

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DRYDEN OIL COMPANY )  
 )  
Under DGS Request For Quotation ) Docket No. MSBCA 1150  
 )  
No. P24758 )

July 20, 1983

Timeliness - A bidder who failed to file a protest within seven days of when it knew the basis for protest was deemed to have waived its right to raise a legal objection to the award of a State contract.

APPEARANCES FOR APPELLANT: Mr. David Perry  
Baltimore, MD

APPEARANCES FOR RESPONDENT: Allan B. Blumberg  
Assistant Attorney General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Mr. Fred S. Hudson  
(Penn Dower Petroleum Co) Upper Marlboro, MD

OPINION BY CHAIRMAN BAKER

This appeal arises out of a competitive sealed bid procurement for 20,000 gallons of Dexron II automatic transmission fluid. The procurement was conducted by the Maryland Department of General Services (DGS) on behalf of the Mass Transit Administration (MTA), the using agency. Although the low bid under this procurement was submitted by Penn Dower Petroleum Company, Inc., Appellant contends that said bid was non-responsive and that it should have been awarded a contract as second low bidder. DGS denies that the low bid was non-responsive and further contends that the captioned appeal should be dismissed on timeliness grounds.

Findings of Fact

1. On or about February 16, 1983 a request for quotations (RFQ) was issued soliciting bids on 20,000 gallons of automatic transmission fluid to be delivered in bulk form to four MTA bus garages.
2. Bids were due on April 4, 1983 at which time 11 bids were received and publicly opened. The low two bids are the only ones relevant to this dispute and appear as follows:

Bidder

Price Per  
Gallon

Penn Dower Petroleum Company	\$ 2.189
Appellant	2.199

3. The RFQ required each bidder to ". . . supply the original General Motors Corporation qualification number for their product under classification of Dexron II." Penn Dower omitted this qualification number from its bid submittal.

4. On April 5, 1983, Appellant's Mr. E. L. Geary visited DGS and received permission to review his competitor's bids on the captioned procurement. At this time, Mr. Geary noticed that a General Motors Corporation qualification number had not been submitted by Penn Dower.

5. Contract award was made to Penn Dower on April 8, 1983.

6. By letter dated April 15, 1983, Appellant protested the award of a contract to Penn Dower. This letter was received by DGS on Monday, April 18, 1983.

7. Penn Dower ultimately furnished the qualification number for its product by letter dated May 6, 1983.

8. By final decision dated May 26, 1983, the DGS procurement officer rejected Appellant's protest on the grounds that it was untimely and that the omission of the qualification number was waivable as a minor informality pursuant to COMAR 21.06.02.03.

9. A timely appeal was filed by Appellant on June 1, 1983.

Decision

COMAR 21.10.02.03 addresses the time for filing protests at the procurement officer's level as follows:

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 SA, 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.

Here the basis for protest became known to Appellant on April 5, 1983, one day after bid opening. A protest, however, was not filed until 13 days later. Accordingly, the protest was untimely.

This Board in reviewing the foregoing regulation consistently has ruled that its provisions are mandatory. Kennedy Temporaries, MSBCA 1061, July 20, 1982 at p. 5; International Business Machines Corporation, MSBCA 1071, August 18, 1982; Eagle International, Inc., MSBCA 1121, March 2, 1983; Pyramid Cleaning Maintenance & Supply, Inc., MSBCA 1106, April 8, 1983; Dasi Industries, Inc., MSBCA 1112, May 5, 1983. In so doing, we have recognized the fine balance between the rights of the protester, the interested party and the using agency and have concluded that unless a legal objection to the award of a State contract is raised promptly, within the time period set forth in the regulations, the State and the firm to whom it awards or intends to award a contract will be unduly prejudiced. For this reason, a party who fails to file a protest within the time provided under COMAR 21.10.02.03 is deemed to have waived its right to thereafter raise a legal objection to the award of a State contract.

For the foregoing reasons, therefore, we dismiss the captioned appeal without consideration of the substantive matters raised.

