

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of ISMART, LLC)
)
) Docket No. MSBCA 1979
)
Under Department of General)
Services Project No.DGSOPC-9701)
)

March 25, 1997

Bid Protest - Timeliness - A bid protest on grounds other than improprieties in a solicitation apparent before bid opening must be filed within seven days after the basis for protest is known or should have been known, whichever is earlier.

APPEARANCE FOR APPELLANT William P. Baker, Esq.
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APPEARANCE FOR RESPONDENT John H. Thornton
 Assistant Attorney General
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OPINION BY BOARD MEMBER STEEL

This matter comes before the Board upon the protest of ISMART, LLC (ISMART) which was previously doing business under the name of Towson Computer, LLC. Respondent Department of General Services (DGS) moved for dismissal of the appeal on the ground of lack of jurisdiction for failure of Appellant to file timely protest at the agency level. This Board grants the motion as set forth below.

Findings of Fact

1. On July 9, 1996, DGS issued an Invitation for Bid ("IFB"), DGSOPC-97011, for the "Procurement of Microcomputers and Associated peripherals" to obtain contracts under which State agencies and local school systems could buy the products of specific manufacturers and related products as the need arose. The contract period is for one year with the State having the option to renew for four additional years.
2. The Procurement Officer on August 13, 1996, informed the president of ISMART by telephone that its bid for the AST Computer, Inc. ("AST") line was nonresponsive and that therefore ISMART would not be recommended for award of that item to the Board of Public Works.

3. On August 14, with the President of ISMART present, the Board of Public Works met and awarded the contract for the AST computer line to Pulsar Data Systems, Inc. (Pulsar).
4. On August 21, 1996 ISMART submitted its protest to DGS¹. Finding the protest to be late, the Procurement Officer rejected the protest, and this appeal timely followed.

Decision

DGS argues that since the protest filed with DGS was filed eight days after the appellant knew or should have known of the grounds of his protest, that its protest was untimely and was properly rejected. At the hearing before this Board, Appellant's President acknowledged that he had spoken with the Procurement Officer and further agreed that he had been told on August 13, 1996 that Appellant's bid regarding the AST line was considered to be non-responsive and would not be presented to the Board of Public Works as a contract for approval on the following day.

Appellant argued that the Board of Public Works was the final decision maker, not the Procurement Officer, and since it did not learn until on or after August 14, 1996 who was selected by the Board of Public Works to be the recipient of a contract for the AST line, the time period should not commence until that date. Appellant knew on August 13 that it would not be recommended for award by the Board of Public Works. We agree that the Board of Public Works must make the final award. However, COMAR does not permit waiting until the fact that an appellant will not be recommended for award is confirmed by the Board of Public Works' action to award a contract to another bidder. See, Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MICPEL ¶154 (1987) [authority to award resided in agency in this case].

Appellant's protest had to have been filed by August 20, 1996 to be timely. Protests on grounds other than improprieties in a solicitation apparent before bid opening must be filed "not later than 7 days after the basis for protest is know or should have been known, whichever is earlier." COMAR 21.10.02.03.C. Such filing is jurisdictional, and failure to file in a timely manner deprives this Board of jurisdiction to hear the appeal. Communication Management Systems, Inc., MSBCA 1625, 3 MICPEL ¶296 (1992); Kennedy Temporaries v. Comptroller, 57 Md. App. 22, 468 A.2d 1026 (1989). Appellant knew that its bid was considered non-responsive and that it would not be awarded the contract for the AST line on August 13, 1996². Therefore, its protest with DGS had to be filed on or before August 20, 1996. When its protest was filed on August 21, 1996, it was at least one day late. Thus, the protest cannot be considered, and must be dismissed by this Board. J&J Reproduction & Drafting Supplies, Inc., MSBCA 1970, 5 MICPEL 409 (1996); Crystal Enterprises, MSBCA 1971, 5 MICPEL 407 (1996); Manolis Painting Co., Inc., MSBCA 1483, 3 MSBCA ¶233 (1989).

¹ In its protest letter, ISMART listed four grounds for protest. The only item which it has appealed to this Board, however, is the determination that it was non-responsive on the AST computer line.

² In fact, it is arguable that Appellant constructively knew that it would not be receiving award on August 12, 1996, since it became public knowledge at the pre-Board meeting on August 12 that award of a contract for the AST line would be made to the next lowest bidder, Pulsar. Thus, Appellant should have filed its protest on or before August 19, 1996.

Wherefore, it is ordered this 25th day of March, 1997 that the appeal is dismissed.

Dated: March 25, 1997

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

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 1979, appeal of Ismart, LLC, under DGSOPC-9701.

Dated:

Mary F. Priscilla
Recorder