

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MICROGRAPHIC )  
SPECIALTIES, INC. )  
 ) Docket No. MSBCA 1331  
Under DGS Quotation Request No. )  
P47739 )

May 20, 1987

Bid Protest - Timeliness - A bid protest received (filed) by the procurement agency more than seven days after the basis for the protest is known is untimely and may not be considered by the procurement officer pursuant to COMAR 21.10.02.03.

Bid Protest - Waiver of Procedural Regulations - Unless clearly unreasonable, a procurement officer may insist upon strict compliance with an agency's procedural regulations for filing a bid protest. However, they may be waived where neither the rights of the State nor any interested party would be prejudiced. The requirement of COMAR 21.10.02.02B that the protest be addressed to the procurement officer is a procedural requirement which thus may be waived, in the absence of prejudice, at the discretion of the procurement officer. In the instant appeal the protester sent two virtually identical letters of protest to the procuring agency. One letter addressed to an individual who was not the procurement officer but who worked for the procuring agency was received by the agency within seven days of the date the protester learned of the grounds for protest. The other letter addressed to the procurement officer was not received within seven days. While the procurement officer could have treated the letter received within seven days as a protest, his discretionary determination not to waive the requirement that the protest be properly addressed to him was not shown to be clearly unreasonable.

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

OPINION BY CHAIRMAN HARRISON

Appellant appeals the final determination of the Department of General Services (DGS) procurement officer that its bid protest was not timely filed.

Findings of Fact

1. On or about January 30, 1987, the DGS Purchasing Bureau (Division of Printing and Publication) issued a Request for Quotation (RFQ) for a microfilm reader/printer. The RFQ contained detailed specifications and a standard instruction to Bidders sheet (Exhibits 1, 2 and 3, Agency Report). The specifications called for a "Fuji FMRP 30AU or equal" microfilm reader/printer, with bids due February 17, 1987. Timely bids were received from Appellant and National Micrographics Systems (National). On February 18, 1987, DGS awarded the contract in the form of a purchase order to National whose product, a Minolta RP407E, was determined to be an equal to the Fuji model noted in the specifications and whose price was \$834 less than Appellant's bid for the Fuji model. The purchase order called for delivery the week of March 16, 1987.

On March 6, 1987 Mr. John Jacobs, Account Executive for Appellant telephoned a Mr. Richard Larmore<sup>1</sup> at the Division of Printing and Publication. During this conversation award

<sup>1</sup>Mr. Larmore is a buyer in the Division of Printing and Publication of the DGS Purchasing Bureau.

of the contract to National was apparently discussed. Following this conversation, Mr. Jacobs sent letters, dated March 6, 1987, to Howard Beck at the DGS Purchasing Bureau and to Kenneth B. Webster, the Procurement Officer for this RFQ at the Purchasing Bureau.

2. The letter sent to Mr. Webster, which asserted that the Minolta RP407E did not meet the RFQ specifications, was virtually identical to that sent to Mr. Beck except that the letter to Mr. Webster commenced with the statement, "I am writing to protest the award of Quotation Request Number P47739." The letter to Mr. Beck commenced with the statement that "Per Mr. Larmore's directions, I am writing to question the award of Quotation Request Number P47739." (Exhibits 8 and 9, Agency Report).

3. Both Mr. Beck and Mr. Webster were addressed in the letters as "Division Manager" of the State of Maryland, Purchasing Bureau, 301 W. Preston Street, Baltimore, MD 21201. In fact, Mr. Webster, who as noted is the procurement officer for this procurement, is the Division Manager of the Printing and Publication Division and Mr. Beck is the Assistant Manager.

4. Appellant's letter to Mr. Beck was received on March 10, 1987 and responded to by Mr. Beck by letter dated March 13, 1987, which stated in part:

I was preparing an answer to your letter when you called today. We discussed your questions and you are not satisfied, but will send a formal protest. I explained the timing for a protest and you felt it was unfair and that you will file a protest anyway.

(Exhibit 9, Agency Report).

5. Appellant's letter to Mr. Webster, although dated March 6, 1987, was not received by DGS until March 17, 1987.

6. In denying the Appellant's protest on timeliness grounds, Mr. Webster, the procurement officer, stated in part:

The State's Procurement Regulations (COMAR 21.10.02.03B) require that ". . . bid protests shall be filed not later than 7 days after the basis of the bid protest is known or should have been known, whichever is earlier." Your protest was dated March 6, 1987 and received on March 17, 1987, well after the time interval prescribed by the procurement regulation.<sup>2</sup>

(Exhibit 10, Agency Report).

