

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
THE MILTON JAMES COMPANY)
) Docket No. MSBCA 1959
Under Maryland Port Administration)
Bid No. 196051-H)
)

September 6, 1996

Minority Business Enterprise - Requirements of the General Procurement Law and COMAR to identify which certified MBE firms will be utilized to meet the MBE subcontracting goal of an IFB involve issues of bidder responsibility. An agency may not issue an IFB which curtails a contractor's rights as set forth in COMAR to ten (10) working days to comply with MBE reporting requirements.

APPEARANCE FOR APPELLANT:

Edward J. Gilliss, Esq.
Royston, Mueller, McLean
& Reid, LLP
Towson, MD

APPEARANCE FOR RESPONDENT:

Deborah M. Levine
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:
(Standard Equipment Company)

Thomas N. Biddison, Jr., Esq.
Gallagher, Evelius & Jones
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the only bidder who submitted a bid was not responsible and that Respondent failed to give the required 20 day public notice of the procurement.

Findings of Fact

1. The above captioned solicitation was advertised (published) in the Maryland Contract Weekly in the May 7, 1996 issue.

2. As a result of seeing the notice of the above captioned solicitation in a local industrial trade magazine, Appellant on or about May 13, 1996, contacted the Maryland Port Administration (MPA) Procurement Officer by telephone and by Facsimile to request the bid documents in order to respond to the solicitation. During a subsequent telephone conversation initiated by Appellant to inquire as to why it had not yet received the bid documents, Appellant was advised that the bid opening date (as set forth in the notice in the Maryland Contract Weekly) would be extended.

3. The MPA Procurement Officer directed his staff to mail Appellant the bid documents on May 21, 1996. However, the MPA postage meter stamp on the envelope containing the bid documents sent to Appellant reflects the date of May 24, 1996.

4. Appellant received the bid documents from MPA on or about May 29, 1996.

5. The bid documents received by Appellant reflect an extended bid opening date of June 12, 1996.

6. On June 12, 1996 bid opening occurred. Only one bid was received; that of the Interested Party, Standard Equipment Company (Standard). On or about June 13, 1996, MPA called Appellant asking for price comparisons on the Standard bid opened on June 12, 1996.

7. On or about June 13, 1996, a sales representative of Appellant called the MPA Procurement Officer and stated that Appellant did not submit a bid because Appellant expected an extension of the bid opening date. Appellant's sales representative went to MPA on June 13, 1996 and examined the bid submitted by Standard.

8. Section 2.4 of the bid Specifications entitled Service and Support provided as follows:

2.4 Service and Support

Successful respondent shall have the capabilities of servicing and repairing loader and accessories. Successful respondent shall maintain and/or have access to parts inventory within 20 miles. Said inventory shall be of sufficient size and variety to offer a level of parts availability to 95% within 48 hours from notification. Availability of normal maintenance items, such as filters, vee belts, hydraulic lines and hoses shall not exceed 24 hours.

9. On June 14, 1996, the MPA Procurement Officer received a bid protest from Appellant dated June 14, 1996. The grounds of protest were set forth in relevant part as follows:

THE MILTON JAMES COMPANY would like to formally protest Maryland Port Administration Bid NO# 196051-H (purchase of loader) on the following grounds.

We at Milton James Co. read the published request for bid #196051-H in one of the local industrial trade magazines. We had not received an invitation to bid at that point. I placed a call to you the following day expressing my interest in receiving a bid package. You asked me to fax you a formal request, to your office, to your attention, and I did so. Approximately 8 days passed without receipt of a request for bid from MPA. Another call was made to you, and you assured me that the bid was coming and there had been a delay. You made the statement to me that as a result of the delay there would be an extension on the bid due date. When I questioned you on the time frame of the extension, you simply stated that it compensated for the initial delay of the bid package.

The bid was finally received on 29 MAY 96. We at THE MILTON JAMES COMPANY were expecting notification of the revised bid date per our conversation.

After reviewing the single bid received by MPA on bid #196051-H it is evident that the single respondent "STANDARD EQUIPMENT" failed to meet the bid requirements in section 2.4 titled "SERVICE & SUPPORT". MPA rightfully deems it necessary to have adequate product support within a reasonable distance from its facility. The maximum distance allowable under your bid specifications requirements is 20 miles.

