

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF RELIABLE )  
REPRODUCTION SUPPLY, INC. )  
)  
)  
Under University of Maryland )  
Request for Proposal )  
No. 83915GM )

Docket No. MSBCA 2232

Bid Protest - Timeliness - The University System of Maryland has adopted procurement policies and procedures which require that a protest based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals be filed before the closing date and time for receipt of initial proposals. The Board holds that the requirements of these timeliness provisions for the University System are substantive in nature and may not be waived.

APPEARANCE FOR APPELLANT:

David P. Ostrow, Esq.  
Owings Mills, MD

APPEARANCE FOR RESPONDENT:

David P. Chaisson  
Assistant Attorney General  
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Appellant's protest and appeal is based upon the "MBE subcontract participation requirement" of the Contract included by the University in the RFP as required by law and the University's Procurement Policies and Procedures (UPPP). Appellant asserts that the MBE requirement should be altered to recognize the reality of competition in the office supply business and argues that the requirement is "prejudicial and exclusive" to non-MBE certified vendors, such as Appellant.

The provisions of Md. Code Ann., State Fin. & Proc. §11-203 exempt the University from Maryland's procurement law. Nevertheless, the University has adopted regulations that seek to promote the purposes of the procurement law. The University has "to the maximum extent practicable" adopted Title 14, Subtitle 3 of Md. Code Ann., State Fin. & Proc.<sup>1</sup>, and by necessary implication COMAR 21.11.03.09, et seq., and COMAR 21.05.08.04 pertaining to minority business participation requirements. UPPP, Section IX. The provisions of UPPP, Section IX also provide that Institutions (of the University System) shall recognize reciprocal certification from other governmental agencies with respect to certification in Maryland by the Maryland De-

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<sup>1</sup> With exceptions not relevant here the University is not exempted from the provisions of Title 14, Subtitle 3 which deal with Minority Business Participation.

partment of Transportation (MDOT). While we find that this would include certification by governmental agencies in other states, MDOT has no reciprocal certification arrangements with other governmental agencies. Thus, only Maryland State MDOT certified entities may be recognized.

### Findings of Fact

1. On February 13, 2001, the University of Maryland (University) issued Request for Proposal No. 83915GM (RFP) involving proposals for a contract to supply office supplies for Coppin State University, Towson University, University of Baltimore, University of Maryland, Baltimore County, and University of Maryland, Baltimore through a "stock-less inventory program."
2. The specifications for the office supply contract specifically provided the following minority business requirement:

*An MBE subcontract participation requirement of 20% of the total net sales, per campus has been established for this procurement. The successful vendor(s) must meet this requirement on a quarterly basis of the contract. By submitting a response to this solicitation, the offeror agrees that this amount of the contract will be performed by minority business enterprises.*

*To be considered for MBE prime or subcontract utilization, proposals must include: (1) completion of the attached MBE Utilization Affidavit (Appendix H) identifying potential MBE(s), the scope of services to be performed by the MBE(s), the scope of services to be performed by the MBE(s) and approximate percentage of the total contract cost to be paid for such work; (2) evidence of State MBE certification for each prime (if applicable) and sub-contractor will be required of the successful vendor.*

3. Responses to the solicitation were due on or before March 12, 2001. Appellant submitted its technical and financial proposal on March 5, 2001. In all, a total of seven companies submitted proposals.<sup>2</sup> The technical proposal submitted by Appellant did not include the required MBE affidavit or State of Maryland (MDOT) certifications of MBE credentials to satisfy the 20% MBE requirement established for the RFP and the University sought clarification.
4. In a letter dated March 16, 2001, Appellant submitted a "clarification" of its plan to meet the MBE requirement. In support of its contentions that it would meet the MBE requirement, Appellant attached approximately thirteen letters or certificates alleging minority certification; however, only one of those submitted was an MDOT certification as required.
5. Due to their failure to meet the MBE requirement, Appellant and three other companies

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<sup>2</sup> A.J. Stationers, Rudolph Office & Computer Supply, Inc., Boise Cascade, Office Depot, Federal Hill and Appellant submitted proposals for consideration. However, only A.J. Stationers and Rudolph Office & Computer Supply, Inc., MDOT certified MBE's, submitted proposals that met all the requirements of the RFP.

