

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HITEK COMMUNITY)
CONTROL CORPORATION)
) Docket No. MSBCA 1535
Under DPS&CS Solicitation)
No. 9030-01A, Home Detention)
System)

August 24, 1990

Bid Protest - Timeliness - A protest filed more than seven (7) days after an offeror knew or should have known of the grounds for protest is untimely pursuant to COMAR 21.10.02.03B.

Bid Protest - Written Protest - Waiver - The Board of Contract Appeals may not waive the requirement of COMAR 21.10.02.02B that a bid protest be in writing.

APPEARANCES FOR APPELLANT: Michael F. Marino, Esq.
Thomas P. Murphy, Esq.
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Washington, D.C.

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

APPEARANCE FOR INTERESTED PARTY: Arvin E. Rosen, Esq.
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OPINION BY CHAIRMAN HARRISON
ON DPS&CS MOTION TO DISMISS

Appellant timely appeals the denial of its bid protest that the Department of Public Safety and Correctional Services (DPS&CS) improperly rejected its proposal for a leased electronic home detection monitoring system for alleged failure to meet a requirement of the performance specifications. DPS&CS has moved to dismiss the appeal on grounds that the bid protest was not timely filed.

Findings of Fact*

1. On or about June 8, 1990, DPS&CS resolicited a request for proposals (RFP) for a leased electronic home detention monitoring system to monitor inmates under home detention.

* Only the facts necessary to the Appeals Board's determination of the Motion to dismiss are set forth.

2. Appellant submitted a proposal based on its "On Guard Plus" system.

3. The performance specifications of the RFP require control equipment located at a central location staffed by DPS&CS personnel and as a primary means of identifying the home presence of an inmate under home detention the use of a transmitter worn around the inmate's ankle (bracelet) and the placement of a receiver/dialer in the inmates residence. Additionally, the specifications require a secondary means of verifying that the person contacted is the inmate assigned to the residence. The specifications regarding such secondary verification provide that:

3. Secondary Verification Subsystem

- a. MANDATORY - In addition to the Primary Verification subsystem, the System must have a secondary way for Division personnel stationed at the Program Office to verify, at their discretion and at the time that the contact is made with the inmate, that the inmate contacted is the inmate assigned to the residence. Any Secondary Verification Subsystem proposed can depend on the vision, but not the hearing, of the Division personnel operating the System to determine whether the proper person is responding to the inquiry.
- b. MANDATORY - Each Secondary Verification subsystem must be able to be installed/deinstalled by Division personnel.

4. Appellant's lead representative for purposes of presentation of its proposal was Mr. Richard A. Angulo, Appellant's Director of Sales and Marketing. On July 17, 1990, Mr. Angulo was called by Mr. Myles Carpeneto, the DPS&CS procurement officer, and advised that Appellant's proposal had been rejected and that Appellant would not be further considered for award because the Appellant's secondary subsystem "monitors a device rather than a person."

5. The parties have entered into a stipulation of facts¹ concerning this telephone conversation and Appellant's response thereto in relevant part as follows:

5. On July 17, 1990, Carpeneto telephoned Angulo and informed him that HITEK's proposal did not monitor the "person" and would not be considered further.

6. Angulo requested clarification of this and Carpeneto answered that HITEK's secondary subsystem monitors a "device" rather than a "person". He also told Angulo that he could give him no further information at that time.

7. Angulo stated that he needed more information because he did not understand the basis of the decision. He asked for more details and other competitive data. Carpeneto reaffirmed that all he could tell him was that the HITEK system monitors a device rather than a person.

8. Angulo told Carpeneto that in government contract matters, contractors ordinarily receive a letter with some explanation as to why their product does not meet the specifications. Carpeneto stated that he could not give Angulo anything further until after the award.

9. Angulo told Carpeneto that if the State was going to refuse to consider HITEK, HITEK would protest.

¹The stipulation entitled "Stipulation of the Parties" and entered into in connection with disposition of the Motion to Dismiss is attached hereto as Exhibit A and incorporated herein by reference.

10. When HITEK did not receive further oral or written communication from the Division, Angulo sent a letter dated July 26, 1990, by facsimile, to Carpeneto protesting the Division's determination to no further consider HITEK's proposal.

