

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of FMB LAUNDRY,)
INCORPORATED)
) Docket No. MSBCA 2136
Under UMBC Request for Bid)
No. BC20025B)
)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Dale Gallimore
Assistant Attorney General
Baltimore, MD

August 6, 1999

Bid Protest - Timeliness - A protest based on alleged improprieties in a solicitation that are apparent before bid opening is required to be filed before bid opening. This requirement is not met by enclosing the protest with the bid since the bid may not be opened until the time set for bid opening.

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest of the award of a contract resulting from the captioned Request for Bid (IFB), issued by the University of Maryland Baltimore County (UMBC). The IFB contemplated award of a contract to furnish, deliver and maintain for a term of three years a total of 145 clothes washing machines and clothes dryers in student residence halls.

The solicitation provides that certain appliances manufactured by Maytag are representative of the University's needs. However, the solicitation also provides that appliances furnished under the contract must comply with requirements of the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. (1991 Supp.) (ADA). The protester contends that the Maytag appliances in fact do not comply with the ADA. The Procurement Officer denied the protest on timeliness grounds.¹

Findings of Fact

1. The University issued its IFB on April 26, 1999 for a total of 145 washers and dryers to be installed and tested and in full operation by August 6, 1999.
2. The IFB, at Exhibit F, "Washer/Dryer Equipment Schedule," designated certain Maytag equipment as representative of its needs, as follows:

¹ The Procurement Officer also determined that the Maytag appliances are in compliance with the ADA.

Designation of Products

Designation of representative equipment is MAYTAG with characteristics indicated by manufacturers model number:

Washer: MAH14PDAAW - Computer trac horizontal axis washer with coin slot operation, *standard machine for physically challenged* [emphasis supplied].

Dryer: MLE15PDAYD - Computer trac stackable (2 Dryers) electric dryers with coin operation, front load, standard stackable.

3. Also relevant to the protest is ¶6.3 of the IFB, headed "Americans With Disabilities Act (ADA)", which requires that "all machines proposed for purposes of this solicitation must meet ADA guidelines." Similarly, a note contained in the specification following ¶6.3.3 states that "[l]aundry equipment designated for use by . . . physically challenged individuals must meet regulations set down by the American[s] [With] Disabilities Act guidelines."
4. An allegation that Maytag appliances do not comply with ADA guidelines because they are too high to be used by a person in a wheelchair was made to the Procurement Officer at the pre-bid conference on May 5, 1999, by one of the prospective bidders.² Another prospective bidder attending the conference who was a sales representative for Maytag, Fowler Laundry Equipment Company (Fowler), responded to the allegation during the conference by asserting that Maytag appliances do comply with the ADA and offering to furnish proof thereof. Appellant attended this conference.
5. As proof of the Maytag equipment's compliance with the ADA, Fowler sent to the Procurement Officer by facsimile transmission on May 6 a letter, dated May 5, 1999 from Maytag. The May 5 letter explained that the ADA did not require rigid adherence to specific height limits so long as the design provided adequate access (or "reach"), and stated affirmatively that the Maytag appliances were in compliance with the ADA. This May 5 letter from Maytag settled the issue of compliance of Maytag's appliances with the ADA to the satisfaction of the Procurement Officer. On or about May 6, 1999 Alliance Laundry Systems, LLC (Alliance), a wholesale distributor of appliances manufactured by Speed Queen (a competitor of Maytag), initiated a telephone call with the Procurement Office. During this conversation the Procurement Officer advised Alliance that the Maytag equipment was ADA compliant.
6. The Procurement Officer received a letter from Alliance, dated May 21, 1999 asserting that the Maytag appliances (set forth in the specifications) do not comply with the ADA. The Procurement Officer did not treat this letter as a protest and therefore did not issue a final decision thereon. Alliance also sent a copy of its letter of May 21, 1999 to Appellant.
7. The IFB originally provided that bids would be opened at 11:00 a.m. on May 18 1999, but this was extended by Addendum No. 1, issued on May 14, so that bids were due and opened at 11:00 a.m. on May 28. Automatic Coin Laundry Equipment Co. (Caleco) was the apparent successful bidder, offering the highest monthly commission. Caleco offered to furnish Maytag equipment. Appellant was the apparent third highest bidder,³ and offered to

² The record does not reflect the identity of this prospective bidder.