Standard Equipment Company is located at 5399 Argo Drive, Frederick, MD. This location far exceeds the maximum allowed by your own bid specifications. Standard Equipment Co. is not an authorized John Deere dealership in the Baltimore area.

10. In response to MPA's request of June 18, 1996, that Appellant submit evidence to substantiate its allegation that Standard could not provide service and support in the Baltimore area, Appellant advised on June 19, 1996 that it was the sole authorized John Deere Industrial Equipment Company (John Deere) dealer in the Baltimore area.

11. Both Appellant and Standard at all relevant times herein were John Deere authorized industrial dealers.

12. Standard responded by letter dated June 13, 1996 to a question posed by the Procurement Officer during a phone call on June 13, 1996 concerning Standard's warranty service ability. Standard's response indicated it could provide service and support in the Baltimore area. The record to include testimony at the hearing does not reflect that the Procurement Officer's determination that Standard was a responsible bidder relative to its capability to perform the service and support requirements of the contract was unreasonable.

13. The specifications for the instant procurement required provision of a John Deere Model 444G, four wheel drive articulating wheel loader or equal. The detailed specifications for the loader set forth in the bid documents were prepared by MPA with significant input from Appellant.

14. The MPA Procurement Officer denied the Appellant's protest by final decision dated June 26, 1996 and on July 1, 1996 Appellant's sales manager filed an appeal with this Board.

15. Appellant's sales manager is not an attorney at law and the notice of appeal did not include a copy of the Procurement Officer's final decision nor specifically set forth the ruling requested from the Board. Appellant is a Maryland Corporation. Appellant was represented by Maryland counsel at all relevant times after its appeal was filed by the non attorney sales manager.

Decision

I. Motions to Dismiss

Motions to Dismiss were filed by the Interested Party and State based on the filing of the appeal on behalf of the appellant corporation by a person who was not an attorney at law licensed in Maryland in violation of COMAR 21.10.05.03A. The Interested Party also moved to dismiss on grounds that the notice of appeal did not include a copy of the Procurement Officer's final decision nor set forth the ruling requested from the Board in violation of COMAR 21.10.07.02 C&D. After entertaining argument of counsel on the motions the Board denied the motions for reasons to be set forth herein and heard the appeal on the merits.

COMAR 21.10.05.03A provides that a corporation "shall be represented by an attorney at law licensed in Maryland." The State and Interested Party thus argue that the notice of appeal filed by the non-lawyer corporate employee was a nullity and given the passage of time any appeal now filed would be untimely.

The Appellant has been represented by counsel at all relevant times since the filing of the notice of appeal. Counsel for Appellant points out that in the filing of contract dispute appeals COMAR 21.10.06.02B provides that the notice of appeal shall be signed personally by the Appellant (the contractor making the appeal), or by an officer of the Appellant corporation or member of the appellant firm, or by the Appellant's duly authorized representative or attorney. Counsel for Appellant argues it is not improper for a bid protest appeal to be filed by a person who is not an attorney at law licensed in Maryland.

The Board has been directed by the Legislature to adopt regulations to provide for informal, expeditious, and inexpensive resolution of appeals before the Board. State Finance and Procurement Article, Section 15-210. We believe the requirements of COMAR 21.10.05.03 are consistent with such direction and necessary to comply with the provisions of Subtitle 2 of Title 10 of the State Government Article. However, the filing of the notice of appeal by a non-attorney we do not find to constitute a violation of COMAR 21.10.05.03 in this appeal where such filing

prejudiced no party and at every other material step in the appeal process, Appellant, as required, was represented by Maryland counsel.¹

Concerning the asserted violations of COMAR 21.10.07.02 C&D, we note that the notice of appeal did set forth the grounds of the protest that had been denied and identified the procurement involved, the issuing agency and the Procurement Officer. We find that no party was prejudiced by the failure to include the Procurement Officer's final decision with the notice of appeal as required by COMAR 21.10.07.02D since the MPA Procurement Officer was promptly notified of the appeal by the Board and the sole Interested Party was notified with reasonable promptness thereafter of the existence of the appeal by the MPA. Under these circumstances we will not dismiss the appeal for failure to include the agency final action therewith. Similarly where there is no prejudice to any party, and we find none here, the Board will not dismiss an appeal for failure of the notice of appeal to specify the ruling requested by the Board as required by COMAR 21.10.07.02C.

