

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GENERAL ELEVATOR)
COMPANY, INC.)
) Docket No. MSBCA 1253
Under Department of Public)
Safety and Correctional)
Services Bid Notice M/C #01-86)

August 30, 1985

Bid Protest - Timeliness - A written protest received more than seven (7) days after a disappointed bidder knows of a ground for protest (in this instance that the procurement officer deemed the low bidder to be a responsible bidder) is untimely pursuant to COMAR 21.10.02.03 B and may not be considered pursuant to COMAR 21.10.02.03 C.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Alan D. Eason
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This is an appeal from a Department of Public Safety and Correctional Services (Public Safety) procurement officer's final decision denying Appellant's protest of the award of the captioned contract to an allegedly nonresponsible bidder on grounds that the protest was not filed timely.

Findings of Fact

1. On March 26, 1985, the Maryland State Police, a constituent agency of Public Safety issued an invitation for bids (IFB) for elevator maintenance service in buildings "F" and "K" at the Maryland State Police Headquarters complex in Pikesville, Maryland.

2. Carroll E. Heckrotte, Appellant's Sales Representative, was present at the bid opening on May 2, 1985. It was announced that National Elevator Company, Inc. (National) was the low bidder. By letters dated May 3, 1985, all bidders were notified that an award would be made to National.

3. By letter dated May 13, 1985, Appellant protested the award to National on grounds that National was not a responsible bidder. The protest was received by Public Safety on May 16, 1985.

4. On May 22, 1985, the procurement officer denied the protest on grounds that it was not filed timely. Appellant responded to the protest decision on May 29, 1985 as follows:

Gentlemen:

We acknowledge receipt of your letter dated May 22, 1985.

The fact that we did not file our protest within the allotted time is not the issue.

The issue at hand is the fact that the "successful" bidder does not meet Paragraph 19, on Page II-5 of the specifications. You are dismissing our protest on the grounds that we did not comply with the specifications. On the other hand you are waiving the specification requirements in making your award.

Very truly yours,

Carroll E. Heckrotte
Sales Representative

5. On July 8, 1985, the procurement officer issued a second decision which incorporated the required notice of finality and right of appeal to this Board¹ which had been omitted from the first decision and once again rejected the protest on timeliness grounds. From this decision, Appellant took a timely appeal to this Board on July 15, 1985. The appeal did not address the timeliness issue, Appellant only asserting that National was not a responsible bidder.

6. Appellant advised the Board by letter dated July 18, 1985 that it did not desire a hearing. On August 1, 1985 the Assistant Attorney General representing Public Safety mailed a copy of the agency report to Appellant who chose not to comment on it as provided in COMAR 21.10.07.03 D.

Decision

Appellant's protest was rejected by the procurement officer as being untimely. COMAR 21.10.02.03 B provides that bid protests, other than those based upon alleged improprieties in the solicitation, "shall be filed not later than 7 days² after the basis for protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03 C defines "filed" to mean receipt in the procurement agency and precludes consideration of protests not received in the procurement agency after the time limits set forth in COMAR 21.10.02.03 B. Therefore, in order to be considered, Appellant's protest must have been filed within 7 days after it knew or should have known of the basis for its protest.

¹See: COMAR 21.10.02.08 C.

²For purposes of COMAR 21.10.02.03 B, "day[s]" means calendar day. COMAR 21.01.02.25.

This Board repeatedly has held that the timeliness requirements of COMAR are substantive in nature and must be strictly construed since the rights and interests of so many parties are at stake. International Business Machines, MSBCA 1071 (August 18, 1982) at 5; Rolm/Mid-Atlantic, MSBCA 1094 (January 21, 1983) at 5; Pyramid Cleaning, Maintenance and Supply, Inc., MSBCA 1099 (March 7, 1983) at 4; David A. Bramble, Inc., MSBCA 1240 (July 9, 1985). Compare Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at 5, rev'd on other grounds, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984).

Appellant's basis for its protest as set forth in its May 13, 1985 letter to the procurement officer was that:

To the best of our knowledge the National Elevator Company does not meet the qualification of successful bidders spelled out in Paragraph 19 on Page 11-5 of the specifications. They have been in business for less than one (1) year and could not have compiled a list of at least five (5) completed contract [sic].

To the best of our knowledge National Elevator Company does not have men skillful in the maintenance of microprocessor equipment such as that on the U.S. Elevator in Building "K".

These alleged shortcomings involve bidder responsibility. Since Appellant's protest was based on National's alleged lack of experience as required by the IFB, it might be inferred that Appellant knew or should have known of the basis for its protest at the time of bid opening when Appellant's representative in attendance would have ascertained that National had submitted a bid and that it was the low bid. However, the procurement officer is required to determine that a bidder is responsible prior to award. COMAR 21.06.01.01. The procurement officer presumably made this determination prior to advising the bidders by letters dated May 3, 1985 that National, who had been announced as low bidder at bid opening the previous day, would be awarded the contract. Therefore, at the very latest, Appellant would have been aware of the grounds for its protest, that National was deemed to be a responsible bidder, upon its receipt of the May 3, 1985 letter from the procurement officer.

The agency report states as an assumption that the letter mailed on May 3, 1985 was received by Appellant on May 6, 1985. In the absence of any comment by Appellant on the content of the agency report, the Board likewise assumes that in the normal course of business Appellant would have received the May 3, 1985 letter by May 6, 1985. The Appellant's protest dated May 13, 1985 was not received by Public Safety until May 16, 1985 some ten days after the basis of its protest was known under the most liberal construction of when Appellant knew or should have known of the grounds for its protest.³ By waiting more than seven days after the date that grounds for its protest were known to file a written protest, Appellant waived

³Appellant may have conceded that its protest was not timely filed when it stated in its May 29, 1985 letter to the procurement officer: "The fact that we did not file our protest within the allotted time is not the issue." (Underscoring added).

its right to protest. See: Pyramid Cleaning, Maintenance and Supply, Inc., supra at 5; Dasi Industries, Inc., MSBCA 1112 (May 5, 1983) at 8. Accordingly, its protest properly was not considered by the procurement officer and its appeal, therefore, is denied.