

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of MERJO ADVERTISING
& SALES PROMOTIONS COMPANY

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Docket No. MSBCA 1948

Under Dept. of General Services
Bid No. 001IT801114

May 21, 1996

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

APPEARANCE FOR APPELLANT:

Thomas P. Lydon, Esq.
Towson, Maryland

APPEARANCE FOR RESPONDENT:

John H. Thornton
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY
(Park Sign Company, Inc.)

J. Seymour Sureff, Esq.
Baltimore, Maryland

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that (1) as a representative of a manufacturer it met the requirement of the Invitation for Bids that the product sought be manufactured within the vendors own facilities and (2) no vendor could meet such a requirement if the language were read literally.

Findings of Fact

1. On January 18, 1996, the Department of General Services (DGS) issued the above captioned Invitation for Bid (IFB) for the purchase of three different types of "wheel signs" for the Maryland State Lottery Agency (Lottery) to be used by the Lottery to display winning lottery numbers.

2. The IFB provided that the “vendor should be capable and equipped to produce this project entirely within their [sic] own facilities, accepting [sic] the art disk¹ and delivering a finished product.”

3. No protest concerning any provision of the IFB was filed prior to bid opening.

4. Bids were opened on February 20, 1996. Four bids were received, including a low bid of \$41,660.00 from Appellant, and a second-low bid of \$47,930.00 from the Interested Party Park Sign Co., Inc. (Park).

5. On February 23, 1996, Park filed a protest with the DGS Procurement Officer protesting against an award to Appellant. The Basis for Park’s protest was “that Merjo is a broker and does not manufacture any products within his own facilities....”

6. The DGS Procurement Officer rejected Appellant’s bid by letter dated March 4, 1996 stating that “[y]our firm[,] a distributor, does not manufacture wheel signs as required in this invitation at your facility.”

7. On March 4, 1996, Appellant filed a protest against the rejection of its bid. Appellant’s protest was based on two grounds:

(1) that Appellant would comply with the IFB requirement that the vendor be capable of manufacturing the signs entirely within its own facilities because “the signs are being produced entirely within the facilities of the factory I represent” and

(2) that literal compliance the requirement of the IFB that the “vendor should be capable and equipped to produce this project entirely within their own facilities” was objectionable because no vendor could in fact manufacture all the components of the sign on its own premises.

8. The DGS Procurement Officer denied Appellant’s protest by final decision dated April 10, 1996.

9. In response to Appellant’s first ground, that Appellant would comply with the IFB because the signs would be produced entirely within the facilities of the factory which Appellant

¹ The term “art disk” refers to the computer disk on which the design of the artwork of the wheels is recorded.

represented, the Procurement Officer's final decision stated: "Your firm, not being a manufacturing or assembly operation, does not comply with the written requirement...."

In response to Appellant's second ground of protest, that the IFB requirement was objectionable because literal compliance was impossible, the Procurement Officer's final decision noted that:

"This requirement was listed on the front page of the ITB document preceding the detailed specifications of the wheel signs. COMAR 21.10.02.03(A) allows for protesting of advertised specifications before bid opening. In that no protest was received, ITB No. 001IT801114 was opened as scheduled.

Failure to protest this requirement before bid opening removes any decision to consider your protest at this time after opening of bids."

10. By decision dated April 10, 1996, the Procurement Officer sustained Park's February 23, 1996 protest.

11. On April 12, 1996, Appellant filed an appeal with this Board from the denial of its protest. The Agency Report was filed on May 7, 1996 and a hearing was held on May 17, 1996.

Decision

The record reflects that Appellant is a broker, not a manufacturer of signs. Appellant's letter of protest confirms that Appellant itself would not be manufacturing the signs: it says that Appellant would "represent" a factory that would produce the signs "entirely within the facilities of the factory." At the hearing Appellant's President referred to Appellant as a "distributor," and testified that Appellant would not make the signs. Appellant further testified that the signs would be made by a corporation located in California and that Appellant had no ownership interest in this corporation. It is clear, therefore, that Appellant could not comply with the IFB requirements that the bidder manufacture the signs itself. Therefore, the Procurement Officer properly rejected Appellant's bid and denied its protest on such ground.

Concerning Appellant's second ground, that the requirement for manufacture of the signs "entirely" within the vendor's facilities read literally could not be complied with, the Procurement Officer correctly notes that COMAR 21.10.02.03A requires that 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.”
A protest received after these time limits “may not be considered.” COMAR 21.10.02.03C.

The IFB clearly stated the State’s requirement that the bidder itself had to make the Lottery’s signs entirely within its own facilities. Any objection Appellant had concerning the reasonableness of this requirement or its meaning was required to be filed before bid opening on February 20, 1996. Appellant failed to protest against this requirement of the IFB prior to that time limit. Accordingly, the Board lacks jurisdiction and the appeal on such ground must be dismissed. See Merjo Advertising & Sales Promotions Company, MSBCA 1942, 5 MSBCA ¶393 (April 9, 1996) at pp. 5-6.

While the Board lacks jurisdiction to consider Appellant’s complaint that no one could comply with a literal reading of the IFB requirement regarding manufacture, we note that Appellant alleges that the factory it represented would be making the signs “entirely” within its facilities. Therefore, it appears that Appellant acknowledges that compliance with the manufacturing requirement is possible. We also note that a total of four bidders submitted bids pursuant to this IFB without pre-bid protest that compliance with the manufacturing requirement was impossible.

Accordingly, the appeal is denied.

Wherefore it is Ordered this 21st day of May, 1996 that the appeal is denied.

Dated: May 21, 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 1948, appeal of Merjo Advertising & Sales Promotions Co. under DGS Bid No. 001IT8001114.

Dated: May 21, 1996

Mary F. Priscilla
Recorder

Subject

Q.1. Write a note on the following: (10)

(a) The process of photosynthesis

(b) The structure of a flower

(c) The life cycle of a butterfly

(d) The human digestive system

Q.2. Answer the following questions.

(a) Why is photosynthesis called an endothermic reaction?

(b) Why?

(c) Why?

Q.3. Write the chemical equation for the reaction of photosynthesis.