BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of	)
	)
UTZ QUALITY FOODS, INC.,	)
	)
and	) MSBCA Docket Nos. 2060 and 2062
	) Consolidated
COCA-COLA ENTERPRISES, INC.	)
	)
Under Board of Regents of the	)
University of Maryland	)
System Request for	)
Proposals No. 77355-A	)

June 29, 1998

Bid Protest - Timeliness - Pursuant to COMAR 21.10.02.03, an offeror must file a protest within seven days of when it knew or should have known of the basis for protest.

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Opinion by Board Member Steel on Respondent's Motions to Dismiss

These consolidated appeals come before the Board on Respondent Board of Regents of the University of Maryland System's (University) motions to dismiss on timeliness and standing grounds the appeals of Utz Quality Foods, Inc. (Utz) and Coca-Cola Enterprises, Inc. (Coke) contesting the propriety of the University's conduct of the procurement of beverage services. Appellants responded thereto, and the Board held oral argument thereon. This decision follows. The findings of fact as set forth herein are only those necessary to a disposition of the motions.[1]

Findings of Fact

1. Utz Quality Foods, Inc., located in Hanover, Pennsylvania, is a manufacturer of what is known in the trade as snack foods, and/or salty snacks, such as potato chips. Until the award of the instant contract, it had exclusive rights to provide snack foods on the University College Park campus, and had contracted through Datronics for signage in Cole Fieldhouse.
2. Coca-Cola Enterprises, Inc. (Coke) is a bottling subsidiary of Coca-Cola, Inc., a beverage manufacturer, which had been providing beverage services to the University.
3. On February 18, 1997, Request for Proposals No. 77355-A was published in the Maryland Contract Weekly entitled Request for Proposal for Vending Services: Soft Drinks and Other Beverages. Copies of the RFP also were sent to beverage suppliers such as PepsiCo, Inc. (Pepsi) and Coke, but not Utz. The RFP's specifications for this negotiated procurement required that the successful offeror vend soft drinks at the College Park campus. There was no mention of snack foods and no specifications regarding snack foods in the RFP.
4. A pre-proposal conference was held on March 4, 1998.
5. On March 18, 1997, Addendum #1 was issued to the RFP which included the following questions and answers:

   Q4. Is juice, tea and water a part of this RFP for Vending Machine Retail and can vendors propose? What are the respective commissions?

   A. Juice, tea and water are currently provided by the snack food vendor and are part of the RFP for Snack Food Vending currently being solicited. However, if vendors feel that these products are critical to their mix and overall offer they are welcome to include them in their offers. The University may negotiate with the respective vendors in order to achieve the best overall solution. Please note that revenue for juice, tea and water is not included in Appendix H of this RFP. Therefore, if offerors include juice, tea and water under this RFP, the commission offered should be competitive. Please note that commissions from juice, tea and water under the current snack food contract are 20-21% of gross revenue.

[1] Utz and Coke allege in their respective protests that the RFP did not permit an offeror to offer snack foods. The State argues that the RFP does not prohibit an offer that includes snack foods and focuses on the language of section 3.3.15 of the RFP which states: "should provide any other services that Offerors deem advantageous to the University". The Board will not address the salient issue of the appeals which is whether the RFP and any amendments thereto in fact authorized a proposal that included snack foods because the Board finds that neither Appellants' protest was timely filed as more fully discussed below.

Q25 Define what is meant by non-drink vending items as specified on p. 17 of the RFP, item 3.3.14.

A. If offerors see value in offering non-drink items for consideration they should propose them. However, the University has the sole discretion to consider and or implement such offers. Non-drink items may include items such as computer disks, personal care items or other items which are consistent with the University mission and customer base.

6. On or before May 5, 1997, offers were received from two vendors, Pepsi and Coke, but the University did not believe that they were as beneficial as originally hoped. Therefore, on July 9, 1997, offerors were provided a Request for Revised Proposal (RRP). Attachment #1 thereto, setting out additional specifications and a modified format for the RRP, does not, however, indicate a solicitation for snack foods. The submission deadline for revised proposals was extended to July 31, 1997.

