

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of)
JOHN D. LUCAS PRINTING COMPANY)
Under MSDE RFP No. 720031)

Docket No. MSBCA 1973

October 30, 1996

Interested Party - Appellant as a subcontractor to the offeror in a proposal submitted in response to an RFP was not an interested party and thus lacked standing to file a protest.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: JoAnn G. Goedert
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest (1) that award of the subject contract not be made to anyone other than the offeror who submitted a proposal in which Appellant was the printing subcontractor; (2) that the printing portion of the subject RFP should have been procured by competitive sealed bid by the Department of General Services; and (3) that the printing portion of the contract be separated out and awarded to it.

Findings of Fact

1. On June 4, 1996, the Maryland State Department of Education (MSDE) issued a request for proposal (RFP) for the printing, processing, distribution and storage of standardized educational tests known as the Maryland Functional Tests.
2. The RFP sought "the services of one contractor to carry out the work associated with printing, distribution, and warehousing of the Maryland Functional Tests", as well as "the manage-

ment of all pieces of the contract described in the Specifications,” and directed offerors to submit a two-volume proposal, with technical and financial components.

3. Issuance of the subject RFP reflected a change from past MSDE practice in administering the Maryland Functional Tests as a result of difficulty in administering the tests under a two party contracting system. Until the award of the current contract, MSDE had utilized two, independently selected contractors for administration of the tests, one for printing functions and another for packaging, distribution, inventorying, storage and maintenance of test security. The printing contract was awarded through a sealed bid process by the Department of General Services, and the contract for the processing, distribution and storage aspects of the tests through an RFP by MSDE. From 1991 through 1996, Appellant had provided printing and bar coding services. The DDD Company has recently been the contractor for processing, distribution and storage of the tests.

4. MSDE received two responses to the captioned RFP: the winning proposal submitted by the DDD Company (DDD), and a proposal from National Resource Network, Inc. (NRN). Appellant was designated as a subcontractor for the proposal submitted in response to the RFP by NRN. NRN's proposal was deemed unacceptable by the MSDE evaluation committee, and the contract was awarded to DDD.

5. The transmittal letter in NRN's proposal suggested that NRN would be directly responsible for the packaging and distribution of the tests. This division of responsibilities was affirmed in the transmittal letter sent by Appellant with its proposal for the printing subcontract included in the NRN proposal. Appellant's letter states, "We intend to be the subcontractor providing the blueline proofing, printing, binding and inkjetting of the bar codes. National Resource Network would be the primary contractor and would supply the processing, distribution and storage of the tests." The Board specifically finds that the NRN proposal was not a joint proposal with Appellant, but one in which Appellant was a subcontractor.

6. On August 30, 1995, Appellant filed a bid protest with MSDE, which MSDE denied by letter dated September 6, 1996. Appellant then filed this appeal on September 18, 1996. NRN, the offeror to whom Appellant was a subcontractor, has not protested the award of the contract to DDD, nor did it join in its subcontractor's protest or appeal.

7. No comment was filed on the Agency Report and neither party requested a hearing.

Decision

The appeal on the grounds the contract not be awarded to anyone other than NRN is dismissed. Appellant is not an "interested party" with standing to protest the contract award process. Under COMAR 21.10.02.01 B(1) only an interested party, i.e., an actual or prospective bidder or offeror for a contract with the State may protest the award of a contract. A subcontractor has no standing to protest such an award. Coach & Car Equipment Corporation, MSBCA 1531, 2 MSBCA ¶249 (1990); American Space Planners, Incorporated, MSBCA 1963, 5 MSBCA ¶400 (1996).¹ Under such circumstances, this Board lacks jurisdiction over Appellant's appeal, and it is accordingly dismissed.

The appeal of the denial of Appellant's protest concerning the method of solicitation, through award of a single contract rather than through two distinct contracts for printing and other test related services, is also dismissed because it was not filed on a timely basis. Under COMAR 21.10.02.03(A), a protest based on alleged improprieties in a solicitation that are apparent before bid opening or the closing date for the receipt of initial proposals is required to be filed before bid opening or the closing date for receipt of initial proposals.

MSDE's decision to procure the printing services as part of the larger RFP was apparent on the face of the RFP and, under COMAR 21.10.02.03(A), should have been protested before the closing date for receipt of proposals. Camelia Food Stores, Inc., et al, MSBCA 1754, 4 MSBCA ¶344 (1995) at p. 16. See also, Paul Blaine Associates, Inc., MSBCA 1123, 1 MSBCA ¶54 (1983); Homecoming, Inc., MSBCA 1647, 3 MSBCA 309 (1992) at p.8. Appellant's protest was not filed until after receipt of initial proposals and must be dismissed as untimely.

Appellant's protest on grounds that (1) its subcontract proposal for printing services as part of the NRN proposal should have received consideration by the agency in isolation from the NRN proposal; and (2) that printing services should have been procured through a Department of General Services sealed bid process is similarly untimely because such alleged defects were also apparent before the date for receipt of initial proposals and required to be protested before the closing date for receipt of initial proposals.

¹ The Board dismissed the appeal in American Space Planners on grounds of lack of a timely appeal to the Board noting, however, that the Appellant as a subcontractor lacked standing.

Wherefore, it is Ordered this 30th day of October that the appeal is dismissed.

Dated: October 30, 1996

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

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 1973, appeal of John D. Lucas Printing Company under MSDE RFP No. 720031.

Dated: October 30, 1996

Mary F. Priscilla
Recorder

