

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of )  
 )  
PTC CORPORATION AND ) MSBCA Docket No. 2027  
ION TRACK INSTRUMENTS, INC. )  
 )  
Under DGS Invitation for Bid )  
No. 0011T808342 )

January 30, 1998

Interested Party - Non-Bidder - Only an interested party, i.e. an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest, may file a bid protest.

Bid Evaluation - A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids. COMAR 21.05.02.13A.

APPEARANCES FOR APPELLANTS

Brett Ingerman, Esq.  
Anthony L. Meagher, Esq.  
Piper & Marbury, L.L.P.  
Baltimore, MD

APPEARANCE FOR RESPONDENT

John H. Thornton  
Assistant Attorney General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY  
BARRINGER INSTRUMENTS, INC.

Michael A. Stover, Esq.  
Whiteford, Taylor & Preston, L.L.P.  
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

Appellant PTC Corporation (PTC) timely appeals the final decision of the Department of General Services Procurement Officer denying on timeliness grounds Appellant's protest that its bid was responsive.<sup>1</sup> For the reasons that follow, the Board concludes that the protest of PTC was not

---

<sup>1</sup>The Board at an initial hearing granted a motion to dismiss the appeal of Ion Track Instruments Inc. (Ion Track) on grounds that PTC was the actual bidder. The reasons therefore will be further discussed in the decision portion of this opinion.

timely filed. The record developed in ascertaining the facts surrounding the filing of the PTC protest to determine the close question of whether the protest was timely reveals that a material violation of the procurement law as alleged by the Appellant in fact occurred. No relief may be afforded, however, because failure to file a timely protest is jurisdictional, divesting the agency and this Board of jurisdiction to determine and/or remedy alleged violations of law.

### Findings of Fact

1. On December 11, 1996 the Maryland Transportation Authority (MdTA) Police requested that the Department of General Services (DGS) procure additional drug and explosive detection devices, Ion Mobility Spectrometers by sole source procurement from the Interested Party, Barringer Instruments, Inc. (Barringer). In his request, Captain Street of the MdTA Police noted that his department had used the Barringer Ionscan for three years, and that personnel had been trained in, and were familiar with, its uses. On January 9, 1997, Philip Pfarr, Jr., Agency Buyer, Purchasing Division of MdTA, through his superiors, approved and forwarded the sole source purchase request to the Department of General Services (DGS)<sup>2</sup>.
2. On February 6, 1997, a DGS Buyer, Ms. Karen Alder, prepared a sole source request to her superiors for the Barringer device as follows:

The Ion Mobility Spectrometers requested are used to detect drugs as well as explosives. The instrument comes with a portable DC vacuum sampler which collects particles, either drug or explosive, for testing. If a law enforcement officer stops a vehicle [sic] and suspects possession of either substance, a sample can be collected and tested immediately within a matter of minutes. The Barringer Ionscan [sic] is the only instrument that has those capabilities. It can detect up to 30 substances within 3 to 4 minutes. This equipment as also been judicially reviewed and approved, and is the only equipment on the market to pass the "DOW" and "FRYE" judicial standards for forensics evidence.

The pricing provided by Barringer Instruments for this procurement has been discounted by \$10,200, which is a very good price.

Therefore, this buyer determines that the Barringer Ionscan 400 is a bonafide sole source procurement, and recommends approval to procure sole source.

3. The Secretary of DGS disapproved this request stating:  
The agency has not furnished a sole source justification (the best is not a justification.) Furthermore, if they're familiar, which is their basis, why do they need training? [emphasis in original]

---

<sup>2</sup>DGS is responsible for commodity procurements of this dollar volume (over \$100,000) on behalf of the using agency. See COMAR 21.02.05.01E(3) and .04.