7. Pepsi apparently included in its revised proposal submitted on or before July 31, 1997 an offer to sell the snack foods of its Frito-Lay subsidiary for the 15-year proposed term of the contract. Coke also submitted a revised proposal on or before July 31, 1997 which did not include an offer for provision of snack foods.

8. Thereafter, apparently, Coke had reason to believe that Respondent was negotiating with Pepsi, although it had not entered into any discussions with Coke. Thus, on August 15, 1997, Coke wrote a letter to the State requesting that Respondent negotiate with both offerors, not just Pepsi. Subsequent to filing its appeal with this Board, Coke argued that this letter in fact constituted a protest. The Board finds that this letter is not styled a protest as was the February 4, 1998 letter of protest, and was clearly an attempt to further discussions, not to invoke the remedial process for a bid protest set forth in COMAR.

9. By memorandum dated September 9, 1997, the procurement officer and agency head designee, pursuant to COMAR 21.05.03.03F, recommended that a contract be awarded to Pepsi. The proposed contract, which included provision of snack foods by Pepsi subsidiary Frito-Lay, was for a term of 15 years, and would include an $8 million one-time up-front payment and a balance of approximately $50 million in revenues to the University over the 15-year period.

10. This recommendation was required thereafter to be approved by the University Board of Regents and ultimately by the State Board of Public Works (BPW). The transcript of the public meeting of the BPW of December 17, 1997, reflects that the BPW approved award of a contract to Pepsi that included provision for snack foods. The agenda item for the Pepsi contract reflected that it was a contract that included snack foods.

11. The agenda item would have been available if requested by members of the general public, had they been in attendance at the December 17, 1997 BPW meeting. However, it appears that the BPW was not provided with a copy of the RFP as amended. A proposed draft of a contract between the State and Pepsi was also available to the BPW.[2] However, pre-decisional confidentiality would have precluded release of the draft contract to the general

[2] Further, a document comparing Coke's and Pepsi's financial proposal was before the Board. It also appears the BPW had a letter from Mr. Kirwan, President of the University, recommending approval of the contract. It is unknown whether or not these documents would have been available to the general public in attendance at the BPW meeting.

public.

12. Accordingly, the only document that the record reflects would have been available to Coke, had it been in attendance on December 17, 1997, would have been the agenda item. However, presence at the meeting, based on the transcript of the discussion, would have revealed the content of the contract, including the snack food portion.

13. The Board finds that it does not appear from the record that Coke received written notification from the University of the University's determination to award to Pepsi between September 9, 1997 and December 17, 1997, i.e., between the decision to recommend award to Pepsi and the public meeting of the Board of Public Works at which the recommendation was approved. In fact, the procurement officer suggests in his decision on Coke's protest, that Coke should have known by as early as August 15, 1997 that it was no longer in the running for award because the Respondent had ceased negotiating with Coke.

14. Notwithstanding that the University never notified Coke of its decision to award to Pepsi, the record reflects that Coke was in fact aware of the potential award as a result of newspaper articles in the month of December. An article in The Baltimore Sun dated December 6, 1997 indicated that the University's Board of Regents had approved a contract on December 5, 1997 "authorizing Pepsi to sell its products -- including the snack foods of its Frito-Lay subsidiary -- on campus until 2013." The article continued that the signs in Cole Field house would soon come down, to be replaced by signs for Pepsi and Frito-Lay.[3]

15. At a hearing on a motion for preliminary injunction filed by Utz in the Circuit Court for Prince George's County, Utz' Vice President for Sales and Marketing testified regarding a December 17, 1997 conversation with the procurement officer as follows:

> I asked [the procurement officer] if what -- "the rumors I heard were true, that Pepsi was, in effect, involved in a 'pouring rights RFP,'"[4] and he said that, "They were,". . . At which point I confronted him with the situation that we had heard that our signs would be coming down, and there would be a possibility that we wouldn't be able to service the University of Maryland with product.
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> And he said, "Nothing's been signed yet, but yes, if everything goes the way it is, that's what will happen." And I said, "How can that be?" And he said, "Through the administrative process [ ] of putting out the RFP for soda, that Pepsi came back and said, 'We'll give you salted snacks as part of the agreement.'"
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> And I said, "Wait a second. If it was a pouring rights, how did salty snacks get into it?" And he said basically that . . . "That's what we -- that's what Pepsi offered, and we accepted."
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> I said, "Don't you have an obligation at that point to rebid it and open it up to salty snacks?" And he said to me, "You don't understand the process.

