

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ENERGY MANAGEMENT)
SYSTEMS)
) Docket No. MSBCA 1769
Under DEED Solicitation No.)
DEED/OGS 06-16-93-003)

December 21, 1993

Bid Protest - Language Constituting - While no specific words of protest are required, the writing must reach a level of confrontation sufficient to put a reader on reasonable notice it is offered as a complaint.

APPEARANCE FOR APPELLANT: Joseph V. Truhe, Jr., Esq.
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APPEARANCE FOR RESPONDENT: Sheila McDonald Gill
Asst. Attorney General
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APPEARANCE FOR INTERESTED PARTIES: James E. Carbine, Esq.
American Solar Tinting, Inc. Weinberg and Green
Courtaulds Performance Films, Inc. Baltimore, MD 21201

OPINION BY MR. PRESS

Appellant appeals from a Department of Economic & Employment Development (DEED) Procurement Officer's final decision denying Appellant's protest on the grounds it was not timely filed under COMAR 21.10.02.03B.

Findings of Fact

1. On August 3, 1993, DEED issued solicitation DEED/OGS 06-16-93-003 to furnish and install all-season window film cover 17,464 square feet of glass at 1100 N. Eutaw Street. The glass is currently covered with window film 30 years of age and it has lost its energy conservation effectiveness.
2. DEED wants modern, energy-efficient glass film replacement and specified 3M P-19 Scotch tint plus All Season Window Film, equivalent or better.
3. The invitation for bids (IFB) required, among other things, that the "U" value of the film applied to 1/4" (6mm) clear glass shall be .70 nominal when measured in accordance with

test procedures for emissivity. These test procedures were specified as follows;

"1. Emissivity: The emissivity of the nonadhesive surface of the film shall be .29 nominal when measured using a Devices & Services Emissometer Model AE at or near room temperature. The manufacturer shall provide independent testing laboratory data of emissivity and calculated window 'U' Values for various outdoor temperatures based upon established calculation procedure defined by the 1985 ASHRAE Handbook of Fundamentals, Chapter 27, or Lawrence Berkeley Laboratory Window 3.1 Computer Program"

The IFB also required a warranty from the film manufacturer for a period of five years during which the film had to maintain solar reflective properties without cracking, crazing, delaminating, or peeling.

4. On September 2, 1993, bids were opened. DEED received two bids and both bidders were present at bid opening namely; Roxanne Wolf of Energy Management Systems (EMS) with a bid of \$49,900.00 (Appellant) and James K. Bradley, of American Solar Tinting, Inc. (AST) with a bid of \$43,622.00 (Interested Party).
5. Appellant offered the name brand 3M film P-19 and AST offered Llumar film E-1220 provided by Courtaulds Performance Films as an approved equal. It was apparent from bid opening AST had offered an equivalent product to the specified 3M film and the Appellant knew or should have known from September 2, 1993, its grounds of protest based upon any error by the unit in accepting E-1220 as an approved equal. The parties stipulated to this at the hearing and the Board agrees Appellant must have filed a protest within seven (7) calendar days of bid opening based on the facts presented in this bid protest appeal.
6. AST, in conformance with the IFB provided independent test results indicating a U value of .75 for E-1220. Since the

IFB required a U value¹ of .70 nominal and test results are subject to some variation, the Procurement Officer appropriately weighed the nominal affect of the .05 U value against other factors such as the 2 years additional warranty for the E-1220, scratch resistant quality of E-1220, price, and other performance criteria and found E-1220 an equivalent to the 3M P-19 brand specified in the IFB.

7. On September 7, 1993, DEED received a letter from EMS dated September 2, 1993, from Roxanne Wolf which stated,

"Dear Mr. Stilling:

There are times when a manufacturer's documentation differs from what their agents/dealers might suggest concerning energy savings characteristics. So that no confusion might arise, we are enclosing Llummar's (the manufacturer) literature on their "low e" window film. Due to the energy inefficiency of your single pane glass, in the specification you have requested an insulated window film with a U value of .70 (the lower the U value the greater the resistance). After reviewing Llummar's own performance data, their low e film E-1220 SR when applied to your glass type has only a U value of .89.

