

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GRADY & GRADY, INC.
Under DPS&CS Solicitation
No. 8907-09

)
) Docket No. MSBCA 1455
)

September 18, 1989

Bid Protest - Timeliness - A bid protest was untimely where it was filed more than seven days after bid opening when the basis for the protest could or should have been known. Review of the bid document at bid opening would have revealed the alleged deficiencies in a competitor's bid.

Bid Protest - Timeliness - The requirement of COMAR 21.10.02.03B that a protest shall be filed not later than seven 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.

Timeliness - Bid Inspection - Burden of Proof - Bidders have a clear statutory right to inspect bids at bid opening or a reasonably short time after bid opening in order to consider potential bases for a protest. Procurement agencies may not place unreasonable obstacles in their way. However, in order to exercise the statutory right to review bids submitted in a competitive sealed bid procurement at or shortly after bid opening, a bidder must exercise that right by requesting an opportunity to review the bids at the time of bid opening if for any reason an agency proposes to withhold the bids from public review for any period of time that a bidder may deem to be unreasonable.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Emery A. Plitt, Jr.
Assistant Attorney General
Baltimore, Maryland

OPINION BY MR. KETCHEN

This is an appeal from a Division of Corrections (DOC) procurement officer's final decision denying Appellant's protest. Appellant alleges that the low bid submitted by the John R. Wald Co., Inc. (Wald) was irregular.

Findings of Fact

1. On May 17, 1988, DOC issued Bid Notices 8907-09 requesting bids for the conversion and expansion of the wood shop located at the Maryland House of Corrections in Jessup, Maryland. Only one bid was received so the procurement was cancelled and the bid rejected pursuant to COMAR 21.06.02.02. COMAR 21.06.02.02 provides that "after opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest."
2. On November 9, 1988, DOC reissued the bid notice with bid opening scheduled for November 28, 1988. Bid opening was thereafter rescheduled for December 9, 1988.

3. Two bids were received and opened on December 9, 1988. These bids were submitted by Appellant and Wald. Mr. Benser, the procurement officer, and Mr. Rose, his superior at DOC, determined that neither bid was responsive and that the procurement should proceed as a negotiated award under COMAR 21.05.04.01A(2). Mr. Rose was delegated the authority to act as the procurement officer and did so throughout the rest of the procurement process.

4. Both Appellant and Wald were briefed on the deficiencies in their bids and were requested to submit revised bids on December 22, 1988. At the opening of the revised bids, which was attended by representatives of both bidders, Wald's bid was announced as being the low bid.

5. Wald was selected as low responsive and responsible bidder and the contract was approved by the Board of Public Works on March 8, 1989.

6. On March 21, 1989, Appellant met with a representative of DOC to inspect Wald's bid and on the same day filed a written protest of the award of the contract to Wald. In its protest, Appellant alleged that Wald's bid was defective because it was submitted with the following irregularities:

- a. No bid bond was furnished.
- b. Wald had not applied for or been given a Minority Business Enterprise (MBE) certification and there was no evidence of MBE participation.
- c. Wald is not incorporated in the State of Maryland.

7. By letter dated April 7, 1989, the DOC procurement officer notified Appellant that its protest seemed to be untimely under the requirements of COMAR 21.10.02.03 requiring filing of a protest regarding the contract formation process within seven days of determination of a basis for a protest. The DOC procurement officer also noted that this requirement for timely

protest was set forth in the bid documents. However, the DOC procurement officer acknowledged that he was aware of a March 23, 1989 telephone call during which Appellant alleged to the Director of Procurement Services, that Appellant had not been given an opportunity to review Wald's bid. Accordingly, the DOC procurement officer requested that Appellant furnish him with further information concerning this allegation.

8. Appellant responded by letter dated April 10, 1989 which included photocopies of notes Appellant's president, Mr. Grady, had made of telephone conversations in which he had attempted to gain access to the bid documents. He also alleged that he "had been given the runaround" by everyone with whom he spoke. These telephone notes reflect that many calls were made to DOC. However, the notes do not reflect that any of these calls were made to DOC within seven days following opening of the bids.

Appellant's telephone notes include the record of a conversation between Mr. Grady and Mr. Benser which took place on January 5, 1989. The subject of that conversation was the status of the contract with a reminder to call back at the end of February for an update. This note does not indicate that Appellant requested to inspect Wald's bid at that time.

According to the notes, a telephone call made in late February, 1989 resulted in an instruction to Appellant that in order to review the bid documents it was necessary to make a formal written request. Such a request was made by Appellant on March 2, 1989 and resulted in the March 21, 1989 meeting at which Appellant was able to examine Wald's bid. Appellant's protest was filed the same day.

