

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MERJO ADVERTISING AND SALES)
PROMOTION COMPANY) Docket No. MSBCA 1466
Under DGS RFQ No. 20020)

November 9, 1989

Bid Protest - Timeliness - Protests based on alleged improprieties in a solicitation that are apparent before bid opening are required to be filed before bid opening.

APPEARANCE FOR APPELLANT None
APPEARANCE FOR RESPONDENT Michael P. Kenney
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This is an appeal of the procurement officer's final decision denying Appellant's protest of the award of the referenced contract on the grounds that it was untimely filed. The basis of the protest was alleged anti-competitive and ambiguous language used in the contracts specifications.

Findings of Fact

1. On July 13, 1989, the Purchasing Bureau of the Department of General Service (DGS) issued RFQ No. 20020 for the printing of 15,000 calendars. The RFQ states that "only first quality work will be accepted" and that the "vendor [is] to be within 60 miles of Annapolis, Maryland." Bid opening was scheduled for July 17, 1989 at 2:00 p.m.
2. Prior to bid opening, Appellant telephoned the procurement officer and complained about the restrictiveness of the sixty mile radius requirement and the ambiguity of the term "first quality work." Appellant's printing plant is located in upstate New York, more than sixty miles from Annapolis, prohibiting Appellant from bidding on this contract. The procurement officer stated that Appellant would not be able to bid on the contract and defended DGS's inclusion of those two restrictions. (Tr. 6-8).
3. At some time prior to bid opening, Appellant spoke with someone else at DGS who advised him to protest the specifications. At bid opening, six bids were received, but Appellant did not submit a bid. At 6:53 p.m. on July 27, 1989,

a facsimile message (FAX) was transmitted from Appellant to the DGS Purchasing Bureau. This message, which was received by the procurement officer the next day, July 28, 1989, was intended to serve as Appellant's protest of the award of the contract. Again, Appellant's protest was based on the inclusion of the sixty mile radius provision and the term "first quality work."

4. The procurement officer's final decision of August 3, 1989 denied Appellant's written protest filed after bid opening on July 27, 1989 on the grounds that it was untimely based on the filing requirements of COMAR 21.10.02.03A and COMAR 21.10.02.02B. Appellant filed a timely appeal with this Board on August 11, 1989.

Decision

Appellant's written protest of the award of this contract is grounded on alleged improprieties in the solicitation. COMAR 21.10.02.03A states that:

A protest based on 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.

Appellant's written protest was transmitted to the FAX Machine at the DGS Purchasing Bureau after the close of business on July 27, 1989, but it was not received by the procurement officer until July 28, 1989. The bid opening was at 2:00 p.m. on July 27, 1989, and that was the deadline for the filing of this protest. The basis of the protest was alleged improprieties in the solicitation were clearly apparent before bid opening as Appellant made several oral protests before that time. In this regard, however, Appellant's oral protests made to the procurement officer prior to bid opening cannot be considered as valid protests. COMAR 21.10.02.02B requires that protests "shall be in writing and addressed to the Procurement Officer." The record does not reflect that the procurement officer waived the requirement for a written protest. See Micrographic Specialties, Inc., MSBCA 1331, 2 MSBCA ¶149 (1987). Compare Bernie's Vending Service, Inc., MSBCA 1420, ___ MSBCA ___ (1989).

For the foregoing reasons, therefore, Appellant's protest is denied as being untimely. We need not address the substantive issues raised by Appellant's protest.