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[3]Newspaper articles also appeared in December, 1997 in The Washington Post and the University Diamondback which provided information about the procurement. For example, an article in the December 9, 1997 issue of the Diamondback stated that the BPW would consider an award of a contract to Pepsi on December 17, 1997. The Board does not imply that the COMAR 21.10.02.03 "should have known" language is triggered by articles appearing in the media. It is clear from the record, however, that Coke was aware of these articles.

[4]The witness defined "pouring rights" as the fountain drinks and soda service on campus.

I not only -- I can't. I'm not allowed to broaden that once it's broadened."

I said, "Something's wrong here. I mean, how can Pepsi broaden the category and you be prohibited from notifying other snack manufacturers, especially one who is currently serving you, that all of a sudden we are out of the process?" And he said, "That's just the way it is."

The Board finds from this testimony that Utz was sufficiently informed of the snack food component to have been placed on notice of its grounds of protest. Therefore, under COMAR 21.10.02.03, it should have filed its protest within seven days or on or before December 24, 1997. It did not file a protest until January 16, 1998, and its protest was therefore untimely under COMAR 21.10.02.03.

16. As noted, Utz filed a protest with the State dated January 16, 1998. This protest specifically alleged that the RFP did not solicit a snack food component and the State was unlawfully accepting one. Utz provided a copy of this protest to Coke on or before January 20, 1998. Therefore, at the very latest, Coke was on notice of grounds for its own protest on January 20, 1998.

17. If it had any question about the validity of grounds set forth in the Utz protest, the Board finds that Coke could have confirmed the essential elements of the protest (filed by Utz on January 16, 1998 and received by Coke on January 20, 1998) by requesting a copy of the beverage and snack food agenda item publicly considered by the BPW at its meeting of December 17, 1997. Therefore, Coke should have filed its protest on or before January 27, 1998. The protest having been filed on February 4, 1998, the Board finds that Coke's protest was untimely under COMAR 21.10.02.03.

18. Coke received a copy of the University's Contract with Pepsi on January 28, 1998, and filed for the first time a formal protest with the procurement officer within 7 days thereafter on February 4, 1998 on grounds, for purposes of this decision, that the contract impermissibly included snack foods in contravention of the RFP, and the State had not negotiated with Coke as it apparently had with Pepsi.[5]

Decision

Preliminarily we observe that since its inception seventeen years ago the Board has recognized, considered and granted motions for summary disposition[6], although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal, expeditious, and inexpensive resolution of appeals . . . ." Section 15-210, Division II, State Finance and Procurement Article; see e.g. Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983).

In all instances the legal standards the Board will apply to determine the appropriateness of

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5 See finding of fact number 8.

6 The word disposition is used rather than judgment because the Board is not a court and has no equitable powers or equitable jurisdiction.

summary disposition remain the same. The party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See Mercantile Club, Inc. v. Scheer, 102 Md. App. 757 (1995). In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party (in this instance the Appellants) against whom the motion is directed. See Honaker v. W.C. & A.N. Miller Dev. Co., 285 Md. 216 (1979); Delia v. Berkey, 41 Md. App. 47 (1978), Affd. 287 Md. 302 (1980).

The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. Coffey v. Derby Steel Co., 291 Md. 241 (1981); Russo v. Ascher, 76 Md. App. 465 (1988); King v. Bankerd, 303 Md. 98, 111 (1985). Therefore, summary disposition is not appropriate if a general issue of material fact is in dispute. Furthermore, for purposes of a motion for summary disposition, even where the underlying facts are undisputed, if they are susceptible of more than one permissible factual inference, the choice between those inferences should not be made, and summary disposition should not be granted. See Heat & Power Corp. v. Air Products, 320 Md. 584, 591 (1990); King v. Bankerd, supra, 303 Md. at 111. Resolving all conflicting evidence and inferences in favor of the Appellants, we nevertheless find that the Respondent's motions for summary disposition must be granted.