- submitting proposals were disqualified.
6. In a telephone conversation on March 27, 2001, Appellant was advised by the University that it did not meet the MBE requirement of the RFP.
  7. By letter dated March 27, 2001, Appellant requested an opportunity to present its views that "it is the responsibility of the University to find Minority contractors" and that Appellant "should not be excluded from participating in the 80% of the RFP that does not require MBE participation."
  8. In a conversation with the Procurement Officer on April 4, 2001 Appellant was advised that the 20% MBE goal would stand and that if Appellant wanted to protest it should send a letter to the Procurement Officer stating the grounds of protest.
  9. By letter dated April 9, 2001, the University returned Appellant's financial proposal and advised Appellant that it did not meet the 20% MBE requirement.
  10. On April 16, 2001, Appellant sent a letter to the University advising that it wished to protest the MBE requirement of the RFP. In the letter, Appellant stated that it is not an MDOT certified MBE and that it "is in the process of resubmitting an application to become MBE certified." It also stated that the MBE certifications submitted in support of its proposal were mostly from out of state vendors. The basis given by Appellant for the protest is its objection to the MBE requirement asserting that the MBE requirement in the RFP was unfair and exclusive, placing an unfair burden on non-MBE businesses and that the responsibility of meeting this mandate should be that of the State.
  11. On May 30, 2001, the Procurement Officer denied Appellant's protest as untimely. The Procurement Officer stated that if Appellant believed that the MBE requirement was restrictive, then its protest over the requirement should have been filed before the closing date for the receipt of proposals, March 12, 2001 and that Appellant did not object to the MBE requirement until March 27, 2001 which was after the March 12, 2001 date proposals were due.
  12. This appeal follows from the Procurement Officer's decision.
  13. On September 6, 2001, the Board heard the appeal on its merits and received argument of counsel on the Respondent's Motion to Dismiss on Timeliness grounds.

#### Decision

The University's Procurement Policies and Procedures require a protest based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals shall be filed before the closing date and time for receipt of initial proposals. UPPP, Section X (B)(3)(a). The Board holds that the requirements of these timeliness provisions for the University are substantive in nature and may not be waived. We base such holding on previous decisions dealing with the General Procurement Law and the implementing provisions of COMAR. See ATI Systems and Federal Signal Corp., MSBCA 1911, 1913 and 1918, 5 MSBCA ¶387 (1996); Scanna MSC, MSBCA 2096, 5 MSBCA ¶452 (1998) (protest may not be considered by the Procurement Officer and this Board lacks jurisdiction over the appeal where post bid opening protest was not filed within 7 days after basis for protest was known). ISMART, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997) (the Board of Contract Appeals has strictly enforced this requirement which it views to be jurisdictional in nature even where the protest was only a day late). The basis of Appellant's protest, the MBE requirement, was apparent from the face of the RFP. Thus, Appellant should have filed its protest before March 12, 2001, the deadline for sub-

mitting proposals. Because Appellant failed to file a timely protest, the appeal must be denied.

Consistent with the requirements of UPP, section X (B)(3)(a), this Board has held on numerous occasions, where the grounds for a protest are apparent prior to bid (or proposals) opening, such as in the instant appeal, a protest filed after bids (or proposal) are opened is untimely and is not entitled to further consideration. See, e.g., International Bus. Machines Corp., MSBCA 1071, 1 MSBCA ¶22 (1982) (protest filed two months after bid opening required dismissal); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983) (timeliness requirements of COMAR 21.10.02.03 A are strictly construed); B&M Supermarket, MSBCA 1758, 4 MSBCA ¶341 at p. 4 (1993) (failure to challenge an allegedly improper RFP binds the contractor to the terms of the solicitation).

It is apparent from the record that Appellant's concerns relate to the 20% MBE requirement of the RFP, which was apparent on the face of the RFP. Appellant contends that the RFP is "prejudicial and exclusive" because it places an unfair burden on non-MBE businesses. Appellant further contends that the burden of the MBE requirements are unfairly borne by the vendors and should be the responsibility of the State. Thus, those concerns relate to the solicitation and were apparent to Appellant before the deadline for submitting proposals. We continue to hold that protests relating to the terms of a solicitation must be filed on or before the date bids or proposals are due. This will afford the contracting agency an opportunity to consider the protest while corrective action, if warranted, is still possible. Appellant failed to raise the MBE issue prior to the deadline for submitting proposals.

Accordingly, the appeal is dismissed for lack of jurisdiction. Wherefore, it is Ordered this 12<sup>th</sup> day of September 2001 that the appeal is dismissed with prejudice.

Dated: September 12, 2001

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Robert B. Harrison III  
Board Member

I concur:

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Randolph B. Rosencrantz  
Chairman

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Anne T. MacKinnon  
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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2232, appeal of Reliable Reproduction Supply, Inc. under University of Maryland Request For Proposal No. 83915GM.

Dated: September 12, 2001

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Mary F. Priscilla  
Recorder

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