's action of filing the appeal with this Board is inconsistent with its position that it had orally protested on July 10th, since there is neither a pattern of actions between the Appellant and the procurement officer to reflect a waiver of the procedural requirements by the procurement officer nor the issuance of the necessary final written decision by him.

If the Appellant wishes to rely on its July 10th statements and actions, it must also show a reaction to those statements and actions by the procurement officer to indicate his understanding that a protest had been made by Appellant. As we said in Kennedy at p. 7,

"[a]lthough we agree that a procurement officer may insist upon strict compliance with the requirements for filing a bid protest, we conclude that the procurement officer, by his actions in this case, effectively waived the formal requirements of COMAR 21.10.02.02B and considered the substantive grounds of Appellant's protest." (Underscoring added).

In the instant case we find nothing in the record to indicate that the procurement officer waived insistence upon strict compliance with the procedural requirements of a bid protest. We believe that Appellant's July 17th letter to the Board was an express objection of the evaluation committee's actions. However, as a formal protest of DET's procurement actions, it was improperly and untimely filed.

Where there has been no showing that a final written decision was issued by the procurement officer, we would normally dismiss the appeal without prejudice. However, as discussed above, Appellant has not filed an appropriate protest and the time period for filing such a protest has expired. Therefore, we will grant DET's Motion To Dismiss with prejudice.

