

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of)
J&J REPRODUCTION &)
DRAFTING SUPPLIES, INC.) MSBCA Docket No. 1970
)
Under State Highway Administration Solicitation)
for Quotes for Plotting Media)

October 18, 1996

Bid Protest - Timeliness - Pursuant to COMAR 21.10.02.03, a bidder must file a protest within seven days of when he knew or should have known of the grounds for protest. However, where bid opening is scheduled within that seven day period, the bidder must protest prior to the time for bid opening.

APPEARANCE FOR APPELLANT None
APPEARANCE FOR RESPONDENT Scott D. Morrell
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the appeal of J&J Reproduction & Drafting Supplies, Inc. (J&J) of the decision of the State Highway Administration (SHA) Procurement Officer denying its bid protest. The Appellant did not submit comments to the Agency Report, and neither party requested a hearing; therefore, this determination is made on the record.

Findings Of Fact

1. SHA issued a Solicitation for Quotes on May 22, 1996 for a multi-step procurement for several types of computer plotting media. The solicitation requiring vendors to submit a sample of the product and their price quotation on June 14, 1996 is quoted in full as follows:

The Computer Operations Services Team of the Maryland State Highway Administration is soliciting price quotations for the various plotting media used for computer plotting.

Your quotation for the items listed in attachment A, will be for the period of July 1, 1996 to June 30, 1997.

Price quotations and samples should be sent to:

Mr. James J. Brennan
Maryland State Highway Administration
Computer Operations Services Team
P.O. Box 717 - C202
Baltimore Maryland 21202

We are asking that you submit a price quotation per roll, based on the fact that we guarantee to order (from the successful low bidder) at least the minimum amount shown in the attachment by June 30, 1997. The price quoted would be effective for all orders within the time period indicated. We will not be ordering or taking delivery on all of the rolls at one time, but will be ordering in sufficient quantities over the year.

Price quotations must be received by the close of business, 4:30 p.m., on June 14, 1996 in a separate sealed, envelope. Samples of media being bid must also be received by the close of business on June 14, 1996, for testing purposes. We will award the contract for each item to the vendor whose bid on that item meets these two specific criteria:

- 1) The sample media must pass a plotting evaluation.
- 2) The successful media with the lowest price will then be selected.

If there are any questions concerning this solicitation of prices, please contact Mr. James Brennan at (410) 545-8668.

Thank you in advance for your prompt consideration of our solicitation for bids.

Sincerely,

Robert Timanus, Chief
Computer Operations Team

2. Six vendors, including J&J, submitted samples of the single matte ink jet film in question to be evaluated. No bidders protested the provisions of the solicitation prior to the date for submission of samples.

3. An eleven member CADD Committee¹, consisting of actual users of the plotting media throughout the State Highway Administration, met to evaluate the products submitted on July 2, 1996, after the same plot was prepared from each sample submitted. The CADD Committee reviewed each plot sample for visual quality, clarity of image, density of lines, how well each held the ink (i.e., whether the image smeared, flaked, etc.), and whether the image held under pressure. Each sample was reviewed without reference to the price quote for that sample, and the committee determined for each sample whether it was acceptable or unacceptable.

4. The CADD Committee unanimously determined that the J&J single matte ink jet film smeared too easily and was thus unacceptable, and J&J was so informed by letter dated July 3, 1996.

5. On July 10, 1996, representatives of J&J and the ink manufacturer arranged to visit SHA on July 11 to examine the CADD Committee plot sample using its media, as well as those of other vendors.

6. On July 19, 1996, the SHA Procurement Officer received J&J's protest of the CADD Committee's evaluation of its media sample. In the protest letter, J&J objected to the evaluation criteria used by the Committee, and suggested five criteria that should have been utilized to evaluate performance.

7. On August 2, 1996, the Procurement Officer denied the protest, and J&J timely appealed to this Board.

Decision

For the reasons set forth below, the Board finds that Appellant's protest was untimely, and that therefore its appeal to this Board must be denied.

COMAR 21.10.02.03 provides in part:

Time for Filing

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. . . .

¹ This is how the evaluation committee was described in the Agency Report. The Board presumes that the Committee was comprised of persons involved in Computer Aided Design.

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

C. The term "filed" as used in §A or §B 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 §A or §B may not be considered.

Appellant filed its initial protest on July 19, 1996, thirty-five (35) days after the due date for submission of samples and prices; at least nine (9) days² after it had notice that its product was found to be unacceptable, and at least eight (8) days after it had reviewed its own sample at SHA. Under either Sections A or B of COMAR 21.10.02.03, then, the Appellant has failed to timely raise its protest with the procurement officer.

The timeliness requirements of COMAR 21.10.02.03 are substantive in nature, and "must be strictly construed, since an untimely objection to a contract award necessarily prejudices the rights and interests of the low bidder, the contracting agency and perhaps other interested parties." Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MSBCA ¶154 (1987); International Business Machines Corporation, MSBCA 1071, 1 MSBCA ¶22 (1982). The requirements of COMAR 21.10.02.03 for filing of a protest are substantive, and may not be waived. Failure of an bidder to meet the substantive timeliness requirements of COMAR 21.10.02.03 deprives this Board of jurisdiction. ATI Systems and Federal Signal Corporation (ATI), MSBCA 1911, 1913 and 1918, 5 MSBCA ¶387 (1996), Delaware Elevator, Inc., MSBCA 1741, 4 MSBCA ¶333 (1993); Kennedy Temporaries v. Comptroller, 57 Md. App. 22 (1984).

Because the Appellant's initial protest was untimely, this Board has no jurisdiction to hear the underlying merits of Appellant's claim that its sample product was not properly evaluated. Appellant's appeal must be dismissed.

Therefore, it is this 18th day of October, 1996 Ordered that this appeal be dismissed as the protest is untimely.

² The record does not show definitively, but the Board assumes Appellant had sufficient notice and/or had received the July 3, 1996 notification letter from the fact that on July 10, 1996 J&J personnel contacted SHA to arrange to come and review their and other vendors' samples.

Dated: October 18, 1996

Candida 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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1970, appeal of J&J Reproduction & Drafting Supplies, Inc., under State Highway Administration Solicitation for Quotes for Plotting Media.

Dated: October 18, 1996

Mary F. Priscilla
Recorder