

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of PROGRAMMED SECURITY,
INC.)

Under Dept. of Agriculture)
Contract No. CSP 334-89)

) Docket No. MSBCA 1433
)
)

April 28, 1989

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.

APPEARANCE FOR APPELLANT: Andrew B. Greenspan, Esq.
Brassel & Baldwin
Annapolis, Maryland 21401

APPEARANCE FOR RESPONDENT: Thomas F. Filbert
Assistant Attorney General
Annapolis, Maryland 21401

OPINION BY CHAIRMAN HARRISON

Appellant appeals the denial of its bid protest on grounds it was not timely filed.

Findings of Fact

1. Appellant submitted a bid to provide monitoring and maintenance service for a two year period for the security system, fire alarm, and chiller monitoring equipment at the Department of Agriculture (DOA) headquarters complex in Annapolis.
2. Bids were due and opened on November 3, 1988. Appellant's bid, one of two, was for \$11,112.00. The other bid submitted by Best Security Systems, Inc. (Best), a competitor of Appellant, was for \$4,200.00.
3. Mr. John P. Nolan, President of Appellant was present at bid opening. At bid opening, Best was asked in the presence of Mr. Nolan to confirm its bid. It did. (Tr. 65-66). Bids were also available for public inspection immediately following bid opening. Appellant inspected the Best bid following bid opening on November 3, 1988 and formed the belief that the Best bid was lacking required documentation. (Appellant's Comment on the Agency Report at p. 1).

4. On November 14, 1988, Appellant was advised that Best was to be awarded the contract.

5. On November 21, 1988, Appellant filed a bid protest alleging that Best's bid price was unrealistically low since it was erroneously based on provision of services for only one year and that Best failed to include certain required documents or documentation with its bid.

6. By letter dated December 21, 1988, the DOA procurement officer denied Appellant's bid protest on grounds that it was not timely filed pursuant to COMAR 21.10.02.03 B and C because it was not filed within seven days of bid opening when Appellant, being present, knew or should have known of its grounds of protest.

7. Appellant appealed to this Board on January 18, 1989.

8. DOA filed Motions to Dismiss on grounds that the protest and appeal were untimely. The Board deferred ruling on the motions pending a hearing of the appeal on its merits.

Decision

Appellant became aware at bid opening on November 3, 1988 that Best allegedly mistakenly based its bid performance for a one year period. The record also reflects that Best's bid was available for inspection respecting the presence or absence of any required documents or documentation. Despite its alleged awareness that its bid was based on one year of performance rather than two, Best confirmed its low bid in the presence of Appellant when asked to do so at bid opening. Appellant was also aware of any alleged problems with required documents (or documentation) in the Best bid at bid opening as a result of its inspection. However, Appellant's written protest was not filed with the procurement officer until November 21, 1988, eighteen days after Appellant became aware of its grounds of protest. Thus Appellant's protest was not filed within the seven day time period prescribed under COMAR 21.10.02.03 B and C.'

COMAR 21.10.02.03 provides:

.03 Time for Filing.

A. A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in §A or §B, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in §A or §B means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest

Appellant, however, argues that under COMAR 21.10.02.03 B the commencement of the running of the seven day period only begins when the protester actually becomes aware that the contract is to be awarded. Appellant thus contends that in a case such as this it was entitled to assume that the procurement officer would detect the alleged flaws in its competitors bid and reject it. We have rejected arguments in the past and reject them here. See Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MSBCA ¶ 154 (1987) and cases cited therein at p.2. Where the rights of so many parties are at stake the time limits of COMAR should be strictly construed such as to effect a resolution of disputes in contract formation at the earliest possible time. See Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 40-41 (1984). Protesters must communicate the grounds of their protest within the required seven day period in order to have it considered. Accordingly, the appeal is denied.

received by the procurement officer after the time limits prescribed in §A or §B may not be considered.

