

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal Of SPEAR WINDOW)	
& GLASS, INC.)	
)	Docket No. MSBCA No. 1955
Under Department of General)	
Services RFP WS-000-953-003)	

July 30, 1996

Timeliness of Protest: - Pursuant to COMAR 21.10.02.03, a bidder must file a protest within seven days of when he knew or should have known of the grounds for protest. However, where bid opening is scheduled within that seven day period, the bidder must protest prior to the time for bid opening.

APPEARANCE FOR APPELLANT	None
APPEARANCE FOR RESPONDENT	John H. Thornton Assistant Attorney General Baltimore, MD

OPINION BY BOARD MEMBER STEEL

This appeal comes before the board on Appellant Spear Window & Glass, Inc.'s (Spear) protest of the Department of General Services (DGS) decision on April 8 to reject all bids.

Findings of Fact

1. On January 10, 1996, DGS issued a solicitation for bids in Contract No. WS-000-953-003 for window replacement at the Woodstock Job Corps Center.
2. Three bids were publicly received and opened on March 8, 1996. Appellant's bid was the lowest at \$493,680. The second lowest bidder was Titan Windows, Inc. with a bid of \$553,884, and the highest bidder was Mico Construction, Inc., with a bid of \$797,800.
3. On April 3, 1996, in accordance with COMAR 21.06.02, DGS notified the bidders by certified mail that all bids were rejected and that bids for the contract would be resolicited under COMAR 21.05.04 because all bids exceeded the funds allocated by DGS for this project

(\$130,000). According to the certified mail receipt, Appellant received this letter on April 9, 1996. None of the bidders protested the rejection of all bids within 7 days of receipt of this April 3 letter.

4. A new prebid meeting was scheduled for April 11, 1996 where Addendum 2 was issued, revising the bid documents and setting a new bid date of April 16, 1996. Appellant attended this prebid meeting and received Addendum 2. On April 15, 1996, DGS issued addendum No. 3 which revised the bid form.

5. Addenda Nos. 2 and 3 broke the original scope of work into a base bid and four add-alternates, so that DGS could contract for the base bid and as many add-alternates for which funding was available.

6. No protest was received regarding Addenda Nos. 2 and 3 prior to the new bid opening date of April 16, 1996. Two bids were received, and Spear was not the low bidder.

7. On May 8, 1996, Spear protested as follows:

The project was originally bid on March 8, 1996. Spear Window & Glass was the low bidder at that time. We should have been ask [sic] to issue a credit for the work to the Annex Building, and the Pedestrian Walkway. Addendum #2 was issued on April 1st with a new bid date of April 16, 1996. The scope of the work was not altered at all, only a break out was requested.

Additionally, Spear Window & Glass was put in a very vulnerable position due to the fact that all other bidders were made aware of our base bid at the time of the original opening.

8. Spear's protest was denied by the Procurement Officer on May 24, 1996 on the grounds that Spear had not protested the rejection of all bids within 7 days of receiving notice that all bids had been rejected pursuant to COMAR 21.10.02.03B; and on the grounds that by submitting a new bid on April 16, 1996, Spear had waived any right to protest the rejection of its March 8 bid. The procurement officer also noted that insofar as the protest might extend to the award of a contract to the April 16 low bidder, it also failed because it had not been filed within 7 days of the April 16 bid opening.

9. A timely appeal of the procurement officer's decision was filed with this Board.

Decision

For the reasons set forth below, this Board finds that the procurement officer was correct in denying Appellant's protest.

Spear Window protested in this matter on two grounds (See finding of fact #7, above) -- that there was no change in the terms of the invitation for bids from the original save for a break out, and that it was vulnerable because its original base bid was made known to its competitors.

The Procurement Officer found that Appellant's protest of the rejection of the March 8 bids was untimely. Respondent argues that any protest against such action had to be filed by Appellant no later than April 16, 1996, seven days after the date it received notice that the March 8 bids were rejected. We agree. We note further that since the seventh day for protesting fell on the date of the second bid opening, Appellant was required to file any protest prior to the time of the bid opening on that date, rather than by the close of business. Rather than protest, Appellant chose to rebid, and only upon learning that his rebid was unsuccessful did it protest the initial rejection of bids.

COMAR 21.10.02.03B requires that "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03A requires that a "protest based upon alleged improprieties in a solicitation that are apparent before bid opening . . . shall be filed before bid opening". In other words, if Appellant wished to protest the rejection of bids, it had to do so within 7 days, and, in this case, prior to the bid opening at 10:00 a.m. on the 7th day. Appellant in fact filed its protest 3 weeks later on May 8.

This Board has repeatedly held that the requirements of COMAR 21.10.02.03 are substantive in nature and "must be strictly construed, since an untimely objection to a contract award necessarily prejudices the rights and interests of the low bidder, the contracting agency and perhaps other interested parties." Motorola Communications and Electronics, Inc., MSBCA No 1343, 2 MICPEL ¶154 (1987); International Business Machines Corporation, MSBCA No. 1071, 1 MICPEL ¶22 (1982). The requirements of COMAR 21.10.02.03 for filing of a protest are substantive, and may not be waived. Failure of an bidder to meet the substantive timeliness requirements of COMAR 21.10.02.03 deprives this Board of jurisdiction. ATI Systems and Federal Signal Corporation (ATI), MSBCA Nos. 1911, 1913 and 1918, 5 MSBCA ¶387 (1996), Delaware Elevator, Inc., MSBCA 1741, 4 MSBCA ¶333 (1993); Kennedy Temporaries v. Comptroller, 57 Md. App. 22 (1984).

Because the Appellant's initial protest was untimely, this Board has no jurisdiction to hear the underlying merits of Appellant's claim, i.e., whether failure to change requirements for the second bid opening, or consequent vulnerability because competitors knew Appellant's base price, were grounds for overturning an award to the interested party. Appellant's appeal must be dismissed.

Therefore, it is this 30th day of July, 1996 Ordered that this appeal be dismissed as the protest is untimely.

Dated: July 30, 1996

Candida Steel
Board Member

I concur:

Robert B. Harrison, III
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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1955, under Department of General Services RFP WS-000-953-003.

Dated: July 30, 1996

Mary F. Priscilla
Recorder

1. The first part of the document is a letter from the author to the editor.

The author expresses his appreciation for the editor's attention to his work and for the opportunity to contribute to the journal.

He also mentions that he has received several inquiries regarding his research.

The author concludes the letter by expressing his hope that the editor will find the enclosed manuscript of interest.

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Very truly yours,

John Doe
Author