

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF NUMBERSONLY-)
NUSOURCE JV)
) Docket No. MSBCA 2303
Under MIEMSS RFP # 02-MIEMSS-03)
)

September 13, 2002

Bid Protest - Timeliness - Statement of Reasons - A protest that does not meet the requirements of COMAR 21.10.02.04 because the reasons for the protest are not supplied may not be considered unless the reasons are ultimately supplied within seven days of the date such reasons were known or should have been known.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: E. Fremont Magee
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its bid protest on timeliness grounds and on the merits. For the reasons that follow we determine that Appellant's bid protest was not timely filed, and we dismiss the appeal for lack of jurisdiction.

Findings of Fact

1. The Maryland Institute for Emergency Medical Services Systems (MIEMSS) issued a request for proposals (RFP) to develop software for a WEB Based EMS Data Collection System on February 26, 2002. The purpose of the WEB Based EMS Data Collection System is to allow Maryland Emergency Medical Services (EMS) Providers to file via the Internet Maryland Ambulance Information Reports required under COMAR 30.03.04.04.
2. Nineteen (19) proposals were submitted in response to the RFP including a proposal from Appellant. One (1) proposal was rejected as not reasonably susceptible of being selected for award because it used software that was unacceptable. The technical section of each of the remaining eighteen (18) proposals was reviewed by the individual members of an evaluation committee. Each member individually evaluated the proposals against the RFP evaluation criteria and numerically scored the proposals for each of the four (4) criteria.
3. The evaluation committee recommended that proposals scoring below 20 out of a possible combined score of 50 be eliminated as not reasonably susceptible of being selected for award. Appellant scored below 20.
4. On July 11, 2002 the Procurement Officer notified Appellant in writing that its proposal was

not reasonably susceptible of being selected for award. The notice listed as deficiencies the inclusion of price information in the technical proposal section, the lack of sufficient detail (particularly in the areas of platform, record storage and security and tracking) and the high number of projected hours for the project. The notice also advised Appellant that its price proposal had not been opened and could be picked up or otherwise returned in accordance with Appellant's wishes.

5. The next day, July 12, 2002, the Procurement Officer received an e-mail from Appellant which read in its entirety:

-----Original Message-----

From: Lhgadhia@aol.com [mailto:Lhgadhia@aol.com]

Sent: Friday, July 12, 2002 10:47 AM

To: Sherry ALBAN

Subject: Re:

Dear Ms. Alban,

This is to note that our receipt of your communication was as of yesterday July 11, 2002.

We hereby register a protest to the rejection of our offer. We will follow up with a letter stating our reasons as required by COMAR within ten days from yesterday.

Sincerely,

Lalit H. Gadhia

6. On July 19, 2002, Appellant sent the Procurement Officer a document entitled "Response In Support Of Protest To MIEMSS Proposal Rejection Reasons And Explanation." By letter dated July 24, 2002, the Procurement Officer denied the protest because the e-mail dated July 12, 2002 did not contain a statement of reasons for the protest, and the document filed July 19, 2002 was filed too late to be considered as a protest. In addition, the letter notified Appellant that the protest, if properly filed, would be denied on the merits since the proposal was not reasonably susceptible of being selected for award because the Appellant's proposal included price information in the technical proposal section, lacked sufficient detail and contained a projected number of hours for the project that was too high.
7. Appellant appealed to this Board on August 5, 2002. Appellant did not comment on the Agency Report, and neither party requested a hearing.

Decision

The Board finds that the Appellant's purported protest, conveyed by e-mail dated July 12, 2002, does not comply with the requirements for a protest under COMAR 21.10.02.04 because it does not contain a statement of reasons for the protest. National Science Corporation, MSBCA 2052, 5 MSBCA ¶433 (1998) at page 3; see also Energy Management Systems, MSBCA 1769, 4 MSBCA ¶345 (1993) at page 5.

COMAR 21.10.02.04 states the minimum requirements for a protest:

The written protest shall include as a minimum the following:

- A. The name and address of the protester;
- B. Appropriate identification of the procurement, and, if a contract has been awarded, its number if known;
- C. A statement of reasons for the protest; and
- D. Supporting exhibits, evidence, or documents to substantiate the reasons for the protest unless not available within the filing time, in which case the expected availability date shall be indicated.