14. Between the telephone conversation of July 17, 1990, and the date the protest was filed, July 26, 1990, no additional information was provided to HITEK or Angulo beyond the information in the telephone conversation.

6. Appellant's letter (bid protest) of July 26, 1990 provided in relevant part as follows:

Dear Mr. Carpeneto:

You called me by phone on 7/17/90 to advise that HITEK was not selected for the contract award on the referenced re-solicitation for the Home Detention System.

Your only stated reason was that HITEK's "Secondary Subsystem" did not meet the requirements as it monitored a "device" rather than "the person". You could not provide me with any other information on the evaluation results at that time.

The following is submitted as a rebuttal to your reason given above:

The MD-DOC Specifications, section III, pages 15 and 16, paragraphs A3a and b, cover the "Secondary Verification Subsystem" (see attached exhibit A).

The HITEK ON GUARD PLUS Secondary subsystem proposed meets this specification in every respect. It is the only system on the market today that is totally automatic, immediate and is 100% accurate in identifying the inmate without the necessity for subjective human interpretation. See our response in the HITEK proposal Volume 1, TAB-D, page 3 of 4 (see exhibit B).² Manually

²Appellant's response to the RFP in this regard provided:

Page 15 Paragraph A3a and b

HITEK complies with all requirements of these two paragraphs. HITEK's ON GUARD PLUS system has a "secondary verification subsystem". The secondary verification system operates independent of the primary verification system. This secondary system can also be used for Random Calling any and/or all inmates at random times within their curfew periods. This

initiated calls at any time may also be made to any inmate using the "Secondary Verification Subsystem". This is done through the software OPTIONS menu, listed as a TELSOL call (see software sampler in TAB-E of Volume I of the HITEK proposal).

Please note that the HITEK Wristlet/Transmitter unit attached to the inmate has all the necessary components in the one single housing, for both the "Primary and Secondary Verification Subsystems". The caller knows that the unit is attached to the offender, otherwise, a "tamper-alert signal" would have been previously sent to the central computer system by the "Primary Verification Subsystem", if the inmate had cut the strap or removed the device from his ankle.

All verification information from both the "Primary and Secondary Verification Subsystems" is immediately printed out on the ON-LINE printer and the status message may be visually observed by any operator, officer or other person, at the time the contact is made with the inmate.

Based on the very limited information you have given us and our rebuttal above, we hereby regard this letter as a formal protest to the recommended award of this contract to any other vendor. (See MD-DOC Solicitation, Section II, page 5, paragraph J titled PROTESTS.)

7. By letter dated July 27, 1990, Mr. Carpeneto issued a final agency decision denying Appellant's bid protest on grounds that it was not timely filed. This final agency decision on the Appellant's protest provided in relevant part as follows:

Dear Mr. Angulo:

In your letter dated July 26, 1990 about solicitation 9030-OIA, Home Detention System, you protest that the State was not correct when it decided that your secondary subsystem monitored a device rather than the person and that, therefore, your firm's electronic home detention system did not meet the requirements of the solicitation.

secondary system operates completely without any 110 VAC commercial power or batteries in the inmate's home. This Random Calling system gives 100% accurate, automatic and immediate verification of the inmate's presence at home. It uses a totally passive participant identifier factory sealed, in the same case as the transmitter. A small Verifier unit is also plugged into the back of the Receiver/Dialer which can easily be installed or de-installed by Division personnel. When the inmate is required to identify himself on the secondary verification subsystem, he simply places the Verifier unit opening over the Wristlet or Anklet and an electronic data exchange takes place identifying the inmate. The central system will immediately, automatically and with 100% accuracy, determine the presence of the inmate. If in violation, the case officer will immediately be paged. See more details in ON GUARD PLUS descriptive material in TAB-E of this booklet.

The Code of Maryland Regulations (COMAR) 21.10.02.03B requires that protests be filed not later than 7 days after the basis for a protest is known or should have been known, whichever is earlier. Although not required by law or regulation, notice of the protest filing deadline was given in Section 11.J. of the solicitation. As you state in your letter, I informed you on July 17, 1990 of the reason why your firm was not selected. Your protest was not sent and I did not receive it until July 26, 1990, 9 days after the date when you knew the basis for your protest. COMAR 21.10.02.03C will not allow me to consider a protest which has been filed late; therefore, I must decline to respond to your protest.