4. On February 18, 1997 Ms. Alder prepared a new Request to Review and Approve Sole Source citing as her rationale that Barringer was the "only manufacturer who can provide this equipment with detection capabilities needed by Toll Facilities Police." She argued that Barringer's was the only dual (drugs and explosives) system; the only system which could produce test results in 3 to 4 minutes, and the only one which had been judicially reviewed and approved under the Dow/Frye tests of admissibility of forensic evidence. This request apparently was also rejected.
5. On March 14, 1997, DGS issued the captioned invitation for bid (IFB) for the purchase of three Ion Mobility Spectrometers and accessories. In error, an older specification was used, requiring, inter alia, that the component must be capable of simultaneously detecting no less than 15 illicit drugs or explosives. Captain Street notified Ms. Alder after the solicitation was pending that newer, more stringent, specifications were available. The proposed amended specifications stated, for example, that 30 drugs or explosives be must be simultaneously detectable. Ms. Alder determined not to amend the specifications or rebid the solicitation.
6. On April 15, 1997, DGS received two bids in response to the IFB; one from Appellant PTC Corporation offering three Ion Track Instruments ITEMISERs, Model P7000C, for \$153,990, and one from Barringer, offering three of its Model 400 Ionscans, at a total price of \$186,200. Thus PTC was the apparent low bidder.
7. On April 16, 1997, Ms. Alder wrote to PTC's Mr. Chavis with several questions regarding the Ion Track Instruments ITEMISER, all of which PTC answered positively. She then referred the bid to Captain Street for technical evaluation.
8. Captain Street freely acknowledged during his testimony that he evaluated the bid based upon the more stringent specifications he had intended should be sent, rather than the specifications which were actually included in the bid solicitation package. As noted, the Procurement Officer had determined not to rebid the solicitation on the basis of the revised specifications. Nonetheless, in April, Ion Track confirmed that its ITEMISER met the revised specifications as well, including conformance with the Dow/Frye judicial standards of admissibility of forensic evidence. Ion Track also provided references supporting their product.
9. The Procurement Officer then raised a concern about a report dated February 1996 performed by the Office of National Drug Control Policy which the State read to indicate that Appellant's Ion Track ITEMISER did not meet the State's requirements. Ion Track pointed out that the study relied upon was performed upon an obsolete version of the ITEMISER which was not the subject of Appellant's bid. They provided information confirming that the ITEMISER offered to the State was competitive with the Barringer Ionscan.
10. Captain Street, as the technical evaluator of the submissions, invited Ion Track to demonstrate the ITEMISER. At the conclusion of the demonstration, Ion Track was asked to test the box in which the MdTA Police secured contraband drugs for testing and teaching purposes. The ITEMISER initially reported the presence of cocaine, and as the machine "wound down" indicated the presence of THC. Captain Street reported to Ms. Alder that the ITEMISER had failed to identify more than one drug simultaneously as required by the Specifications.
11. It is clear from the testimony, however, that it cannot be concluded that the ITEMISER is

incapable of detecting numerous different drug concentrations simultaneously based on this unscientific test. The Board was persuaded by testimony at the hearing that the Barringer Ionscan would experience the same problem under similar circumstances, and in fact, might not have indicated the presence of THC at all. Further, the tests were not performed in an unbiased manner, and the Barringer instrument was not similarly tested.

12. By letter of May 30, 1997 to PTC Corporation, the Procurement Officer indicated her judgment that the ITEMISER system was “non-responsive” for eight reasons of which this Board finds six were not a part of the specifications upon which the bids were based and two were inaccurate<sup>3</sup>. The Board notes that she found that the Ion Track system was non-responsive to the needs of the requesting Agency rather than to the specifications contained in the IFB.
13. On June 5, 1997, Ion Track Instruments wrote a vehement and thorough response to the May 30 letter. Had Ion Track been the bidder, this letter would have constituted a protest.
14. Mr. Chavis of PTC, upon receiving a copy of the Ion Track Instruments letter, indicated orally to Ms. Alder that he was uncomfortable with the letter, but asked that she reconsider the non-responsive finding.
15. Between June 5, 1997 and July 30, 1997, it appears as though Ms. Alder did in fact reconsider the finding and did continue her evaluation, although she did not indicate formally in any writing that she was doing so or would do so.
16. On July 30, 1997, she wrote a letter to Ion Track, with a copy to PTC, responding to the June 5, 1997 letter. She referred to a simultaneous evaluation of the Ionscan and the ITEMISER which apparently took place in Delaware. In fact, the two systems proposed in the bids were not compared in the test performed by the National Guard in Delaware, and their ability to simultaneously detect multidrug concentrations was not tested. However, it had been reported to Ms. Alder that such tests had been performed and the information she received confirmed her view of the Ion Track ITEMISER, as she reported in the letter:

As I'm sure you are aware, the State of Delaware recently did an evaluation evaluating the [Barringer] Ionscan and the ITEMISER simultaneously, providing the same media for testing in both instruments. This is the reason my reply was delayed. We, again, wanted to review the instrument's [sic] performance, and felt having them tested side-by-side would provide a better comparison. The Delaware testing reports confirmed our evaluation. . .

Therefore, our original evaluation results sent to Mr. Joel Chavis of PTC Corporation on May 30, 1997, stand as written.

17. Following receipt of the July 30, 1997 letter on August 5, 1997, Mr. Chavis of PTC filed a formal protest on August 12, 1997.
18. Ms. Alder denied the August 12, 1997 protest by letter of August 20, 1997, on timeliness

---

<sup>3</sup>Since the Board is making findings here notwithstanding that it does not have jurisdiction to hear this appeal, these eight reasons are not addressed in detail.

grounds, and this appeal timely followed.

### Decision

This Board first looked at the standing of Ion Track Instruments to file the "protest" dated June 5, 1997 and thereafter appeal to this Board. We found that Ion Track, since it was not a bidder pursuant to COMAR 21.10.02.01 and .02, did not have standing to file a protest or appeal, and the appeal was orally dismissed as to Ion Track Instruments. While Ion Track is the manufacturer of the equipment sought in the procurement, only actual or prospective bidders have standing to file protests with procuring agencies and appeals before this Board. See State Finance and Procurement Article, §15-217(a) and COMAR 21.10.02.01(3) and .02.<sup>4</sup> While Ion Track, as a potential supplier to a bidder, certainly has been aggrieved by the conduct of the solicitation, and even timely submitted what the Board would find to be a protest, it does not qualify as an interested party who is entitled to file a protest because it is not the actual or prospective bidder, offeror or contractor. Under COMAR 21.10.02.01 B(1) only an interested party may protest the award of a contract. A subcontractor has no standing to protest such an award. John D. Lucas Printing Company, MSBCA 1973, 5 MICPEL ¶408 (1996), and cases cited therein.

PTC Corporation was the local vendor and actual bidder who proposed to provide the State with Ion Track equipment at a particular price. PTC Corporation, as the low-bidder in the instant solicitation, was permitted to go forward with its Appeal.

It seems from the testimony adduced that all Ion Track and State personnel were operating on the assumption that the June 5, 1997 Ion Track Instruments letter was a valid protest. In the case of PTC, Mr. Chavis believed that Ms. Alder was reconsidering, at his oral request, her decision of May 30, 1997. The Board finds that since Ion Track did not have standing to protest, the letter of June 5, 1997 could not be considered a valid protest in this solicitation, despite the fact that both Ion Track and the State arguably treated it as such. PTC, the only bidder eligible to protest the May 30, 1997 decision, did not do so until August 12, 1997.<sup>5</sup>

The Board finds that PTC's protest was untimely, because PTC is legally not entitled to rely on intimations and suggestions of reconsideration. PTC was on notice of the decision of DGS to find its bid non-responsive upon receipt of the May 30, 1997 letter. In light of such notice, it had 7

---

<sup>4</sup>COMAR 21.10.02.01B Terms defined states:

(1) "Interested party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.

\* \* \*

(3) "Protestor" means an actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files the protest.