9. On April 20, 1989, the DOC procurement officer requested additional information regarding Appellant's allegations that Wald's bid was defective. This information was transmitted by letter dated April 25, 1989.

10. The DOC procurement officer denied Appellant's protest by letter dated June 16, 1989. The procurement officer determined that Appellant's protest filed on March 21, 1989 was untimely because it was filed more than seven days after bid opening, the time when Appellant knew or should have known the basis for its protest under COMAR 21.10.02.03. He states that Appellant could have requested DOC to permit it to inspect the bids at the bid opening which was attended by Mr. Grady, or during Mr. Grady's January 5, 1989 telephone conversation with Mr. Benser, which was already seven days after the bid opening. The DOC procurement officer then addressed the substantive issues of Appellant's protest and found them to be without merit.

11. Appellant filed its notice of appeal with this Board on June 19, 1989. DOC filed the Agency Report on July 21, 1989.

12. Appellant filed its comments on the Agency Report by letter received by the Appeals Board on August 2, 1989, although it did not request a hearing within the time specified by the Appeals Board's regulations. Accordingly, this decision is based on the record including the Agency Report and Appellant's comments received by the Appeals Board.

Decision

The DOC procurement officer denied Appellant's protest on the grounds that it was untimely under the filing requirements of COMAR 21.10.02.03 which provide as follows:

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in SA, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in SA or SB means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest received by the procurement officer after the time limits prescribed in SA or SB may not be considered. (Underscoring added).

Appellant's protest asserts that Wald's bid was nonresponsive and that such grounds were ascertainable only by a review of the bid documents. Appellant denies that its protest was untimely as it filed its protest within seven days from the date that it actually examined Wald's bid on March 21, 1989.

Maryland procurement law requires procurement agencies to give bidders an ample opportunity to inspect bids at the time of bid opening or within a reasonable time thereafter. One of the fundamental reasons for holding public bid openings in competitive sealed bid procurements is to provide an opportunity for the public to be made aware of any defects or irregularities in the bids. COMAR 21.05.02.11 B thus states in part that "[t]he name of each bidder, the bid price, and such other information as is deemed appropriate shall be read aloud or otherwise made available....The opened bid shall be available for public inspection at a reasonable time after bid opening...." This requirement is also set forth in Md. Ann. Code, State Finance and Procurement Article §13-210(a) which states that "at and after bid opening, the contents of a bid and any document submitted with the bid shall be open to public inspection." The bidders' opportunity to review the bids and bid documents is their right and procurement agencies should not place obstacles in their way. Nor should procurement agencies require bidders to make their requests in writing as a condition precedent to reviewing bid documents.

By letter dated August 2, 1989, Appellant's comments on the agency report stated that it had inquired at bid opening whether information regarding bid bonds and MBE certification would be read aloud and was told this would not be done. While this letter does tend to indicate that Appellant inquired at bid opening about those parts of the bid that would ultimately form the basis for its protest, the information in this letter is not corroborated by any other credible evidence, and, in any event, does not state that Appellant actually requested an opportunity to inspect the bids. Moreover, this letter was written well after the fact of bid opening. The information in it was never conveyed to the procurement officer. The letter by itself thus does not provide clear and credible evidence that Appellant affirmatively attempted to exercise its right to inspect the bid documents at or immediately after bid opening. Accordingly, Appellant by its August 2, 1989 letter commenting on the agency report does not establish by a preponderance of the evidence that DOC attempted to hinder Appellant's right to inspect the bid documents at bid opening based on a clear request made at that time to do so.

As noted above, there is no evidence that Appellant made a request to inspect the bid documents at the bid opening or at anytime during the next seven days. Nor is there any evidence that DOC prevented or hindered Appellant from inspecting the bid documents during that period. Appellant's first contact with DOC was on January 5, 1989, 14 days after bid opening, and the subject of that conversation was limited to the status of the project. In fact, the first documented evidence of a request by Appellant to inspect the bids was in a telephone conversation occurring in late February, 1989 followed by a written request dated March 2, 1989.

We have held that the basis for a protest was known or should have been known at the time of bid opening, where a review of bid documents would have revealed the alleged deficiencies in a competitive bid, which is the situation in this case. See Four Seas and Seven Winds Travel, Inc., MSBCA 1372, 2 MSBCA ¶186 (1988). Therefore, the deadline for filing this protest was December 29, 1988, seven days after the bid opening, not seven days after March 21, 1989, when the bids were finally inspected. The requirement under COMAR 21.10.02.03B that a protest "shall be filed not later than seven 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 is denied as being untimely, and thus we need not address the substantive issue of the responsiveness of the Wald bid raised by Appellant's protest.