Coke argues that it is not required to file a protest on grounds that the Contract covers snack foods, in alleged violation of the RFP, until it actually has had the opportunity to review the Contract. Coke maintains that it filed its protest within seven days of its receipt and review of the Contract. We reject this argument on grounds akin to our earlier rejection of a similar argument that the seven days should not run from the date the protester/appellant becomes aware of the alleged defect, but from the date the appellant becomes aware of the State's determination to award a contract to its competitor. See Motorola Communications and Electronics, Inc., MSBCA 1343, 2 MICPEL ¶154 (1987).

COMAR 21.10.02.03 states in relevant part that "B. . . . protests [other than those based on apparent defects in a solicitation] shall be filed not later than seven days after the basis for protest is known or should have been known, whichever is earlier. C. . . . A protest received by the procurement officer after the time limits prescribed in 'A or 'B may not be considered." The Board's jurisdiction is dependent upon timely filing, and failure to file in a timely manner deprives this Board of jurisdiction to hear the appeal. ISMART, MSBCA 1979, 5 MSBCA ¶ 417 (1997) (appeal dismissed on grounds that it was at least one day late). See also, AEPCO, Incorporated, MSBCA 1844, 4 MSBCA ¶370 (1994)(while the allegations of the appeal are serious, this Board only has jurisdiction to consider them if complaint was made timely); and AD Jackson Consultants, Inc., MSBCA 1817, 4 MSBCA ¶366 (1994) (If an offeror fails to file its protest in a timely fashion, the protest may not be considered by the Procurement Officer or by the Board).

Insofar as Coke alleges in its appeal that the University was negotiating with Pepsi and not Coke in contravention of the Procurement Law, the Board finds that its letter of August 15, 1997 concerning further negotiations did not constitute a protest. The Sexual Assault and Domestic Violence Center et al., MSBCA 1858, 4 MSBCA ¶376 (1995) (letter does not constitute a formal

protest because it was not specifically designated as a protest directed to the Procurement Officer as required, or otherwise comply with COMAR 21.10.02.03 and .04). Therefore, the protest of that issue on February 4, 1998 was untimely, the grounds therefore having been known on or before August 15, 1997.

In the instant case it is undisputed that Utz was aware that snack foods were included in a Pepsi proposed "pouring rights" contract, which contract would impact its business with the University of Maryland, on approximately December 17, 1997, as testified to by its Vice President for Sales and Marketing in the P.G. County judicial proceeding. Likewise, Coke knew at the latest on January 20, 1998[6] when it received Utz' protest that it had grounds for protest on the snack foods issue, and had known much earlier, at least on August 15, 1997, that it had grounds for protest on its alleged secondary issue, the requirement of negotiations with each offeror. Utz filed its protest on January 20, 1998, more than 7 days after it knew of grounds for protest on December 17, 1998. Coke filed its protest on February 4, 1998, more than seven days after January 20, and also more than seven days after August 15, 1997. Therefore, the Board must find, pursuant to COMAR 21.10.02.03, that these appeals were untimely and must be dismissed.[7]

Wherefore, it is Ordered this 29th day of June, 1998, that the appeals are dismissed with prejudice.

Dated: June 29, 1998

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

[6] Counsel for Utz also forwarded to House counsel for Coke on January 23, 1998 a copy of the initial pleadings filed by Utz in the Circuit Court for Prince George's County.

[7] Because we find that the protests were untimely and that the Board therefore does not have jurisdiction to hear the merits of these Appeals, we do not address other issues, such as, for example, whether as a non-offeror, Utz has standing to appeal. In addition, we need not address whether the numerous events proffered by the State other than those on December 17, 1997 for Utz and January 20, 1998 for Coke would have triggered the "knew or should have known" language of COMAR 21.10.02.03, nor do we need to consider with respect to Coke, whether the notice of award in the Contract Weekly of January 27, 1998 constituted constructive notice of the snack foods irregularity.

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 the consolidated appeals of UTZ QUALITY FOODS, INC., MSBCA 2060, and the appeal of COCA-COLA ENTERPRISES, INC., MSBCA 2062, under Board of Regents of the University of Maryland System Request for Proposals No. 77355-A.

Dated: June 29, 1998

Mary F. Priscilla
Recorder