The requirements for filing a protest are jurisdictional and strictly construed. Thus an oral protest is not allowed because the regulations provide that it must be in writing. AEPCO, Inc., MSBCA 1844, 4 MSBCA ¶370 (1994). Similarly, a protest filed one (1) day late is not allowed and, pursuant to COMAR 21.10.02.03C, may not be considered. ISmart, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997), *aff'd*, Maryland State Board of Contract Appeals v. ISmart, LLC, No. C-97-034415 (Cir. Ct. How. Co., March 17, 1998). See also Alliance Roofing and Sheet Metal, Inc., MSBCA 2251, 5 MSBCA ¶502 (2001) at pages 5-7; PTC Corporation and Ion Track Instruments, Inc., MSBCA 2027, 5 MSBCA ¶430 (1998); JVC, Inc., MSBCA 2067, 5 MSBCA ¶445 (1998); Aquaculture Systems Technologies, L.L.C., MSBCA 2141, 5 MSBCA ¶470 (1999).

It is clear from the record herein as the Board focuses on the Appellant's July 19, 2002 document entitled "Response In Support Of Protest To MIEMSS Proposal Rejection Reasons And Explanation" that Appellant knew of the grounds of its protest as set forth therein upon receipt on July 11, 2002 of notice from the Procurement Officer that its proposal was not reasonably susceptible of being selected for award. COMAR 21.10.02.03B requires that "...protests shall be filed not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier."

However, Appellant did not include a statement of reasons for the protest in its July 12, 2002 e-mail to the Procurement Officer. If the statement of reasons for the protest is not presented within seven (7) days after the basis for the protest is known, the requirement of this regulation is defeated. A party could otherwise file a protest without setting forth reasons for the protest and supply the reasons days, weeks, or months later, potentially delaying the procurement. Until the reasons are supplied, there could also be no decision on the propriety of the protest.

As the Court of Special Appeals of Maryland observed in Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 40 (1984):

The requirement that a protest be in writing and that it be filed within seven days is both procedural and substantive. It is designed, at least in part, to govern internal agency procedures; but it also has a substantive impact upon other parties. A protest triggers the dispute-resolution process established in § 7-201, and that necessarily affects not just the agency and the protester, but the would-be successful

bidder (and possibly other bidders) as well. His right to the contract is placed in jeopardy by the invocation of that process; and he certainly has an interest in knowing promptly (and within the time limit established by the regulation) whether he may be called upon to defend his bid.

A natural concomitant of this principal is that the protest must include a statement of reasons for the protest as required by the regulation. It hardly serves the interest of “the would-be successful bidder (and possibly other bidders) as well” to know within the seven (7) day time limit as set forth in the regulation that there is a protest but to not also know the reason for it.

The document Appellant filed on July 19, 2002 entitled “Response In Support Of Protest To MIEMSS Proposal Rejection Reasons And Explanation” does not cure the jurisdictional defect. If that document is a protest, it is one (1) day late since the notice of the rejection was received by Appellant eight (8) days earlier, on July 11, 2002. As noted above in ISmart, LLC a protest that is filed one (1) day late is not allowed and must be dismissed.

That document cannot supply the statement of reasons for the protest because the statement of reasons for the protest is one of the items required at a minimum to be included in the protest under COMAR 21.10.02.04C, and the Procurement Officer could not waive the requirement of COMAR 21.10.02.03B and allow the reasons for the protest to be supplied more than seven (7) days after the reasons were known.

The only matter which is allowed to be filed outside the seven (7) day requirement for a protest is “[s]upporting exhibits, evidence, or documents to substantiate the reasons for the protest...not available within the filing time...” under COMAR 21.10.02.04D. Appellant’s July 19, 2002 filing does not qualify for that exception. That filing consists only of the Technical Proposal Specifications Form which was part of the Appellant’s technical proposal, quotations from the RFP and statements by Appellant that it met applicable requirements and complied with the RFP. All of those items were available within seven (7) days of July 11, 2002. In any event, the statement of reasons for the protest, which is required to be included with the protest under COMAR 21.10.02.04C, is a separate requirement from the allowance for late filing of initially unavailable “[s]upporting exhibits, evidence, or documents to substantiate the reasons” provided for under COMAR 21.10.02.04D.

As we have noted above, a protest that is not timely filed may not be considered. Failure to file a timely protest is jurisdictional, requiring that an appeal involving a late protest be dismissed. We find that the same reasoning applies to a purported protest which fails to include the statement of reasons for the protest required “as a minimum” under COMAR 21.10.02.04C. If such reasons are not supplied within seven (7) days of when they are known or should have been known, the purported protest must be treated as late and, pursuant to COMAR 21.10.02.03C, it may not be considered.

Accordingly, it is hereby Ordered this 13th day of September, 2002 that the appeal is dismissed with prejudice.

Dated: September 13, 2002

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
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 2303, appeal of NumbersOnly-NuSource JV under MIEMSS RFP # 02-MIEMSS-0003.

Dated: September 13, 2002

Michael L. Carnahan
Deputy Recorder