

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF POTOWMAC )  
ENGINNERS )  
 ) Docket No. MSBCA 2257  
Under DPSCS Solicitation )  
No. KAB-000-004-I01 )

January 17, 2002

Bid Protest - Timeliness - Where a bid is available for public inspection on a date following bid opening and the ground for protest would be apparent from a review of the bid, a protest upon such ground must be filed within seven (7) days of when the bid was available for public inspection.

APPEARANCE FOR APPELLANT: Donald H. Nixon, Esq.  
Rockville, Maryland

APPEARANCE FOR RESPONDENT: Karl A. Pothier  
Assistant Attorney General  
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Jeffrey S. Marcalus, Esq.  
(Development Facilitators, Inc.) Hillman, Brown & Darrow, P.A.  
Annapolis, Maryland

OPINION BY BOARD MEMBER HARRISON ON  
RESPONDENT'S MOTION TO DISMISS

Appellant timely appeals from a final decision of the of the DPSCS's (Department) Division of Capital Construction and Facilities Maintenance. In that final agency action, the Procurement Officer denied as untimely Appellant's bid protest regarding the Department's solicitation for construction inspection and testing services at its Maryland Correctional Institution (MCI-H) in Hagerstown, Maryland, where the central kitchen facilities of the Department's Division of Correction are being expanded. Preliminarily at the hearing of the appeal, Respondent moved to dismiss the appeal on timeliness grounds. For the reasons that follow the appeal is dismissed with prejudice on timeliness grounds.<sup>1</sup>

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<sup>1</sup>The issue on the merits involved an interpretation of whether a billable hourly rate less than the minimum wage constituted a "token" billable hourly rate prohibited by the specifications. Because the Board lacks jurisdiction over the appeal, the Board expresses no opinion on the issue.

Findings of Fact

1. On April 26, 2001, the Department issued a Request for Proposal (RFP) under the subject Contract. In the RFP, the Department sought proposals from construction inspection and testing firms (CITFs') to provide services for the MCI-H central kitchen expansion project. The Department identified multi-step sealed bidding under COMAR 21.05.02.17 as the procurement method for the RFP, and notified prospective CITFs that their proposals must contain both a Technical Proposal and a Price Proposal. The proposal documents informed the CITFs that the contract would be awarded "to the lowest Price Proposal received from firms receiving at least 80% of the maximum 100 available technical points." The Department included a copy of the Price Proposal Form in the RFP.
2. Three CITFs, Appellant, Development Facilitators, Inc. (DFI), and Sidhu Associates, Inc. (Sidhu), responded to the RFP, and on June 5, 2001, the Department notified each that its technical proposal had been accepted.
3. Addendum #1, issued on August 3, 2001, requested the technically qualified CITFs to submit, by 2:00 p.m. on August 28, 2001, new Price Proposals utilizing a revised Price Proposal Form, a copy of which it provided with the Addendum. DFI, Appellant and Sidhu submitted their revised Price Proposals by the date and time requested.
4. On August 30, 2001, the Department opened the Price Proposals. That same day, it provided a tabulation of the Proposals via facsimile to DFI and Sidhu. The Department provided the tabulation to Appellant the following day, August 31, 2001, the delay due to problems the Department encountered transmitting the document the previous day.
5. The tabulation reflected the following total bids:

DFI	-	\$220,405.00
Appellant	-	\$227,606.00
Sidhu	-	\$230,620.00

- Individual prices for specific categories of personnel were not provided in this bid tabulation provided the bidders by facsimile.
6. On October 9, 2001, forty (40) days after bid (price proposal) opening, Appellant filed a bid protest with the Procurement Officer. In the protest, Appellant complained that the billable "unit prices" utilized by DFI in its Price Proposal were "substantially low," and may mean that DFI anticipated paying its "professionals/paraprofessionals" below the minimum wage. Appellant requested that the Procurement Officer reject DFI's bid as non-responsive and award the contract to "the next responsive bidder," Appellant.
  7. On October 15, 2001, Appellant again wrote to the Procurement Officer and requested to examine the DFI bid (i.e., the entire price bid) asserting that DFI's bid was nonresponsive. In support of the assertion of nonresponsiveness, the letter stated that Appellant's statistical analysis demonstrated that the unit prices utilized by DFI in its Price Proposal most probably were substantially low, which would cause the unit prices to be less than the minimum wage.
  8. On October 24, 2001, the Procurement Officer denied Appellant's protest as untimely. The Procurement Officer found that because Appellant knew or should have known the basis for

its protest when it was informed of the Price Proposals on August 31, 2001, Appellant was required, pursuant to the applicable regulation COMAR 21.10.02.03B, to file its protest within seven (7) days of that date. Appellant, however, failed to meet this requirement when it filed its protest on October 9, 2001 and the Procurement Officer accordingly, denied the protest.