There are other differences which could be addressed, but based solely on Llummar's publication on their low e film it appears impossible that their product can approximate the performance characteristics so clearly defined in the specification.

If we may be of any service in this matter feel free to contact our office."

¹ASHRAE gives a "winter" U value calculation which assumes 0° F outside and 70° F inside with a 15 MPH wind factor. AIMCAL gives a "winter median" U value calculation which assumes 45° F outside and 68° F inside with a 15 MPH wind factor. The IFB did not express which of the U value set of assumptions one was to make since the U value is not defined to that level of specificity in the IFB. It is obvious that the U value determined fluctuates indirect relationship to the temperature and wind conditions one assumes. The indoor and outdoor temperature and wind speed factors used for the Lawrence Berkely Laboratory window 3.1 Computer Program were not offered into the record.

The Procurement Officer (Mr. Stilling) viewed this letter as an attempt to supplement the bid package, not as a protest. The same day the Procurement Officer received a telephone call from Roxanne Wolf inquiring if he had received the September 2, 1993 letter. The Procurement Officer informed Ms. Wolf he had the letter but that bids would be evaluated based on the bid packages only, not material offered post bid. No one mentioned that EMS was protesting the finding of E-1220 as an equivalent product. Several other DEED personnel reviewed the September 2, 1993, letter and all concluded it was an informational letter only, not a protest since a protest was not mentioned nor any relief for EMS as a disappointed second low bidder.

8. Subsequently DEED received more inquiries from EMS and finally on October 5, 1993 DEED received a letter from EMS "PROTEST OF: SOLICITATION:..." which clearly protested the award to AST based on an arbitrary finding by the Procurement Officer that E-1220 was a product equivalent to 3M P-19.²
9. The Procurement Officer in determining if the E-1220 film was equivalent reviewed the data provided in the IFB packages. In terms of the U value criteria, 3M P-19 was listed as U = .70 and E-1220 was tested as U = .75. Since the Procurement Officer was aware that these types of test have error margins and since the IFB required a U value of .70 nominal, he correctly determined that .70 nominal was not a strict definitive criteria but rather set a goal or range of U value. In determining that the E-1220 U value of .75 would be within the nominal range of .70 he considered the testing error and the .05 degree of difference and concluded that such difference was nominal when compared to the other qualities of E-1220 such as scratch resistance and extended warranty. The

² Appellant had raised several issues on appeal but stipulated that only this single issue described in the September 2, 1993, letter potentially survived the State's timeliness defense.

Procurement Officer using this data which was available to him and in consultation with others at DEED reasoned E-1220 was an equivalent.

10. The Procurement Officer upon receipt of the October 5, 1993 protest, further investigated Appellant's allegations and denied the protest on grounds of timeliness. The final decision of the Procurement Officer was timely appealed to this Board where a hearing on jurisdiction and the merits was held.

Decision

COMAR does not prescribe the use of any particular language that must be used to constitute a protest. A protest means a complaint relating to the solicitation or award of a procurement contract. COMAR 21.10.02.01B. (2). The protest shall be in writing and addressed to the procurement officer. COMAR 21.10.02.02B. COMAR 21.10.02.04 prescribes the form required for protests as;

"To expedite handling of protests, the envelope should be labeled "Protest". The written protest shall include as a minimum the following.

- A. The name and address of the protester;
- B. Appropriate identification of the procurement, and, if a contract has been awarded, its number if known;
- C. A statement of reasons for the protest; and
- D. Supporting exhibits, evidence, or documents to substantiate the reasons for the protest unless not available within the filing time, in which case the expected availability date shall be indicated."

The Procurement Officer and two other DEED personnel familiar with procurements all testified that the September 2, 1993 letter from Appellant was not a protest. The letter contained no language of protest, nor did it request relief from an error. DEED personnel uniformly treated the letter as informational or an attempt to provide information after bid opening since the letter was written in language which would not, given a reasonable reading, rise to the level of a complaint. We agree. While no specific words of protest are required, the writing must reach a

level of confrontation sufficient to put a reader on reasonable notice it is offered as a complaint. Procurement Officers receive many letters and other written material in regards to solicitations. The vast majority of the letters constitute "puffing", or provide information, comments, criticisms and suggestions. The Procurement Officer must, and does, have the authority to decide how to reasonably manage this material since otherwise every letter would be potentially a protest and the procurement process would cease. It is not unduly burdensome on a protestor to state with clarity its intent, since the rights of many parties are at stake including the taxpayer who have an interest in the expeditious fulfilling of State needs. The protestor should not be timid in his protest but rather make formal accusations or state their displeasure in a manner calculated to clearly reflect an intent that the award should be set aside or altered to correct the error, impropriety or other basis of protest.

