

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MOTOROLA COMMUNICATIONS)
AND ELECTRONICS, INC)

Docket No. MSBCA 1343

Under MTA Contract No. MTA-3-32-22)

July 10, 1987

Bid Protest - Timeliness - The requirement under COMAR 21.10.02.03B that a protest "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier" is substantive in nature and must be strictly construed.

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MEMORANDUM OPINION BY CHAIRMAN HARRISON

Appellant has appealed the rejection of its bid protest on timeliness grounds by the Mass Transit Administration's (MTA) procurement officer. At the hearing MTA moved to dismiss the appeal on grounds that the bid protest was not timely filed. The material facts as gleaned from the Appellant's written appeal to this Board, the Agency Report and the Appellant's comments on the Agency Report are not in dispute.

On February 13, 1987 MTA advertised and solicited bids for providing a new Fixed End Radio System for bus operations.

Bid opening occurred on April 24, 1987. Atkinson System Technologies Co. (Atkinson) submitted the low bid at \$2,103,739.00. Appellant was second low bidder at \$2,486,137.00.

Upon its review of the Atkinson bid on May 20, 1987, Appellant "learned that the Atkinson bid was noncompliant."¹ Appellant requested a photocopy of certain pages of the bid which were delivered to it by the procurement officer on May 22, 1987.

On June 3, 1987, Appellant became aware that MTA intended to award the contract to Atkinson. On June 4, 1987, Appellant hand-delivered to the procurement officer a letter dated June 3, 1987, which alleged that the Atkinson bid was materially "non-compliant" and listed 15 alleged bid deficiencies. The letter concluded with a statement that because of the "non-compliance" of the Atkinson bid, Appellant anticipated it would be awarded the contract.

¹See Appellant's comments on the Agency Report.

On the following day, another letter of protest from Appellant incorporating the allegations of its June 3, 1987 letter was hand-delivered to the procurement officer. The grounds of protest set forth in both letters were those that Appellant had ascertained as a result of its May 20 review of the Atkinson bid.

Appellant's protest was rejected by the procurement officer in his final determination dated June 12, 1987 because the protest was not timely filed.

By letter dated June 18, 1987, the Appellant appealed to this Board.

We have consistently held that the requirement under COMAR 21.10.02.03B that a protest "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier" is substantive in nature and must be strictly construed. Frank W. Hake, Inc., MSBCA 1323 (May 27, 1987); 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; Roim/Mid-Atlantic, MSBCA 1094 (January 21, 1983), 1 MSBCA ¶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 had actual knowledge of the grounds of its protest, i.e. that the Atkinson bid was in its opinion nonresponsive in several respects, on May 20, 1987. Its protest on these same grounds filed some fourteen days later thus was not timely. Appellant, however, urges us to overrule our former decisions and adopt a test which would commence the running of the seven day period not from the time a bidder learned or should have learned of its grounds for protest but from the time it knew or should have known an award was to be made to the bidder in whose bid it had perceived an as yet undisclosed defect. This we decline to do, believing as we have observed in the past that where the rights and interests of so many parties are at stake the time limits of COMAR should be strictly construed such as to effect a resolution of potential problems regarding contract formation at the earliest possible time. This goal is best achieved by continuing to follow our determination that the seven day period begins to run at the time grounds for protest actually or constructively become known.

Accordingly, the Appellant's protest was not timely filed and was properly rejected by the procurement officer under COMAR 21.10.02.03C. The motion to dismiss the appeal is granted.