8. From denial of its protest, Appellant filed an appeal with the Appeals Board on August 8, 1990.

9. On August 15, 1990, DPS&CS filed a Motion to Dismiss (accompanied by the Stipulation of the Parties set forth above) on grounds that Appellant's protest was not timely filed. Appellant responded thereto in writing on August 16, 1990 and the Appeals Board heard oral argument on the motion on August 16, 1990.

Decision

The Appeals Board shall grant the Motion to Dismiss. COMAR 21.10.-02.03B requires that protests "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."

Appellant initially argues that it was not provided sufficient information in the July 17, 1990 telephone conversation to provide a basis for protest and commence the running of the seven day period for filing a protest. In this regard Appellant notes that the Appeals Board has held that a protester may delay filing its protest pending receipt of additional information where the information provided to the protestor earlier leave uncertain whether there is any basis for protest. United Technologies Corp. and Bell Helicopter, Textron, Inc., MSBCA 1407 and 1409, 3 MSBCA ¶201 at p. 15 (1989).

However, based on the Stipulation of the Parties entered into in connection with disposition of the Motion to Dismiss and the content of the

Appellant's written protest filed with Mr. Carpeneto on July 26, 1990, the Appeals Board finds, contrary to Appellant's assertion that it needed further information to know whether it had a basis for protest, Appellant "knew or should have known" of the basis for protest immediately after Mr. Angulo talked to Mr. Carpeneto on July 17, 1990. The stipulation reflects that Mr. Angulo knew following his telephone conversation with Mr. Carpeneto on July 17, 1990 that DPS&CS had rejected Appellant's proposal because DPS&CS wanted a secondary verification subsystem that monitored a human characteristic or "person" rather than a mechanical device. The terms of the secondary verification subsystem specification as written required that the offeror's proposed system provide a secondary means for DPS&CS personnel to verify at the time contact is attempted to be made with an inmate that the person contacted is in fact the inmate assigned to the residence. Mr. Angulo knew prior to the July 17 telephone conversation that the system that Appellant had proposed for the secondary verification subsystem was based on a mechanical device. Under Appellant's proposed secondary subsystem as incorporated in its proposal to DPS&CS an inmate identifies himself by manual placement of the bracelet over the verifier unit opening on the receiver/dialer which causes an electronic data exchange that may be observed by DPS&CS personnel monitoring the contact. Because removal of the bracelet would trigger an alarm on the primary verification subsystem, Appellant argues that the person using the bracelet when the secondary subsystem is placed into operation and the electronic exchange takes place may be assumed to be the assigned inmate and thus its secondary verification subsystem meets the functional characteristics of the specifications.

Accordingly, Appellant knew on July 17 as a result of Mr. Carpeneto's expressed reason for rejection of Appellant's proposal that DPS&CS was rejecting its system based on a mechanical device and requiring a product or system where secondary verification was dependent on a physical human characteristic despite the absence of any such specific requirement expressly set forth in the specification. Since Appellant "knew or should have known" on July 17 that DPS&CS was requiring the secondary verification subsystem to be based on physical rather than mechanical characteristics, its protest that its product met the specification as written and that DPS&CS interpretation of what was required was beyond the express requirements of the specifications was required to be filed by July 24, 1990 at the latest. Its protest filed on July 26 1990 was therefore untimely.

Appellant argues in the alternative that Mr. Angulo gave verbal notice of protest during the July 17 telephone conversation adequate to toll the running of the seven day filing requirement.

Assuming arguendo that Mr. Angulo's comment during the July 17 telephone conversation that HITEK would protest constitutes a protest, we note that COMAR 21.10.02.02B requires protests to be written. While there may conceivably be circumstances where an agency procurement officer may waive the requirement that a protest be in writing (as distinct from the requirement that the protest in whatever form be communicated in seven days) this appeal does not present them since the agency has insisted upon

compliance with the regulation, and there is no evidence of conduct consistent with an intent to waive the requirement for a written protest.³ Thus the Appeals Board rejects Appellant's alternative argument.

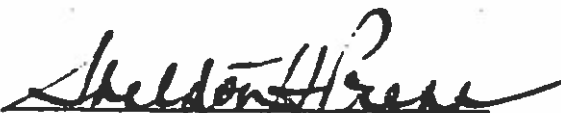
Finally Appellant asks this Board to waive the requirement for a timely written protest. This Board, however, lacks authority to waive the provisions of COMAR (substantive or procedural) promulgated by another State agency. See Kennedy Temporaries v. Comptroller, 57 Md. App. 22, 41 (1984).

