

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of RGS ENTERPRISES, INC.)

Under UMBC Request for Bids No.)
BC 12838B)

) Docket No.
) MSBCA 1106
)

April 8, 1983

Timeliness — A Protest filed more than seven (7) days after a disappointed bidder knew or should have known of the grounds for protest is untimely pursuant to COMAR 21.10.02.03.

Interested Party — Where the actions of the procurement officer do not deprive a party of the opportunity to fully and fairly compete for a State contract, that party is not an interested party pursuant to COMAR 21.10.02.01A and has no standing to protest such actions.

Interested Party — Where a party has been determined, without timely protest, to be non-responsible, i.e., ineligible for award, it cannot be aggrieved by the subsequent award of a contract to another bidder. Under such circumstances, the disappointed bidder is not an interested party pursuant to COMAR 21.10.02.01A.

Appearance for Appellant:

Robert G. Shields
RGS Enterprises, Inc.
Baltimore, Maryland

Appearance for Respondent:

Peter W. Taliaferro
Assistant Attorney General
Baltimore, Maryland

OPINION BY MR. KETCHEN

This appeal is taken from a University of Maryland, Baltimore County (UMBC) procurement officer's final determination which confirmed the rejection of Appellant's low bid as non-responsible and concomitantly ruled that the protest filed by Appellant was untimely. Appellant, however, maintains that (1) its protest was timely filed, (2) it was the lowest responsible bidder, and (3) the contract was improperly awarded to the next lowest bidder at a price greater than originally bid.

FINDINGS OF FACT

1. On April 2, 1982 UMBC issued Request For Bids (IFB)¹ No. BC 12838B for a computerized billing service for UMBC's National Defense, Direct Student Loan Program (NDSL) for the period July 1, 1982 to June 30, 1983, with two one-year extension options.

¹A "request for bids" in a competitive sealed bid procurement means invitation for bids (IFB). COMAR 21.01.02.56.

2. The IFB required the successful contractor, on a monthly basis, to bill each participating student and to provide UMBC both with monthly reports summarizing all loan activity and sufficient information to prepare all required Government reports regarding NDSL loans.

3. At the bid opening on May 4, 1982 the following bids were publicly announced and recorded pursuant to COMAR 21.05.02.11B:

Appellant	\$12,567.60
Wachovia Services, Inc.	\$17,560.80
University Accounting Service	\$20,113.80
American National Educational Corp.	\$20,899.20
AFSA	\$21,853.80

Appellant was not present at the bid opening.

4. Immediately following the opening of bids, UMBC requested that Appellant provide a detailed description of its computerized billing services and a user's manual so that it could determine whether Appellant had the capability to perform the contract work. The record does not indicate whether Appellant had expressly informed or otherwise had actual knowledge at this time that it was the apparent low bidder.

5. On May 5, 1982 Appellant submitted the requested information describing its existing computerized billing and mailing list services. Appellant further expressed its intent to modify its existing software to comply with the Federal requirements relative to the UMBC NDSL program.

6. From May 5, 1982 until late June 1982, while bids were being evaluated, Appellant's Vice-President contacted UMBC representatives on several occasions and was informed that the award had not been made and that it would be given written notification when it was.

7. UMBC ultimately awarded the contract to the second low bidder, Wachovia Services, Inc. (Wachovia), on June 24, 1982, one week prior to commencement of the contract period.

8. Although Appellant had submitted the low bid, UMBC determined that it was not a responsible bidder. On June 25, 1982, UMBC personnel informed Appellant's Vice-President of this fact in a telephone conversation. The reasons given for UMBC's determination were that:

(a) Appellant would not have a sufficient computer program available in time to meet the contract starting date of July 1, 1982;

(b) Appellant lacked experience and expertise concerning the Federal regulatory requirements of the program;

(c) It would take considerable time and effort by UMBC personnel in assisting Appellant's contract performance, because of lack of experience and expertise, and lack of an adequate computer software program available in time to commence work under the contract on July 1, 1982.²

9. By letter dated June 30, 1982, UMBC formally notified Appellant that contract award had been made to Wachovia.

10. Appellant protested the failure to award the contract to it as the low responsive and responsible bidder by letter dated July 22, 1982. In so doing, Appellant advised UMBC that it first learned that it had submitted the lowest bid in a telephone conversation with UMBC officials on July 20, 1982.

11. After meeting with Appellant on August 10, 1982, the UMBC procurement officer proceeded to deny Appellant's protest by written decision dated August 24, 1982.

12. A timely appeal was filed on September 8, 1982. In its letter of appeal, Appellant also alleged that the Maryland Register of September 3, 1982 indicated that Wachovia was awarded the contract for the period July 1, 1982 through June 30, 1983 for \$26,000.³ As an additional grounds for appeal Appellant contends that a contract award for an amount different from Wachovia's original bid price is contrary to the requirements of COMAR 21.05.02.13C. This apparent discrepancy between Wachovia's bid price and the contract award price was never protested to the UMBC procurement officer.

