

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of FRANK W. HAKE, INC.)
 Under DGS Contract P.O. #15539) Docket No. MSBCA 1323

May 27, 1987

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:	Julian B. Stevens, Jr., Esq. Annapolis, MD
APPEARANCE FOR RESPONDENT:	John H. Thornton Assistant Attorney General Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the determination of the Department of General Services (DGS) procurement officer that its bid protest was not timely filed.

Findings of Fact

1. On June 23, 1986, the DGS Purchasing Bureau issued Request for Quotation (RFQ) No. 15539 for the purchase of a hovercraft for the Department of Natural Resources (DNR).

2. At bid opening on August 22, 1986, bids were received from Slingsby Aviation PLC (Slingsby), Appellant, and two other bidders.

3. On December 5, 1986, Appellant visited the Purchasing Bureau and reviewed the DGS file on this procurement. Among the documents in the file at that time was a letter dated November 19, 1986 from Herbert M. Sachs, Assistant Secretary for Administration, DNR, to Paul Harris, Chief of the Purchasing Bureau of DGS. This letter stated:

After careful review of the bids submitted on the above order, I have determined it in the best interest of the State of Maryland and Department of Natural Resources to proceed with the low bid.

Please award the purchase of the hovercraft to low bidder, "Slingsby Aviation" accordingly.

Thank you for your help on this order.

(Exhibit 5, Agency Report).

At the time of this visit, Appellant was advised by Robert Kleinhen, the DGS buyer in charge of the procurement, that DGS was then in the process of obtaining a performance bond from Slingsby and that award would be made to Slingsby when DGS received the bond.

4. By letter dated December 22, 1986, Appellant asked Mr. Kleinhen to send it copies of certain documents in the procurement file, including a copy of Mr. Sachs' letter of November 19, 1986. Mr. Kleinhen mailed the copies requested to Appellant on December 29, 1986. The copies were received by Appellant in early January 1987.

5. Testimony at the hearing of this appeal reflects that upon its review of the procurement file on December 5, 1986, Appellant formed the belief, based upon critical written comment contained in the file from DNR police personnel who had reviewed the bids, that the Slingsby bid was nonresponsive for alleged failure of its craft to meet certain of the RFQ specifications. (See Appellant's Exhibits 2-7; Tr. 34-45).

6. Award of the contract to Slingsby was approved by the Board of Public Works on February 2, 1987. Appellant protested the award to Slingsby on the grounds set forth above by letter dated February 13, 1987.

7. Appellant's protest was received by DGS on February 13, 1987 and denied on timeliness grounds by final decision of the procurement officer dated February 25, 1987.

8. Appellant noted this appeal with the Board on March 11, 1987.

Decision

We have consistently held that 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. DP Service Bureau, Inc., MSBCA 1297 (October 10, 1986); General Elevator Company, Inc., MSBCA 1253 (August 30, 1985), 2 MSBCA ¶111; David A. Bramble, Inc., MSBCA 1240 (July 9, 1985), 1 MSBCA ¶103; Dryden Oil Company, MSBCA 1150 (July 20, 1983), 1 MSBCA ¶55; Dasi Industries, Inc., MSBCA 1112 (May 5, 1983), 1 MSBCA ¶49; Rolm/Mid-Atlantic, MSBCA 1094 (January 21, 1983), 1 MSBCA ¶35; Kennedy Temporaries, MSBCA 1061 (July 20, 1982), 1 MSBCA ¶21, rev'd on other grounds, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984). Appellant had actual knowledge on December 5, 1986 that DGS intended to make an award to Slingsby based upon review of the procurement file containing Mr. Sachs' letter of November 19, 1986 officially requesting DGS to award a contract to Slingsby and advice at that time from Mr. Kleinhen that DGS intended to award to Slingsby. Also on December 5, 1986, Appellant had, as a result of its review of the procurement file, formed the belief that the Slingsby bid was nonresponsive. Thus, Appellant's protest on such grounds was required to have been filed not later than seven days from December 5, 1986. It was not filed until February 13, 1987 and thus was untimely. Accordingly, we must deny the appeal.