For the foregoing reasons, the Appeals Board finds the Appellant's protest to have been untimely. Accordingly, the appeal is dismissed.

Dated: *August 23, 1990*


Robert B. Harrison III
Chairman

I concur:


Sheldon H. Press
Board Member


Neal E. Malone
Board Member

³In DP Service Bureau, ¶ MSBCA 1297, 2 MSBCA ¶ 137 (1986) and Kennedy Temporaries, MSBCA 1061, 1 MSBCA ¶ 21 (1983) rev'd 57 Md. App. 22 (1984), the Appeals Board had noted a distinction between substantive and procedural requirements of filing a protest and asserted that under certain circumstances an agency procurement officer may waive the requirement that a bid protest be written. However, based on the Court of Special Appeals analysis of this issue in Kennedy Temporaries it appears that waiver of the requirement for a written protest may seldom if ever be possible. See Kennedy Temporaries v. Comptroller, 57 Md. App. 22, 41 (1984).

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1535, appeal of HITEK COMMUNITY CONTROL CORPORATION, under DPS&CS Solicitation No. 9030-01A, Home Detention System.

Dated: *August 24, 1990*

Mary F. Priscilla
Mary F. Priscilla
Recorder

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HITEK COMMUNITY
CONTROL CORPORATION

Under DPSCB Solicitation
No. 9030-01A, Home Detention
System

Docket No. MSBCA 1535

* * * * *

STIPULATION OF THE PARTIES

The parties, the Division of Correction of the Maryland Department of Public Safety and Correctional Services (the "Division"), HITEK Community Control Corporation ("HITEK"), and Vorec Corporation by their attorneys, stipulate to the following facts for the determination of the procurement agency's Motion to Dismiss:

1. The Division of Correction resolicited proposals for a leased electronic home detention monitoring system by solicitation #9030-01A, dated June 8, 1990.

2. HITEK timely submitted a proposal on the solicitation based upon the HITEK "On Guard Plus" system.

3. Richard A. Angulo is the Director of Sales and Marketing for HITEK. Mr. Angulo served as the lead representative of HITEK in its proposal and negotiations with the Division under solicitation number 9030-01A.

4. Myles Carpeneto is the Director of Procurement Services for the Division, and is the Procurement Officer under solicitation number 9030-01A.

5. On July 17, 1990, Carpeneto telephoned Angulo and informed him that HITEK's proposal did not monitor the "person" and would not be considered further.

6. Angulo requested clarification of this and Carpeneto answered that HITEK's secondary subsystem monitors a "device" rather than a "person". He also told Angulo that he could give him no further information at that time.

7. Angulo stated that he needed more information because he did not understand the basis of the decision. He asked for more details and other competitive data. Carpeneto reaffirmed that all he could tell him was that the HITEK system monitors a device rather than a person.

8. Angulo told Carpeneto that in government contract matters, contractors ordinarily receive a letter with some explanation as to why their product does not meet the specifications. Carpeneto stated that he could not give Angulo anything further until after the award.

9. Angulo told Carpeneto that if the State was going to refuse to consider HITEK, HITEK would protest.

10. When HITEK did not receive further oral or written communication from the Division, Angulo sent a letter dated July 26, 1990, by facsimile, to Carpeneto protesting the Division's determination to no further consider HITEK's proposal.

11. Attached hereto as Exhibit A is a true copy of the protest sent by facsimile by HITEK and received July 26, 1990, by the Division.


12. By letter dated July 27, 1990, Carpeneto responded to the bid protest, declining to consider it, as untimely.

13. A true copy of the protest decision is attached hereto as Exhibit B.

14. Between the telephone conversation of July 17, 1990, and the date the protest was filed, July 26, 1990, no additional information was provided to HITEK or Angulo beyond the information in the telephone conversation.

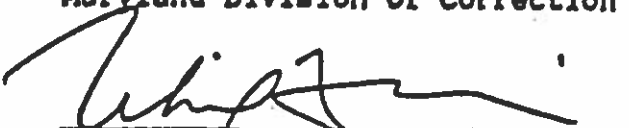
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