7. In Appellant's written appeal to this Board, it is asserted that the letter to Mr. Beck dated March 6, 1987 was a protest of the award to National.

8. Appellant elected not to comment on the Agency Report which included a Motion to Dismiss the appeal on timeliness grounds; nor did Appellant request a hearing.

#### Decision

DGS contends that Appellant's protest was not timely filed. This Board has consistently held that the requirement of COMAR 21.10.02.03B requiring a protest to be filed<sup>3</sup> within seven days after the basis for the protest is known or should have been known is substantive in nature and must be strictly construed. DP Service Bureau, Inc., MSBCA 1297 (October 10, 1986); General Elevator Company, Inc., MSBCA 1253 (August 30, 1985), 2 MSBCA ¶111; David A. Bramble, Inc., MSBCA 1240 (July 9, 1985), 1 MSBCA ¶103; Dryden Oil Company, MSBCA 1150 (July 20, 1983), 1 MSBCA ¶55; Dasi Industries, Inc., MSBCA 1112 (May 5, 1983), 1 MSBCA ¶49; Rolm/Mid-Atlantic, MSBCA 1094 (January 21, 1983), 1 MSBCA

<sup>2</sup>We cannot determine from the procurement officer's decision whether he found that Appellant's failure to ascertain the status of the procurement until March 6, 1987, some seventeen days after the public bid opening on February 17, 1987, constituted untimely delay under the "should have been known" language of COMAR 21.10.02.03B. In any event, we believe that the record would have justified the procurement officer in making a finding that Appellant should have made earlier inquiry.

<sup>3</sup>The term "filed" as used in COMAR 21.10.02.03 means receipt in the procurement agency. COMAR 21.10.02.03C.

¶35; Kennedy Temporaries, MSBCA 1061 (July 20, 1982), 1 MSBCA ¶21, rev'd on other grounds, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984).

Appellant's letter dated March 6, 1987 to Mr. Webster, stated to be a protest, and setting forth the grounds therefore, was not received by DGS until March 17, 1987. It thus was not timely filed. However, the letter addressed to Mr. Beck of the same date (March 6, 1987) was received on March 10, 1987. This letter because of its similarity in language to the letter to Mr. Webster we believe could have been treated by the procurement officer as a protest despite its failure to be addressed to him. Since the letter to Mr. Beck was received in the procurement agency within seven days of March 6, 1987, it would have been timely had the procurement officer treated it as a protest. He did not treat this letter as a protest, however, relying, we assume,<sup>4</sup> on the provisions of COMAR 21.10.02.02B which provides that protest be in writing "and addressed to the respective procurement officer representing the State agency." (Underscoring added).

In Kennedy Temporaries, supra, we held that an agency's procedural regulations may be waived, in the absence of prejudice, at the discretion of the procurement officer. In Kennedy Temporaries, we distinguished between substantive requirements, such as timeliness of filing a protest and procedural requirements, such as the protest being written. The former as noted above must be strictly enforced while the latter may be relaxed where neither the rights of the State nor any interested party would be prejudiced. See also DP Service Bureau, Inc., supra. Here the procurement officer apparently determined not to waive the requirement of COMAR 21.10.02.02B (which we find to be procedural rather than substantive) that the protest be addressed to him. Whether he declined to do so on the basis of prejudice or simply as a matter of discretion cannot be determined from the record. However, assuming arguendo that neither the rights of the State nor any interested party would be prejudiced, the determination whether to waive the procedural requirement to address a protest to the procurement officer is a matter within the sound discretion of the procurement officer. This Board will not disturb a procurement officer's discretionary determination unless it is shown that such determination is clearly unreasonable. Hanna v. Bd. of Ed. of Wicomico Co., 200 Md. 49, 51 (1952).

Based on the record before us, we conclude that Appellant has not met its burden to show that the procurement officer's determination to demand strict compliance with the procedural requirement that the protest be addressed to him and not to treat the letter to Mr. Beck as a protest was clearly unreasonable. Accordingly, the appeal is denied.

<sup>4</sup>Another possible reason why the procurement officer declined to treat the letter to Mr. Beck as a protest is that he did not consider it to be a protest because of (1) the letter sent to him the same date specifically stating that it was a protest, and (2) the use of the phraseology "question the award" as distinct from "protest the award" in the letter to Mr. Beck.

