

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Hess Fence & Supply )  
Company, Inc. )  
)  
) Docket No. MSBCA 2061  
Under DGS Invitation for Bid )  
No. BB-000-973-001 )  
)

June 1, 1998

Board of Contract Appeals - Jurisdiction -

Absence of Final Decision - The Board of Contract Appeals lacks jurisdiction to hear an appeal where no final agency decision has been issued.

APPEARANCE FOR APPELLANT: NONE

APPEARANCE FOR RESPONDENT: John H. Thornton  
Assistant Attorney General  
Baltimore, MD

MEMORANDUM OPINION BY CHAIRMAN HARRISON  
ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Respondent's Motion to Dismiss for Lack of Jurisdiction is decided on the written record. Appellant did not comment on the Agency Report nor respond to the Motion to Dismiss. The Board accepts as true the facts asserted by Respondent through its counsel in support of the Motion to Dismiss.

Findings of Fact

1. On February 11, 1998, the Department of General Services (DGS) issued an Invitation for Bid for the captioned procurement for new fence gates and related work at the State Office Complex parking lots.
2. Three bids were received and opened at a public bid opening on March 18, 1998.
3. The low bidder was Long Fence Company, Inc. (Long). The second-low bidder was Appellant.
4. Long did not submit an executed Minority Business Enterprise (MBE) Utilization Affidavit or an executed MBE Solicitation Affidavit with its bid. However, Long's bid did not take

- exception to the 20% MBE goal or otherwise indicate that Long did not make the required commitment.
5. Mr. Terry W. Hess of Appellant attended the bid opening on March 18, 1998. Immediately after bids were opened Mr. Hess raised with Mr. Edward Marks, the DGS Procurement Representative, the issue of the lack of an MBE Utilization Affidavit with Long's bid. Mr. Marks told Mr. Hess he would review the matter.
  6. Later that day, March 18, and again on the following day, March 19, Mr. Marks and Mr. Hess spoke on the telephone. In both conversations Mr. Marks explained to Mr. Hess that Long's bid was responsive. Mr. Marks also told Mr. Hess in both conversations that if Mr. Hess was not satisfied with DGS's action Mr. Hess's recourse was to file a protest in writing with the Procurement Officer with the right to appeal a denial to this Board.
  7. During the March 19 conversation between Mr. Marks and Mr. Hess, when Mr. Hess continued to express dissatisfaction with DGS's position, Mr. Marks transferred Mr. Hess's call to Mr. John Cook, the Procurement Officer. During this conversation Mr. Hess asked, "What do I do from here?" or words to that effect. Mr. Cook then explained to Mr. Hess that he had to file a protest in writing with the Procurement Officer. The protest would be reviewed and sustained or denied, and, if denied, Appellant could appeal to this Board.
  8. Appellant filed no protest of any sort with DGS and therefore, DGS issued no Procurement Officer's decision.
  9. On April 10, 1998, Appellant filed this appeal. The appeal asks the Board to decide that the bid of Long must be rejected because neither the MBE Utilization Affidavit nor the MBE Solicitation Affidavit were filed with Long's bid.
  10. DGS filed a Motion to Dismiss the instant appeal for lack of jurisdiction on May 13, 1998. Appellant has filed no response thereto.

### Decision

The Board has jurisdiction over appeals from final agency determinations. Appellant never filed a protest with the procurement unit (DGS) and no Procurement Officer's decision (i.e. final agency decision) was issued from which Appellant could appeal as required by the provisions of Chapter 02 entitled Protests of Subtitle 10 of Title 21 (State Procurement Regulations) of the Code of Maryland Regulations. Therefore, in the absence of final agency action on a protest this Board lacks jurisdiction. See Advance Presort Service, MSBCA 1891, 5 MSBCA ¶384(1995); Norman V. Crouse Co., MSBCA 1752, 4 MSBCA ¶340(1993).

Accordingly, the appeal must be dismissed for lack of jurisdiction.

Wherefore, it is Ordered this 1st day of June, 1998 that the Motion to Dismiss for Lack of Jurisdiction is granted and the appeal is hereby dismissed with prejudice.

Dated: June 1, 1998

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Robert B. Harrison III  
Chairman

I concur:

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Candida S. Steel  
Board Member

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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 2061, appeal of Hess Fence & Supply Company, Inc. under DGS Invitation to Bid No. BB-000-973-001.

Dated: June 1, 1998

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Mary F. Priscilla  
Recorder