

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of NATIONAL SCIENCE)
CORPORATION)
)
) Docket No. MSBCA 2052
Under DGS Bid Request No.)
001IT809227)
)

April 8, 1998

Board of Contract Appeals - Jurisdiction - The Board of Contract Appeals lacks jurisdiction over a bid protest appeal where no agency final decision on the protest has ever been issued.

Bid Protest - Language Constituting - While no specific words of protest are required, the writing must reach a level of conformation sufficient to put a reader on reasonable notice it is offered as a complaint.

APPEARANCE FOR APPELLANT: William C. Dickerson, Esq.
Levin & Tepper
Bethesda, MD

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This Board grants Respondent's Motion to Dismiss for lack of jurisdiction for the reasons set forth below.

Findings of Fact

1. On November 21, 1997, the Department of General Services (DGS) issued the captioned bid request (Invitation to Bid or ITB) for the purchase of two trucks for the Maryland Transportation Authority. Bids were due by December 23, 1997 at 2:00 p.m. Four bids were received. The bids were submitted on copies of the ITB itself.
2. The low bidder was Bob Bell Chevrolet Nissan, Inc. (Bell). The second-low bidder was Appellant, National Science Corporation (NSC).
3. On January 6, 1998, the Procurement Officer, Walter E. Johnson, awarded the contract to Bell.
4. Mr. Johnson prepared the award approval form on December 29, 1997. Several days before

that, although he cannot remember the exact date, Mr. Johnson spoke on the telephone with Mr. Raphael Nwadije of NSC. During that telephone conversation Mr. Johnson told Mr. Nwadije that the NSC bid was nonresponsive. Mr. Nwadije allegedly asked Mr. Johnson to confirm the determination of non-responsibility in writing.

5. On February 3, 1998, Mr. Nwadije sent Mr. Johnson a facsimile (FAX) dated February 1, 1998 with some attached "Vehicle Specifications."¹ Mr. Nwadije's FAX which was unsigned stated:

We call your attention to your verbal communication a forth [sic] night ago with respect to the subject bid.

We believe there could have been error in your assertions that the 4700 series we tendered fell short of the descriptive specs attendant. Our pricing are very competitive, and yet, we were by-passed in award.

We would be grateful [sic] if you'd review your records and make amends. Thank you.

6. On February 10, 1998, NSC filed an appeal with this Board. However, no Procurement Officer's decision has ever been issued.

Decision

This Board lacks jurisdiction because no Procurement Officer's decision was ever issued from which NSC could appeal to the Board. Advance Presort Service, MSBCA 1891, 5 MSBCA ¶384 (1995); Norman V. Crouse Co., MSBCA 1752, 4 MSBCA ¶340 (1995).

The Board also lacks jurisdiction because NSC's FAX on February 3, 1998, assuming arguendo that it constituted a protest, was not timely filed. COMAR 21.10.02.03B requires that a protest must be filed not later than 7 days after the basis for protest is known. The Procurement Officer, Mr. Johnson, told NSC sometime prior to December 29, 1997 that its bid was nonresponsive. NSC's February 3 FAX refers to "your verbal communication a forth [sic] night ago" in which Mr. Johnson made "assertions that the 4700 series we tendered fell short of the descriptive specs"

A protest against the rejection of NSC's bid thus had to be filed within seven days after the date of this conversation between Mr. Johnson and NSC when NSC was advised that its vehicle did not meet the ITB specifications. Mr. Johnson asserts that this conversation occurred before December 29, 1997. NSC's February 3 FAX dated February 1, 1998 confirms that the conversation

¹ For the most part, these "Vehicle Specifications" were too light to be readable.

occurred at least a fortnight, two weeks, before February 1, 1998. Therefore, the February 3 FAX, if it was a protest, was late and may not be considered. COMAR 21.10.02.03C. Since the "protest" was late the Board lacks jurisdiction to hear an appeal from the "protest". Kennedy Temporaries v. Comptroller, 57 Md. App. 22 (1984); Ismart, LLC, MSBCA 1979 5 MSBCA ¶417 (1997); Crystal Enterprises, MSBCA 1971, 5 MSBCA ¶407 (1996); ATI Systems and Federal Signal Corporation, MSBCA 1911, 1913 and 1918, MSBCA ¶387 (1995) at p. 3.

Finally, the Board lacks jurisdiction because it does not find that Appellant's FAX of February 3, 1998 constitutes a protest. The Board only has jurisdiction over appeals from the issuance of a Procurement Officer's decision on a protest. Sections 15-217 and 15-220, Division II, State Finance and Procurement Article. An Appellant must file a protest that conforms materially to the requirements of COMAR.

COMAR does not prescribe the use of any particular language that must be used to constitute a protest. A protest means a complaint relating to the solicitation or award of a procurement contract. COMAR 21.10.02.01B.(2). The protest shall be in writing and addressed to the procurement officer. COMAR 21.10.02.02B. COMAR 21.10.02.04 prescribes the form required for protests. One of the requirements is that the communication contain a statement of the reasons for the protest. While no specific words of protest are required, the writing must reach a level of confrontation sufficient to put a reader on reasonable notice it is offered as a complaint. See Emergency Management Systems, MSBCA 1769, 4 MSBCA ¶345 (1993) at pp. 5-7. We do not find that the language employed in the FAX sufficed to notify the Procurement Officer that a formal protest under COMAR 21.10.02.04 was intended. Therefore, no protest has been filed and no corresponding duty to issue a Procurement Officer's decision thereon arises.

Because the Board lacks jurisdiction the appeal must be dismissed.

Therefore, it is ORDERED this 8th day of April, 1998 that the appeal is dismissed.

Dated: April 8, 1998

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 2052, appeal of National Science Corporation under DGS Bid Request No. 001IT809227.

Dated: April 8, 1998

Mary F. Priscilla
Recorder