

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EG&G ASTROPHYSICS

Under DGS RFQ No. P-58626

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Docket No. MSBCA 1468

November 14, 1989

Bid Protest - Timeliness - The requirement under COMAR 21.10.02.03B that a protest "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier" is substantive in nature and must be strictly construed.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Michael P. Kenny
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This is an appeal from a Department of General Services (DGS) procurement officer's final decision denying Appellant's protest on the basis that it was untimely. Appellant alleges that the resolicitation of the original purchase order gave the second-low bidder, Security Defense Systems (SDS) an unfair advantage.

Findings of Fact

1. In February 1989, DGS issued Request for Quotation (RFQ) No. 57128 for the purchase of an X-Ray scanning machine to be used at Baltimore-Washington International Airport. The RFQ specified a "Heimann X-Ray Scanning System, Hi-Scan Model 9080TS or equivalent." Bidders were to explain how equivalent products differed from the Heimann model on a special Detailed Exceptions form which was included in the bid documents.
2. Three bids were submitted, and at bid opening on March 27, 1989, Appellant's bid of \$32,495 was recorded as the low bid, and it was subsequently awarded the contract. SDS was the second-low bidder with a bid of \$39,500.
3. Appellant bid the Linescan System 7 scanning machine and submitted the required exceptions form, noting on it that the detector sensor had a phosphor fluroscope strip which "meets or exceeds imaging requirements of the solicitation (demonstrable)." SDS bid the specified Heimann Hi-Scan Model 9080TS.
4. On April 6, 1989, after the contract had been awarded to Appellant as low bidder, SDS filed a protest of the award alleging that Appellant's Linescan machine did not comply with the requirements of the specifications. SDS noted that the specifications called for an L-shaped folded diode array, utilizing cesium iodide scintillation

crystals, and ruling out phosphor fluroscopic strip amplification. SDS stated that only the Heimann model had such an array, which the procurement officer had been unaware of when he wrote the specifications.

5. On May 19, 1989, the procurement officer cancelled its purchase order with Appellant, and issued a second RFQ, RFQ No. 58626, which contained more generalized specifications, thus allowing machines other than the Heimann Hi-Scan Model 9080TS to be eligible for award.

6. Bids on the second solicitation were opened on June 26, 1989. Both Appellant and SDS submitted quotations on the same machines that they had previously bid. Appellant's price quote for the Linescan machine was \$29,450; it had reduced its price by \$3,045. SDS's price quote for the Heimann machine was \$28,975 as it had reduced its original bid by \$10,525. SDS was low-bidder and was awarded the contract on June 28, 1989.

7. In a letter dated July 7, 1989, but not received by the procurement officer until July 10, 1989, Appellant protested the award of the contract to SDS. In its letter or protest, Appellant states that "in the spirit of customer responsiveness, we decided to acquiesce in your changed specifications and rebid the Linescan unit." Appellant alleged that the rebidding process allowed SDS to obtain Appellant's pricing system and to develop a strategy to underbid Appellant.

8. In his final decision dated August 1, 1989, the procurement officer denied Appellant's protest on the grounds that it was untimely. The procurement officer cited COMAR 21.10.02.03B which states in part that "...protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."

9. Appellant filed a timely appeal with this Board on August 11, 1989. Appellant did not comment on the Agency Report, and neither party requested a hearing.

Decision

Appellant's protest of the award of the referenced contract to SDS stems from its concern over the alleged impropriety of the cancellation of the purchase order and the subsequent resolicitation. Appellant contends that this process allowed SDS to have a second try at bidding its machine which enabled it to devise a new bidding strategy, thus resulting in its being able to submit a lower priced bid than Appellant.

COMAR 21.10.02.03B provides in relevant part that "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." Appellant would have known of the grounds of its protest when it learned that the purchase order was to be cancelled and the matter rebid. Since Appellant

submitted a bid in response to the resolicitation, it was obviously aware of the resolicitation sometime prior to bid opening on June 26, 1989. Thus its protest on July 10, 1989 was untimely.

Appellant alternatively argues that the grounds for its protest were not definitely known until bid opening when it was revealed that SDS had submitted a lower bid. Assuming some merit to this alternative argument, its protest is still untimely.

Appellant's protest was received by the procurement officer on July 10, 1989. In its letter of appeal to this Board, Appellant stated that it did not know the basis for its protest until July 5, 1989 when it received the bid results in the mail.

We have held that the basis for a protest is known or should have been known at the time of bid opening where a review of the bid documents would have revealed the alleged deficiencies in the bid. See Grady & Grady, Inc., MSBCA 1455, MSBCA (1989); Four Seas and Seven Winds Travel, Inc., MSBCA 1372, 2 MSBCA 186 (1988). Therefore, Appellant is said to have constructive knowledge of the basis of its protest, and the filing deadline cannot be extended because Appellant did not avail itself of the opportunity to be present at the bid opening.

Thus under Appellant's alternative argument the deadline for filing this protest was July 3, 1989, seven days after bid opening, not seven days after July 5, 1989, when the bid results were received by Appellant. The requirement under COMAR 21.10.02.03B that a protest be filed "not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." is substantive in nature and must be strictly construed. Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MSBCA 154 (1987); Frank W. Hake, Inc., MSBCA 1323, 2 MSBCA 151 (1987).

For the foregoing reasons, therefore, Appellant's protest was properly denied as being untimely.

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