II. Merits

A. Notice

The record reflects that only minimal effort was made by MPA to comply with the requirements of COMAR 21.05.02.04A regarding the mailing or otherwise furnishing notice of the procurement to a sufficient number of bidders for the purpose of securing competition. This was not a ground of protest, however. The ground of protest was an alleged failure to comply with the notice requirements of COMAR 21.05.02.04B dealing with publication of public notice. As set forth in Appellant's protest, Appellant complained that bids were opened only 12 days after Appellant received the bid documents. At the hearing Appellant testified that this did not give Appellant sufficient time to prepare its bid.

¹ The Board was provided with no citation to a Maryland case in which dismissal was mandated as a result of the filing of a notice of appeal with an Executive Branch agency or Article III Court by a non Maryland lawyer. However, the Board acknowledges the cases cited from other jurisdictions where that particular court dismissed an action by a corporation (not involving a statutory exception for non attorney representation of a corporation in small claims court) because of attempted representation by a non-attorney even where the corporation is thereafter represented by counsel after the initial filing by the non-attorney. See Midwest Home Savings and Loan Ass'n v Ridgewood, Inc., 463 N.E.2d 909,(Ct. App. Ill. 1984); Paradise v. Nowlin, 195 P.2d 867,(Dist. Ct. App. Cal. 1948); Sheridan Mobile Village, Inc. v. Larsen, 604 N.E.2d 217, 219 (Ct. App. Ohio 1992); Housing Authority v. Tonsul, 450 N.E.2d 1248, (Ct. App. Ill. 1983).

Appellant's attorney at the hearing argued that the notice that appeared in the May 7 issue of the Maryland Contract Weekly was defective because COMAR 21.05.02.04B(1) requires notice for invitations for bids expected to exceed \$25,000² to be published in the Maryland Register and not the Maryland Contract Weekly. Appellant's attorney also argued that a bidder is entitled to receive bid documents 20 days before bid opening. However, Section 13-103(c)(3) of the State Finance and Procurement Article, 1995 Replacement Volume specifically requires notice to be published in the "Contract Weekly at least 20 days before bid opening. . ." Therefore publication (advertisement) in the Maryland Contract Weekly was legally required and appropriate. The Board also finds the notice to be timely since the actual bid opening and as set forth in the bid documents was on June 12, 1996 more than 20 days from the notice of the procurement as published or advertised in the May 7, 1996 issue of the Maryland Contract Weekly. The General Procurement Law and COMAR only require that publication of notice of the procurement, not receipt of the bid documents, be at least 20 days before the bid submission date. Therefore, the appeal on grounds of inadequate notice is denied.

B. Vendor Responsibility

Appellant's second ground of protest was that, Standard, the Interested Party was not able to meet the service and support requirements of Section 2.4 of the Specifications and thus was not a responsible bidder. Appellant at the hearing admitted that it would be required to sell parts to the Interested Party just as it would to any other person. Therefore, the Interested Party had access to parts within 20 miles of the MPA because Appellant who was located in Baltimore where MPA is located would sell parts to the Interested Party. Credible testimony was also presented at the hearing that the Interested Party could meet all the requirements of Section 2.4 of the Specifications dealing with service and support. Such testimony was consistent with information obtained by the Procurement Officer shortly after bid opening from the Interested Party concerning the Interested Party's ability to perform. Because ability to perform relates to bidder responsibility such information may be received after bid opening. See Chesapeake Bus & Equipment Company, MSBCA 1347, 2 MSBCA ¶163 (1987). Accordingly, the board will not disturb the discretionary

²

The procurement herein would be reasonably expected to exceed \$25,000.

finding by the MPA Procurement Officer that the Interested Party was responsible. See N.B.R. Incorporated, MSBCA 1830, 4 MSBCA ¶364(1994) at pp. 6-7.

The appeal on grounds the Interested Party is not responsible is thus denied.

Wherefore, it is Ordered this 6th day of September, 1996 that the appeal is denied.

Dated: September 6, 1996

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1959, appeal of The Milton James Company under Maryland Port Administration Bid No. 196051-H.

Dated: September 6, 1996

Mary F. Priscilla
Recorder