



## Findings of Fact

1. In late August or early September 1983, SHA issued an invitation for bids (IFB) on a contract to provide construction inspection personnel to various projects under construction within its District 4 area (Baltimore and Harford Counties). The IFB contained a unit price list requesting hourly rates for personnel described as Engineering Technicians II, III, IV and V respectively. (Unit items 1-4). Additionally, overtime hourly rates were solicited for these four classes of personnel. (Unit items 5-8). For each of the eight unit items described heretofore, an estimate of the approximate number of manhours expected to be required was provided. This estimate was to be used to compute the total price for each unit item and, hence, the total bid price.

2. On October 6, 1983, bids publicly were opened at the SHA offices. Total bid prices were read aloud and EBA was identified as the apparent low bidder. Appellant's President, Mr. Cletus J. Vogel, attended the bid opening but did not seek to examine EBA's unit prices.

3. In reviewing EBA's unit prices prior to award, SHA representatives noted that EBA had bid only \$1.00 per hour for Engineering Technician II personnel. The next low bid for this item was \$7.00 per hour. Further, SHA observed that EBA's bid for Engineering Technician V personnel exceeded the next low bid for this item by \$5.00 per hour. Apparently concerned that a bid mistake had been made, SHA requested that EBA confirm its bid for these two unit items. By letter dated October 27, 1983, EBA's President confirmed the accuracy of the bid as submitted.

4. Contract award to EBA was made on November 4, 1983. Notice to proceed, effective December 1, 1983, was mailed by SHA on November 21, 1983.

5. Appellant obtained a copy of the bid tabulation on December 28, 1983. Upon reviewing the prices bid by EBA for each unit item, Appellant's President concluded that EBA had submitted an unbalanced bid.

6. Appellant's President initially was reluctant to file a protest with SHA for fear of disrupting a long standing professional relationship. Ultimately, however, he did prepare a bid protest letter dated January 9, 1984 and mailed it to the SHA Administrator. This letter was not received at the SHA offices until January 17, 1984.

7. By final decision dated February 1, 1984, Appellant's protest was denied by the SHA Administrator on timeliness grounds.

## Decision

COMAR 21.10.02.03 addresses the time for filing protests at the procurement officer's level as follows:

- 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.

In reviewing the foregoing regulation, we consistently have ruled that its provisions are mandatory. Kennedy Temporaries, MSBCA 1061, July 20, 1982 at p. 5, rev. in part on other grounds, No. 484 (Ct. of Spec. Appeals, filed January 4, 1984); International Business Machines Corporation, MSBCA 1071, August 18, 1984; Eagle International, Inc., MSBCA 1121, March 2, 1983; Pyramid Cleaning Maintenance & Supply, Inc., MSBCA 1106, April 8, 1983; Dasi Industries, Inc., MSBCA 1112, May 5, 1983; Dryden Oil Company, MSBCA 1150, July 20, 1983. In so doing, we have recognized the fine balance between the rights of the protester, the interested party and the using agency and have concluded that unless a legal objection to the award of a State contract is raised promptly, within the time period set forth in the regulations, the State and the firm to whom it awards or intends to award a contract will be unduly prejudiced. For this reason, a party who fails to file a protest within the time provided under COMAR 21.10.02.03 is deemed to have waived its right to thereafter raise legal objection to the award of a State contract.

Here Appellant received a copy of the bid abstract on December 28, 1983. By this date, if not earlier, it should have known of the grounds for protest. Nevertheless, a protest was not filed until January 17, 1984, 20 days later. Accordingly, the protest was untimely and appropriately was not considered by the SHA Administrator.

Appellant states that it does not subscribe to the Maryland Register or the Code of Maryland Regulations and thus was unaware of the time requirements applicable to the filing of a bid protest. In the absence of some express notification in the IFB, therefore, it is argued that a seven day filing period is inadequate and unfair.

The State Documents Law created the Code of Maryland Regulations and required that it include, among other things, every administrative rule adopted by any agency. Art. 41, Md. Ann. Code, §256B, 256C. The foregoing statute concomitantly created the Maryland Register to act as a temporary supplement to the Code of Maryland Regulations. Publication of adopted agency rules in either of these documents constitutes constructive notice of those rules to any person subject to or affected by them except where the Legislature otherwise specifically provides by law or where such constructive notice is insufficient in law.<sup>1</sup>

<sup>1</sup>Art. 41, Md. Ann. Code, §256P; compare 44 U.S.C. §1507; Federal Crop Insurance Corp v. Merrill, 332 U.S. 380 (1947); State v. Ciccarelli, 55 Md.

Here the Legislature did not expressly require a statement to be placed in solicitations advising prospective bidders or offerors of their right to protest and of the procedures for doing so. It did require, however, that the Board of Public Works and the procuring agencies promulgate regulations pertaining to these matters.<sup>2</sup> Effective July 1, 1981, regulations pertaining to bid protest procedures were adopted pursuant to the State Documents Law and, at the time of this procurement, these regulations had been published both in the Maryland Register and the Code of Maryland Regulations.<sup>3</sup> Accordingly, Appellant had constructive notice of the time requirement for the filing of a bid protest and was obligated to adhere to this deadline in order to perfect its protest.

For the foregoing reasons, therefore, the appeal is denied.

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App. 150, 162, 461 A.2d 550, 557 (1983).

<sup>2</sup>Art. 21, Md. Ann. Code, §§2-101, 7-201(a).

<sup>3</sup>See COMAR 21.10.02.03; 7:24 Md. R. S-11, 8:9 Md. R. S-117, 8:13 Md. R. II-5.