

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of)
)
JCV, Inc.)
) Docket No. MSBCA 2067
Under Maryland Department)
of General Services)
Invitation for Bid)
No. UT-009-971-001)

August 6, 1998

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 of the protest.

APPEARANCE FOR APPELLANT

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APPEARANCE FOR RESPONDENT

John H. Thornton
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APPEARANCE FOR INTERESTED
PARTY E2CR, Inc.

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OPINION BY BOARD MEMBER STEEL

This appeal comes before the Board on the written record.¹ Appellant argues that the procurement officer erred in determining that its bid was non-responsive.

Findings of Fact

1. On February 18, 1998, The Maryland Department of General Services (DGS) issued an Invitation for Bid (IFB), Project No. UT-009-971-001, to replace the Fuel Storage & Delivery System Group B at the Gunpowder Falls, Elk Neck, and Smallwood State Parks.

¹A hearing was originally scheduled for July 7, 1998. Counsel for Appellant notified the Board that he was unavailable on that date, but has been unable to present the Board with a satisfactory substitute date. His office was informed that if a date was not proposed, the Board would issue a ruling based on the written record. Counsel, by his silence, having concurred, this decision on the written record follows.

2. Ten bids were received and opened at a public bid opening on April 9, 1998, with Appellant JCV Inc. (JCV) submitting the apparent low bid. The second low bidder was E2CR Inc. (E2CR).
3. JCV submitted, as required by the IFB and COMAR 21.06.07.02, a bid bond on the standard Bid Bond form provided with the IFB. On the standard bid bond form King E. Adkins is listed as attorney-in-fact for JCV's proposed surety, National Grange Mutual Insurance Company (NGMIC). Attached to that standard form is a Power-of-Attorney form from NGMIC, purportedly appointing Mr. Adkins.
4. While there appears on this document the signature of Assistant Vice President Landry, certifying that the document is a true and correct copy of a Power of Attorney which is still in force an effect, the statement which Mr. Landry certifies by his signature states that he has "hereunto set my hand and affixed the seal of said Company at Keene, New Hampshire" No such company seal or certification seal appears on the document submitted with the bid bond.
5. Immediately after Mr. Landry's signature, the following language appears:
WARNING -- Any unauthorized reproduction or alteration of this document is prohibited. This power is void unless seals are readable and the certification seal at the bottom is **embossed**. The diagonal imprint, warning and confirmation must be in red ink.
However, no seal appears, embossed, or otherwise.
6. On April 16, 1998, the Procurement Officer notified JCV that as a result of the defect in the Power-of-Attorney form that the bid bond was deemed defective and that the bid was therefore non-responsive. This oral notification was confirmed by letter of April 17, 1998, which was received by Appellant on April 18, 1998, as shown by certified mail receipt in the record before the Board.
7. On April 28, 1998, the procurement officer sent an additional letter explaining in further detail why the bid was considered non-responsive. On that same day, JCV filed a protest with the procurement officer. A final decision denying the protest on the grounds of timeliness and that the bid was non-responsive was issued on May 1, 1998, and this appeal timely followed.

Decision

More than seven days had elapsed between the time that JCV knew or should have known of the fact that the State had rejected its bid as non-responsive, as well as the underlying reasons for that rejection, and the date the protest was filed.² JCV was notified first by telephone on April 16, 1998, and then by letter dated April 17, 1998 and received on April 18, 1998, that the bid was rejected because the Power-of-Attorney attached to the bid is void, causing the bid bond to be non-responsive under COMAR 21.06.07.02A.

²While we do not reach the merits of this appeal since it is untimely, we note that the procurement officer would likely be upheld in her determination of non-responsiveness, in light of the many decisions of this Board as cited in the Respondent's Agency Report. We further note that Appellant did not address the issues of timeliness in its response to the agency Report, but rather argued that it was in the discretion of the Procurement Officer to waive the defect apparent in the Power-of-Attorney document. We also do not here address the extent of such discretion under COMAR 21.06.07.02B, because of our determination that we lack jurisdiction to do so.

In a follow-up letter dated April 28, 1998³, the procurement officer noted that the National Grange Mutual Insurance Company had promptly written that the omission was a clerical oversight and did not affect the validity of the bond, and asked that she accept a substitute bond⁴. She reported that she was nonetheless unable to accept the bid bond as submitted nor allow the substitution of a valid bond.

Although Appellant was clearly on notice on April 18, 1998 of the grounds for the rejection of its bid, and thus the grounds for its protest, no protest from JCV was submitted to the Procurement Officer until April 28, 1988. COMAR 21.10.02.03 states in relevant part that "B. . . protests [other than those based on apparent defects in a solicitation] shall be filed not later than seven days after the basis for protest is known or should have been known, whichever is earlier. C. . . A protest received by the procurement officer after the time limits prescribed in 'A or 'B may not be considered." Thus the Procurement Officer was correct to reject the protest on the grounds that it was untimely.

The Board's jurisdiction is also dependent upon timely filing of both the protest and the appeal, and failure to timely file deprives this Board of jurisdiction to hear the appeal. Thus, the failure of this Appellant to file a timely protest deprives this Board of jurisdiction to hear its appeal. ISMART, MSBCA 1979, 5 MSBCA ¶ 417 (1997) (appeal dismissed on grounds that it was at least one day late). See also, AEPCO, Incorporated, MSBCA 1844, 4 MSBCA ¶370 (1994)(while the allegations of the appeal are serious, this Board only has jurisdiction to consider them if complaint was made timely); and A.D. Jackson Consultants, Inc., MSBCA 1817, 4 MSBCA ¶366 (1994) (If an offeror fails to file its protest in a timely fashion, the protest may not be considered by the Procurement Officer or by the Board).

Therefore, the Board must find, pursuant to COMAR 21.10.02.03, that Appellant's protest was untimely, and the appeal must be dismissed.

Wherefore, it is Ordered this 6th day of August, 1998, that the appeal is dismissed with prejudice.

Dated: 8/6/98

Candida S. Steel
Board Member

³We find that the procurement officer had no authority to hear the protest underlying this appeal despite the colorable invitation to file a protest implicit in the April 28 letter:

State procurement regulations provide a procedure for filing a protest against the rejection of your bid and for appealing a denial of the protest to the Maryland State Board of Contract Appeals. If you wish to avail yourself of these procedures we will cooperate with you fully, provided that State procurement law imposes a strict deadline on the time for filing a protest and we cannot and do not waive or extend that deadline.

The Procurement Officer cannot waive the timeliness requirements of COMAR 21.10.02.03 promulgated by the Board of Public Works.

⁴ This request, not being made by the bidder or interested party, and not containing protest language, cannot be considered a protest.

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 the appeal of JCV Inc. under Maryland Department of General Services Project No. UT-009-971-001.

Dated: August 6, 1998

Mary F. Priscilla
Recorder