

Findings of Fact

1. In the fall of 1981, the University became interested in the installation of a combined energy management and telephone system for its campus. Since its new Law School Building was due to open in the spring of 1982, the University felt that it was an opportune time to change the system for the entire campus.

2. Without public notice, the University executed an Application For Service with the Chesapeake and Potomac Telephone Company (C & P), in December, 1981 for a Dimension 600 Telephone System. C & P had advised the University that it was the only source of supply for this type of system which combines energy management and telephone service from a central computer or "single switch". The University also believed that the document it signed was not a binding contract and that it could terminate the purchase, without obligation, at any time prior to the single switch being delivered.

3. The following notice appeared in the February 19, 1982 edition of the Maryland Register.

UNIVERSITY OF BALTIMORE

Purchasing Department

Bid Request

The University of Baltimore intends to award a contract for a telephone system to tie in the main building with the new addition to the Academic Center (a k a Law School Building) to the C & P Telephone Company. The system will incorporate Centrex, Dimension, and an energy management program. Bids will be due March 22, 1982, 2 p.m.

Anyone wishing to submit a proposal which fulfills the above requirements should direct it to Ron Bond, Procurement Officer, University of Baltimore, 1420 N. Charles Street, Baltimore, Maryland 21201, (301)659-3111.

4. Johnson Controls submitted a proposal in response to the Maryland Register notice but it was determined to be non-responsive because it only addressed the energy management component. Appellant did not submit a proposal.¹

5. In mid-April, 1982, Johnson Controls advised Appellant of the February 19, 1982 notice in the Maryland Register and of the alleged contract executed in December, 1981 by the University with C & P. Upon receiving this information, Appellant contacted the State Telecommunications Coordinator at the Maryland Department of General Services in an attempt to verify what it had been told. Appellant was directed to contact the University's procurement officer.

6. On April 21, 1982, the University entered into a formal written contract with C & P.

7. On May 13, 1982, Appellant contacted the University's President by telephone to inquire into the methods used by the University in this procurement. This request for information also was reduced to writing and mailed to the University.

8. Appellant met with the University's procurement officer on May 17, 1982 to review the procurement. On May 19, 1982, the University further provided the information requested in Appellant's May 13, 1982 letter.

9. On June 2, 1982, the University received a written protest dated June 1, 1982 from Appellant. The grounds for protest were as follows:

- (1) A contract was signed with C & P in December 1981 without advertisement in the Maryland Register; without a request for proposal available for interested parties; and without notification that a sole source award had been made.
- (2) The notice of February 19, 1982 in the Maryland Register is not clear if it was a notice requesting proposals or a notice of award.
- (3) Appropriate State Agencies were not made aware of this procurement prior to April 15, 1982.
- (4) The bidder's list for telecommunications equipment at the Department of General Services was not utilized.

¹Mr. Hirsch testified that Appellant had an employee whose job was to review trade journals, including the Maryland Register, and determine for which projects to request specifications. (T. p. 85-86). The record is not clear if this person in fact saw the February 19, 1982 notice and made a determination not to seek the specifications for the subject project.

- (5) This contract was not in the best interest of the State of Maryland because it significantly increased the cost of telephone service which could have been supplied by other vendors at a substantially lower price.
- (6) A sole source award should not be made when only C & P information was used to determine that there was only one source of supply.

Appellant requested that the contract be terminated for the convenience of the State and that the procurement be rebid.

10. By final decision dated June 25, 1982, the University's procurement officer denied the protest because it had not been filed in a timely manner as prescribed by COMAR 21.10.02.03.

11. An appeal was filed with this Board on July 16, 1982.

Decision

The primary issue raised in this appeal concerns whether Appellant has complied with the timely filing requirements of COMAR 21.10.02.03.

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

This Board has previously held that the timeliness requirements of this regulation are substantive in nature and as such must be strictly construed since the rights and interests of not only the protestor but those of the contracting

agency and other interested parties are at stake. See Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at p. 5; International Business Machines, MSBCA 1071 (August 18, 1982) at p. 5.

The crux of Appellant's protest is that it was deprived of an equal opportunity to compete for the University's combined telephone and energy management contract. Our initial concern, therefore, is when Appellant first knew or should have known of the sole source procurement conducted by the University.

In the February 19, 1982 Maryland Register, the University notified the public that it intended to award a contract to C & P for the installation of a combined telephone and energy management system. This notice also apprised potential bidders that other proposals would be considered if received by March 22, 1982. We regard this publication as sufficient notice to Appellant that a sole source award would be made unless it protested or submitted a competitive proposal within the time stated. Compare Comp. Gen. Dec. B-182318 (January 27, 1975), 75-1 CPD ¶ 53; Comp. Gen. Dec. B-183767 (September 17, 1975), 75-2 CPD ¶ 161. By waiting until June 2, 1982 to file its protest, Appellant lost its right to challenge the procurement method.

Aside from its constructive knowledge of the University's actions, the record is clear that Appellant obtained actual knowledge of the sole source procurement in April, 1982, when it was contacted by Johnson Controls. Appellant subsequently confirmed this information in a meeting with the University's procurement officer on May 17, 1982 and through answers prepared by the procurement officer and received by Appellant on May 24, 1982. Nevertheless, Appellant still did not file a protest until June 2, 1982.

We recognize that Appellant has identified a number of serious deficiencies in the University's procurement process. However, a bidder who has been deprived of its right to compete equally for State work is required to exercise its administrative remedy in a timely way. Failure to do so will result in the individual interests of a bidder being outweighed by the public interest involved in assuring that State procurements proceed without delay.

For the foregoing reasons, the appeal is denied.