9. On October 24, 2001, the Board of Public Works approved the Department's award of the contract to DFI.
10. On November 5, 2001, Appellant appealed the Procurement Officer's final decision to this Board.
11. In its notice of appeal, Appellant identifies the grounds of the appeal as the Department's acceptance of a nonresponsive bid asserting:

The Agency has failed to enforce the requirements set forth in its Request for Proposal for submission, evaluation and award of the above cited solicitation.

Page two of the bidding instructions require that a qualified bidder submit a billing rate for each discipline unit required to be made available for completion of the contract. The instructions further state that "No token hourly rate will be acceptable." The billing rates for many disciplines as submitted by the accepted bid were at \$5.00 per hour. Either the billing rate submitted was a "token" rate in violation of the RFP, or the accepted bidder is paying its employees less than federal and state minimum wages, a violation of procurement regulations. Without an established billing rate, the Agency has no basis for evaluating and paying unit rate charges resulting from any contract awarded under the solicitation.

12. In procurement by multi-step sealed bidding under COMAR 21.05.02.17, price bids are considered under the regulations governing procurement by competitive sealed bidding. The record reflects that the entire price bids with individual prices for specific categories of personnel as submitted by the three qualified vendors herein were available for public inspection upon request on and after August 31, 2001.

### Decision

Pursuant to COMAR 21.10.02.03B, a protest based on grounds other than a solicitation's alleged irregularities apparent before bid opening must be filed with the procurement officer not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier. A protest received by the Procurement Officer after the seven day period may not be considered. COMAR 21.10.02.03C. The Board strictly construes whether a bidder knew or should have known the basis of its protest. ISMART, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997) affirmed MSBCA v. ISMART, LLC, No. (97-034415) (Cir Ct. for Howard County March 17, 1998); Clean Venture, Inc., MSBCA 2198, 5 MSBCA ¶486 (2000). Where review of the bids, as in the case herein, would have

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<sup>2</sup>In his letter, the Procurement Officer used August 30, 2001 as the date Appellant was informed of the results of the Price Proposals because he was unaware of the difficulties his staff experienced transmitting the Price Proposal tabulation sheet to Appellant on August 30, 2001.

revealed the grounds of protest, the seven day time limit set forth in COMAR 21.10.02.03B commences to run when bids are available for public inspection. Pile Foundation Construction Co., Inc., MSBCA 2224, 5 MSBCA ¶501 (2001) presently pending appeal in the Circuit Court for Baltimore City (Civil Action No. 24-C-01-003468) and cases cited at pp. 13-14.

The Department informed Appellant via facsimile of the total bids of the bidders. The record reflects that the entire bid of the bidders with the specific price information set forth that formed the basis of Appellant's protest would have been available upon request on and after August 31, 2001. As noted, the Board has held that the seven day period set forth in COMAR 21.10.02.03B begins to run from the time bids are available for inspection with respect to a protest based on the content of a bid. Consequently, pursuant to COMAR 21.10.02.03B, Appellant's protest was required to be filed with the Procurement Officer on or before September 7, 2001. Because Appellant filed its protest on October 9, 2001, more than a month after the expiration of the seven day period provided by COMAR 21.10.02.03B, the protest could not be considered by the Procurement Officer. COMAR 21.10.02.03C. The Procurement Officer, therefore, properly denied the protest as untimely, and the Board may not consider it on appeal. See Clean Venture, Inc., *supra*, where the Board opined that compliance with COMAR 21.10.02.03B is a jurisdictional condition to agency consideration of a protest which is also binding on the Board such that the Board lacks jurisdiction to consider an untimely protest on appeal.

Therefore, it is Ordered this 17<sup>th</sup> day of January, 2002 that the appeal is dismissed with prejudice.

Dated: January 17, 2002

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Robert B. Harrison III  
Board Member

I concur:

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Randolph B. Rosencrantz  
Chairman

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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2257, appeal of Potowmac Engineers under Department of Public Safety and Correctional Services No. KAB-000-004-I01.

Dated: January 17, 2002

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Mary F. Priscilla  
Recorder

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