A protest must be filed not later than 7 calendar days after the basis for protest is known or should have been known, whichever is earlier. COMAR 21.10.02.03B. Appellant knew its grounds for protest on September 2, 1993. No protest was filed within seven days since this Board has found the letter of Appellant, dated September 2, 1993, received by DEED September 7, 1993 was informational only and not a protest. Consequently, the Procurement Officer was precluded from considering the protest since it was late. COMAR 21.10.02.03C.

At first glance the result seems draconian. However, a bid protest effectively stops the procurement process and is not an action taken lightly. The need of State units to function is at risk. There is an important State interest to have the ability to procure its needs in a fair, competitive and effective manner. The Procurement Officer should not have to guess or speculate if a letter is a protest or not. Requiring the protestor to express its protest in language which places a reasonable reader on notice a complaint is intended is not unduly burdensome. Consequently, a failure to file the protest within the time limits required

operates as a waiver of the right to protest. Communications Management Systems Inc., MSBCA 1625, 3 MSBCA 296 (1992). Timeliness requirements are substantive in nature and must be strictly construed. Transitional Technology, Inc., MSBCA 1527, 3 MSBCA 256 (1990). Accordingly, the appeal must be dismissed.

However, if the Board had found that a timely protest was filed, the appeal would have been denied on the merits.

A procurement officer must determine the responsive nature of an IFB from the materials presented applying his knowledge, judgment and expertise. Here, the question arose as to E-1220 being an approved equal. The test for this is well known as stated by the Board from a decision of the Comptroller General of the United States.

"[T]he ... overriding consideration in determining equality or similarity of another commercial product to a name brand commercial product is whether its performance capabilities can be reasonably equated to the brand name referenced. In other words, whether the equal product can do the same job in a like manner and with the desired results should be the determinative criteria rather than whether certain features of design of the brand name are also present in the 'equal' product. 45 Comp. Gen. 462 (1966).

Automated Telecommunications, Inc., MSBCA No. 1439, 3 MSBCA ¶219 at 11 (1989))."

Obviously, no two brand name products are identical and identity of product is not required. The determination of an approved equal by the Procurement Officer was based upon his knowledge, judgment and the data required by the IFB. At the hearing it became clear that even experts in solar film window design would accept variations for the U value within nominal tolerances. The machine which measured emissivity of the product has a known variation of .02 to .04. Even the method for rounding the numbers obtained demonstrated an affect on the results to a

degree of .01.³ Clearly, a reasonable case can be made that a variation in the U value from .70 to .75, (i.e. a difference of .05) is acceptable as nominal even when you have the delicate, precision testing machines with which to measure. The determination by the Procurement Officer that a .05 variance in U value from .70 is nominal has support in the record. This Board will not set aside the Procurement Officer's technical determination unless Appellant demonstrates that the determination was arbitrary, capricious or unreasonable. Automated Telecommunications, Inc. Id. Appellant has failed to meet its burden of proof that the Procurement Officer's determination was inappropriate.

Wherefore, it is this 21st day of December, 1993 Ordered that the appeal be dismissed.

Dated: 12/21/93

Neal E. Malone

Neal E. Malone
Board Member

I concur:

Robert B. Harrison III

Robert B. Harrison III
Chairman

Sheldon H. Press

Sheldon H. Press
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

³ Contrasting the winter U value against the winter median U value can have an affect of .08 for some products. Interested Party Exhibit #1.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:


- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1769, appeal of Energy Management Systems under DEED Solicitation No. DEED/OGS 06-16-93-003

Dated: 12/21/93



Mary F. Priscilla
Recorder

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSION ON THE
STRUCTURE OF THE
ATOMIC NUCLEUS
AND THE
PROPERTIES OF
THE ELEMENTS

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