COMAR 21.10.02.02A states:

An interested party may protest to the appropriate procurement officer against the award or the proposed award of a contract subject to this title . . . .

<sup>5</sup> We note that such protest was filed within 7 days of PTC's receipt of the State response to the Ion Track June 5, 1997 letter.

days following receipt of that letter to file its protest since the basis of its protest was known. COMAR 21.10.02.03.

PTC argued that the grounds on which the protest would have been based had been withdrawn by the Procurement Officer's apparent reconsideration of the grounds of her non-responsiveness finding, and that thus the time for filing a protest was tolled until that reconsideration was complete and communicated. We do not here address the question of whether or not a Procurement Officer can revoke a decision which starts the clock running for the filing of a protest. At the least we note, assuming that a Procurement Officer may revoke such a decision, the written decision which triggers the seven day COMAR 21.10.02.03B filing deadline must be withdrawn with like writing and notice to other interested parties. Under no circumstances may bidders operate under an assumption that a formal protest is not required within seven days of receiving the instrument which puts them on notice of the grounds for a protestable State action without formal revocation thereof. Oral and written conduct not rising to the level of a formal written withdrawal may not operate as a constructive tolling of the seven day limitations.

Thus, the Board does not have jurisdiction to consider this appeal and it must be dismissed. ISMART, LLC, MSBCA 1979, 5 MICPEL ¶417 (Mar. 25, 1997). The timely filing of a protest is jurisdictional, and failure to file in a timely manner deprives this Board of jurisdiction to hear the appeal. Communication Management Systems, Inc., MSBCA 1625, 3 MICPEL ¶296 (1992); Kennedy Temporaries v. Comptroller, 57 Md. App. 22, 468 A.2d 1026 (1989). Crystal Enterprises, MSBCA 1971, 5 MICPEL ¶407 (1996).

However, because it was necessary to hear the evidence on the merits in order to determine this close question of timeliness (and thus jurisdiction) it should be apparent from the matters set forth in the Findings of Fact above that the solicitation in this appeal was not one which should serve as a model under the General Procurement Law. First, MdTA wished to purchase only additional Barringer Ionscan systems because they were familiar with the product, had been trained thereon, and had a backlog of supplies therefor. They were not deflected from this desire by one, nay, two separate admonitions from officials at DGS rejecting the Procurement Officer's request that the solicitation be conducted as a sole source procurement.

While we find that the actions of the State were mistaken rather than malicious, Captain Street, by his own willing admission in testimony before the Board, did not evaluate the Ion Track Instruments system according to the specifications issued in the solicitation, but in light of more stringent specifications. Likewise, the Procurement Officer did not follow the proscriptions of the General Procurement Law to evaluate the bids on the basis of the specifications sent with the solicitation. COMAR 21.05.02.13, Bid Evaluation and Award, requires:

A. General. The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids . . . A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids.

\* \* \*

C. Restrictions. Nothing in this regulation shall be deemed to permit a contract award to a bidder submitting a higher quality item than that designated in the invitation for bids if that bid is not also the most favorable bid...

Ms. Alder found that PTC's bid was non-responsive to the needs of the requesting (using) Agency, rather than non-responsive to the Specifications. Had the Board jurisdiction to decide this matter, it would find that the Ion Track Instruments ITEMISER as bid met the specifications issued with the solicitation. Since the protest, as we have found, was untimely, we have no jurisdiction to issue a ruling on the merits.

For the foregoing reasons, the appeals of Ion Track Instruments and PTC Corporation are dismissed.

Wherefore, it is Ordered this 30th day of January, 1998 that the appeals are dismissed.

Dated: January 30, 1998

---

Candida S. Steel  
Board Member

I concur:

---

Robert B. Harrison III  
Chairman

---

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 2027, appeal of PTC Corporation and Ion Track Instruments, Inc., under DGS Invitation for Bid No. 0011T808342.

Dated: January 30, 1998

\_\_\_\_\_  
Mary F. Priscilla  
Recorder