³ The second bidder, Equipment Marketers, also offered Maytag appliances. Thus, if Appellant's contentions in this appeal were to be sustained, Appellant would be in line for award.

furnish equipment manufactured by Speed Queen. Enclosed with Appellant's bid was a copy of the May 21 letter from Alliance asserting that Maytag appliances do not comply with the ADA.

8. The Procurement Officer received from Appellant a letter of protest, dated June 1, 1999. The protest letter, which the Board finds was received by the Procurement Officer on June 1, asserts that if the two lowest bidders (Caleco and Equipment Marketers) were offering to furnish Maytag equipment, award to either bidder would be improper since Maytag equipment does not meet the requirements of the ADA.
9. On June 2nd the Procurement Officer received a letter from Maytag, dated June 1, elaborating on the basis for its position that the specified Maytag equipment does comply with the ADA.
10. The Procurement Officer issued his final determination on June 8, 1999, denying the protest because it was not timely filed. This appeal, by letter dated June 11, 1999, followed.
11. No party requested a hearing and Appellant did not comment on the Agency Report. Accordingly, this opinion is issued on the written record with particular reliance upon factual assertions in the Agency Report.

Decision

This appeal must be dismissed because the protest to the Procurement Officer was untimely. COMAR 21.10.02.03A requires that a protest based upon alleged improprieties in a solicitation that are apparent before bid opening shall be filed with the Procurement Officer before bid opening. As this Board has previously noted, the requirement for the filing of a protest before the bid opening date must be strictly construed, since an untimely objection to a contract award necessarily prejudices the rights and interest of the low bidder, the contracting agency and perhaps other interested parties. See, e.g., Spear Window & Glass, Inc., MSBCA No. 1955, 5 MSBCA ¶399 (1996) and cases cited therein. The requirements of COMAR 21.10.02.03 are substantive in nature and may not be waived, and the failure of a bidder or offeror to meet those requirements deprives this Board of jurisdiction. ATI Systems and Federal Signal Corp., MSBCA Nos. 1911, 1913 and 1918, 5 MSBCA ¶387 (1995). Here, the solicitation expressly required that the appliances to be furnished under the contract comply with the ADA, and also specified Maytag appliances as representative of the agency's needs. The alleged impropriety is, thus, apparent on the face of the solicitation. Further, Appellant's attendance at the May 5 pre-bid conference, and the fact that Alliance sent Appellant a copy of its May 21, 1999 letter to the Procurement Officer, demonstrate that Appellant knew or should have known of the alleged inconsistency before bid opening. Appellant did not file its protest until June 1, after the bid opening date of May 28. The June 1 protest was thus late and pursuant to COMAR 21.10.02.03C may not be considered.

The May 21 letter from Alliance to the Procurement Officer asserting that the Maytag appliances do not comply with the applicable ADA standard, was sent by Alliance, not Appellant, and thus cannot form the basis for an appeal to this Board by Appellant.⁴ Second, even if Appellant's enclosure of the May 21 letter with its bid could be considered a protest by Appellant, it was untimely. COMAR 21.10.02.03A requires a protest of improprieties in a solicitation that are

⁴ In any case, the May 21 letter was never the subject of a final decision issued by the Procurement Officer. Alliance has not filed an appeal on grounds that its May 21st letter constitutes a pre-bid protest which the Procurement Officer must respond to.

apparent before bid opening to be filed before bid opening, and that did not happen here. A protest filed with a bid cannot properly be considered as filed before bid opening since the Procurement Officer under Maryland's procurement law is not authorized to open the bid until the time set for bid opening. COMAR 21.05.02.11.

Appellant's protest filed on June 1, 1999 is untimely and may not be considered. COMAR 21.10.02.03C. Accordingly, it is Ordered this 6th day of August, 1999 that the Appeal is dismissed with prejudice.

Dated: August 6, 1999

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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.

(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 2136, appeal of FMB Laundry, Inc. under UMBC Request for Bid No. BC20025B.

Dated:

Mary F. Priscilla
Recorder

