

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DELMARVA DRILLING)	
COMPANY)	
)	Docket No. MSBCA 1096
Under Salisbury State College)	
Project No. SSC-20-82 - Drilling)	
of 12" Irrigation Well & Instal-)	
lation of 500 G.P.M. Pump.)	

January 26, 1983

Bid Protest - Timeliness - A bid protest filed after bid opening and concerning the time period prescribed in the IFB for submitting a bid was considered untimely pursuant to COMAR 21.10.02.03A and was not entitled to substantive review by the Board.

Interested Party - A contractor who did not submit a bid pursuant to an IFB was not aggrieved by the State's decision to award a contract and therefore was not an interested party for the purpose of bringing an appeal.

Contract Award - Late Bid - The lateness or disappearance of a bid is not excused in the absence of a showing that it was due to improper handling by State personnel.

APPEARANCE FOR THE APPELLANT: Kevin Burdette
Delmarva Drilling Co., Inc.
Bridgeville, DE

APPEARANCE FOR THE RESPONDENT: Christine Steiner
Assistant Attorney General
Baltimore, MD

OPINION BY MR. LEVY

This appeal is from a Salisbury State College (College) procurement officer's final determination denying Appellant's request that the captioned contract be rebid rather than awarded to one of its competitors. Appellant alleges that bidders were given insufficient time for preparation of bids between the issuance of an addendum and bid opening and that the receipt of only two bids necessitated a resolicitation. The College contends that: (1) Appellant should not be allowed to maintain this protest because it is not an interested party, and (2) the grounds for protest are without merit. Neither party requested a hearing and our decision therefore is based on the written record furnished pursuant to the Board's regulations.

Findings of Fact

1. On April 25, 1982, the College advertised for bids "for drilling of a 12 inch irrigation well and supplying of pumping equipment to produce 500 g.p.m. of water flow."

2. Bids were to be opened publicly on May 13, 1982. Appellant and two others submitted timely bids. Prior to these bids being opened, however, one of the bidders announced at the bid opening that he did not think his bid was responsive because it did not conform to the portion of the specification requiring use of "reverse circulation rotary process of drilling." Apparently based on that statement, the procurement officer advised that the bids would not be opened and that the project would be rebid since there was a policy requiring more than two responsive bids to make an award.

3. A new specification was mailed on May 19, 1982. On May 27, 1982 an addendum was issued which permitted the drilling method to be at the contractor's option. This addendum also rescheduled the bid opening from May 28, 1982 to June 3, 1982.

4. Under the second solicitation, only two timely bids were received. Although Appellant alleges that it mailed a bid on June 1, 1982, the bid never arrived at the College.

5. Appellant filed a bid protest on June 7, 1982, alleging that the addendum was not received ten days prior to the bid opening, and that the receipt of only two bids precluded an award. The requirement that an addendum be received ten days prior to bid was said to emanate from "a policy enforced by the Department of General Services in their General Conditions for the last several years."

6. The procurement officer denied Appellant's protest in a final decision issued on June 15, 1982. A timely appeal was filed with this Board on June 24, 1982.

Decision

Appellant initially contends that the period between the receipt of the addendum and bid opening was insufficient and thus did not permit an adequate opportunity to prepare a bid. The College maintains that Appellant is ineligible to protest this matter since it is not an interested party.

COMAR 21.10.02.02A specifically provides that:

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. (Under-scoring added.)

An interested party is defined at COMAR 21.10.02.01A as ". . . an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." The issue, therefore, is whether Appellant may have been aggrieved by an unreasonably short period for bid preparation.

It is clear to this Board that the failure to provide a reasonable time to allow prospective bidders to respond to a solicitation addendum can affect the competitive process. Compare COMAR 21.05.02.08C. Where an insufficient time period is provided for the preparation of bids, a protest is the only means which a prospective bidder has of preserving its right to compete equally. We thus conclude that Appellant was an interested party and had a right to protest what it perceived to be an unreasonable time constraint on the filing of bids.

However, while Appellant had standing to file a protest concerning the time period provided for submitting a bid, its rights were limited by the following time restriction:

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.

COMAR 21.10.02.03A. Since this ground for protest involves a matter which was apparent in the solicitation prior to bid, Appellant by waiting until after bid opening, waived its right to raise it.

Turning to the second ground for protest, Appellant contends that the receipt of only two bids precluded the award of a contract and mandated resolicitation. The College again maintains that Appellant is not an interested party and has no standing to file a protest. The issue raised, therefore, concerns whether Appellant was aggrieved by the College's decision to award a contract under these facts. We conclude that Appellant was not aggrieved and, thus, was not an interested party.

"The concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids." 40 Comp. Gen. 321, at 324 (1960). It does not confer upon bidders any right to insist upon the enforcement of provisions contained in an invitation, stated policy or other regulations, the waiver of which would not result in an unfair competitive advantage to one bidder over another. Such provisions are solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders to which the rules and principles applicable to formal advertising are directed. In the absence, therefore, of a showing that a bidder somehow was deprived competitively in the instant procurement, it would have no standing to complain of the State's decision to award a contract to someone else.

Here Appellant did not submit a bid on the captioned procurement. The decision of the College to award a contract after the receipt of invited bids thus did not affect Appellant's right to compete equally and it was not, therefore, an interested party.

Finally, Appellant contends that it should not be penalized because its bid allegedly was lost in the U.S. mail. However, as this Board previously has found, it is the responsibility of a vendor to get its bid to the appointed place in a timely manner. In the absence of a showing that the lateness of a bid was due to improper handling by State personnel, the lateness or disappearance of a bid is not excused. Pioneer Oil Company, Inc., MSBCA 1060, May 4, 1982.

For the foregoing reasons, therefore, the appeal is denied.