

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

Appeal of DAVID A. BRAMBLE, INC.)
) Docket No. MSBCA 1240
Under State Highway Administration)
Contract No. Q-529-501-227;)
FAP No. SR-1302(4))

July 9, 1985

Bid Protest - Timeliness - A written protest received more than seven (7) days after a disappointed bidder knows of a ground for protest apparent at bid opening is untimely pursuant to COMAR 21.10.02.03 B.

APPEARANCE FOR APPELLANT: Ernest S. Cookerly, Esq.
 Chestertown, MD

APPEARANCE FOR RESPONDENT: Stephen M. LeGendre
 Assistant Attorney General
 Baltimore, MD

APPEARANCES FOR INTERESTED PARTY: John A. Wolf, Esq.
 James E. Edwards, Jr., Esq.
 Ober, Kaler, Grimes &
 Shriver
 Baltimore, MD

MEMORANDUM OPINION AND ORDER
BY MR. KETCHEN ON RESPONDENT'S MOTION TO DISMISS¹

This timely appeal is taken from a Maryland State Highway Administration (SHA) procurement officer's decision denying Appellant's protest of the proposed award of the captioned contract to the low bidder, James A. Julian, Inc. (Julian). Appellant maintains that at the time of opening of the bids, Julian's low bid was nonresponsive as its accompanying bid bond was

¹The Board's decision was issued orally on June 24, 1985, following the hearing on the merits of the appeal. This memorandum opinion and order reflects the Board's decision stated on the record and is issued pursuant to the notice requirements of the Maryland Administrative Procedure Act, Md. Ann. Code, State Government Article §10-214. See generally: *Nuger v. State Ins. Comm'r*, 231 Md. 543, 191 A.2d 222 (1963).

defective. Julian, however, contends that Appellant's bid protest should be dismissed as untimely. Julian further contends that its bid was accompanied by a valid bid bond although Mr. Richard J. Flynn who executed the bid bond was not listed on the power-of-attorney accompanying the bid bond as an attorney-in-fact having the authority to execute bid bonds on behalf of the surety. SHA moved to dismiss the instant appeal contending that the protest was untimely.

Findings of Fact

1. SHA issued an invitation for bids (IFB) for Contract No. Q-529-501-277; FAP No. SR-1302(4) for rehabilitation of Maryland 309 from Maryland 303 to approximately one mile north of Maryland 481, a distance of approximately three miles.

2. Bids were received and opened on March 19, 1985 with the following results:

James A. Julian, Inc.	\$1,287,914.00
Appellant	1,351,158.95
I. A. Construction Corp.	1,414,163.00

3. At bid opening, the low bid of Julian was announced as being irregular. The basis for the irregularity was that the name of Richard J. Flynn, who signed the bid bond as an attorney-in-fact, did not appear on the accompanying power-of-attorney provided by the surety, The Aetna Casualty and Surety Company (Aetna), as having authority to execute bid bonds for Aetna. However, Julian's bid bond was sealed with a live seal.

4. The parties stipulate that a representative of Appellant was present at the bid opening on March 19, 1985 when SHA announced the irregularity that the power of attorney accompanying Appellant's bid bond did not bear the name of Richard J. Flynn as an attorney-in-fact for Aetna. (Tr. 8, 12-13).

5. On March 20, 1985, Aetna submitted to SHA, a power-of-attorney dated January 4, 1985, which authorized the signature of Richard J. Flynn as an attorney-in-fact on bid bonds.

6. SHA received Appellant's bid protest on March 27, 1985, eight days after the bid opening. Appellant contended that Julian's bid was nonresponsive because the bid bond was not signed by an individual authorized by Aetna.

7. By letter dated May 2, 1985, Appellant's bid protest was denied by SHA's procurement officer.

8. Appellant filed a timely appeal with this Board on May 17, 1985.

9. At the hearing on the appeal on June 24, 1985, SHA moved to dismiss the appeal on the ground that the protest was untimely as it was filed eight days after notice of the basis for the protest.

Opinion

COMAR 21.10.02.03 provides, in pertinent part, that:

* * *

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.

The parties stipulated that a representative of Appellant was in attendance at bid opening when the specific irregularity of Julian's low bid was announced. Appellant is thus charged with having actual knowledge, or in the language of COMAR, Appellant "knew" of the irregularity in the low bid on March 19, 1985. Despite the fact that Appellant knew of the irregularity and thus the basis of its protest on March 19, 1985, Appellant did not file a bid protest until March 27, 1985, more than seven days later.

Appellant argued that the seven day limit had not yet expired when his protest was filed as a weekend constituted two of the days between the time when he knew of the basis for his protest and when the protest was filed. However, COMAR 21.01.02.25 states that a day "means calendar day unless otherwise designated," and no where in the regulations concerning the filing time for a bid protest is it designated that weekends should not be counted. Thus, Appellant may not extend the filing deadline past March 26, 1985.

This Board repeatedly has held that the timeliness requirements of COMAR are substantive in nature and must be strictly construed since the rights and interests of so many parties are at stake. International Business Machines, MSBCA 1071 (August 18, 1982) at 5; Rolm/Mid-Atlantic, MSBCA 1094 (January 21, 1983) at 5; Pyramid Cleaning, Maintenance and Supply, Inc., MSBCA 1099 (March 7, 1983) at 4. Compare Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at 5, rev'd on other grounds, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984). The grounds for protest raised by Appellant were made apparent at bid opening. By waiting more than seven days after that date to file a written protest, Appellant waived its right to protest. See: Pyramid Cleaning, Maintenance and Supply, Inc., supra at 5; Dasi Industries, Inc., MSBCA 1112 (May 5, 1983) at 8.

For the above reasons we conclude that Appellant was not timely in filing its protest. The motion to dismiss is granted.