DECISION

Before we may consider the substantive issues Appellant has raised, we must first determine if the Appellant complied with the timely filing requirements of COMAR 21.10.02.03, which provides that:

A. Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in §A, bid 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 this regulation means receipt in the procurement agency. Protesters are cautioned that protests should be transmitted or delivered in the manner which shall assure earliest receipt. Any protest received in the procurement agency after the

²Statement of William P. Cox, Executive Accountant, UMBC; Statement of Diane Taylor, Accountant, UMBC; Meeting Notes, August 10, 1982; UMBC Procurement Officer's decision, August 24, 1982.

³The bid request published in the Maryland Register of April 2, 1982 estimated contract costs at \$26,000 per year.

time limits prescribed in this regulation may not be considered.
(Underscoring added.)

We do not regard compliance with these regulations as mere procedural technicalities as Appellant argues. Raising a legal objection to the award of a State contract is a serious matter because the rights and interests of so many people are at stake. See Cessna Aircraft Company; Beech Aircraft Corporation, Comp. Gen. B-180913, August 12, 1974, 74-2 CPD ¶ 91, at p. 22. Accordingly, we have consistently held that these timeliness requirements are substantive in nature and must be strictly construed. See Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at p. 5; International Business Machines, MSBCA 1071 (August 18, 1982) at p. 5; Rolm/Mid-Atlantic, MSBCA 1094 (January 21, 1983) at p. 5.

From May 5, 1982 until the latter part of June 1982, Appellant maintained contact with UMBC officials concerning the status of the pending contract award. On June 25, 1982, Appellant was advised by UMBC that while it had submitted the lowest bid, it would not be awarded the contract because it was determined to be non-responsible.⁴ UMBC sent a letter dated June 30, 1982 to Appellant confirming that Wachovia was awarded the contract. Based on these circumstances, therefore, we cannot accept Appellant's assertion that it was not aware of the basis for its protest until July 20, 1982. Compare Mayor and City Council of Baltimore v. Amil Perticone, 171 Md. 268, 274, 188 A. 797, 800 (1936); Policy Research, Inc., Comp. Gen. B200386, March 5, 1981, 81-1 CPD ¶ 172, at p. 3; Nielson, Maxwell & Wangsgard, Comp. Gen. B-205418, April 26, 1982, 82-1 CPD ¶ 381, at p. 4; Telefile Computer Corporation, Comp. Gen. B-181126, May 17, 1974, 74-1 CPD ¶ 269. Since Appellant knew or should have known of the grounds for its protest on or before June 25, 1982, it lost its right to challenge the UMBC procurement officer's responsibility determination by waiting until July 22, 1982 to file its protest.

Appellant also alleges that a contract improperly was awarded to Wachovia at a price higher than the submitted bid. Assuming, arguendo, that this is true and ignoring the fact that Appellant failed to raise this matter initially with the UMBC procurement officer, we nevertheless conclude that Appellant had no standing to challenge the award made.

Maryland law permits any interested party to protest against the award or the proposed award of a contract for supplies, services, maintenance or construction. COMAR 21.10.02.02A. In this regard, an 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." COMAR 21.10.02.01A. As to when a party is aggrieved, this Board previously has stated as follows:

"The concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids." 40 Comp. Gen. 321, at 324 (1960). It does not confer upon bidders any right to insist upon the enforcement of

⁴Responsibility is a factual determination as to whether a bidder has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance. COMAR 21.01.02.59.

provisions contained in an invitation, stated policy or other regulations, the waiver of which would not result in an unfair competitive advantage to one bidder over another. Such provisions are solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders to which the rules and principles applicable to formal advertising are directed.

Delmarva Drilling Co., MSBCA 1096 (January 26, 1983) at p. 4. Thus, if a party is not affected competitively by the actions of a procurement officer, it has no standing, i.e., right, to protest.

Here Appellant was determined to be non-responsible based on performance guidelines equally applicable to all bidders. This determination became final, sometime in early July 1982, when Appellant omitted to file a timely protest. Since the subsequent alleged actions of the UMBC procurement officer relating to the award of a contract to Wachovia did not deprive Appellant of its right to compete fairly and equally for the award of the captioned contract, Appellant was not aggrieved and has no standing to protest. Compare John Bernard Industries, Inc., Comp. Gen. B-189105, 189106, 189112, 189119, 189139, June 22, 1977, 77-1 CPD ¶ 446; Comspace Corp., Comp. Gen. B-189516, October 17, 1977, 77-2 CPD ¶ 296.

In closing we must acknowledge concern as to the allegations raised by Appellant pertaining to a contract award at a price higher than bid. However, our review authority and powers are limited by statute. Accordingly, if the requirements of Article 21 were not followed in this instance, it is up to the procuring agency and/or its legislative auditor to effect a remedy in the public interest.

