

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Viron Energy)
Services)
) Docket No. MSBCA 2122
Under DGS Project No. 98-EPC-)
IDC)
)

May 20, 1999

Contract Award - Late Bid - Burden of Proof - Appellant failed to establish that the lateness of its bid should be excused pursuant to the exception set forth in COMAR 21.05.02.10B permitting consideration of a late bid where the bid would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees.

APPEARANCE FOR APPELLANT: J. Snowden Stanley, Jr., Esq.
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APPEARANCE FOR RESPONDENT: John H. Thornton
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OPINION BY BOARD MEMBER STEEL

Appellant timely appeals the final decision of the Department of General Services (DGS) on its protest of the determination of DGS not to accept its proposal because the proposal was not timely received at the designated place for receipt of proposals.

Findings of Fact

1. On November 23, 1998, DGS issued a Request for Proposals (RFP) seeking competitive sealed proposals for the procurement of indefinite quantity contracts for energy performance services.
2. The deadline for receipt of proposals was February 16, 1999, at 11:30 a.m. at the Department of General Services, Bid/Proposal Administration, 301 West Preston Street, West Lobby, Room L-100, Baltimore, Maryland, 21201.
3. The Bid/Proposal Administration (BPA) is a division of the Office of Procurement and Contracting of DGS. The main function of BPA is to distribute solicitation documents and to receive bids and proposals for construction and construction-related procurements.
4. On February 16, 1999, there was only one entrance into 301 West Preston Street usable by

the public, that entrance being the automatic door at the east end of the building directly adjacent to the O'Connor Building at 201 West Preston. Room L-100, the office of BPA, is at the opposite end of the lobby (on the west side of the building, adjacent to Eutaw Street) about 150 feet from the east entrance into the building. The only entrance into BPA is from the south side of the lobby. There is a large sign over the outside of the door to Room L-100 identifying it as Room L-100 and as the location of BPA.

5. There were three large signs in the lobby of 301 West Preston directing that bids and proposals for DGS procurements should be taken to Room L-100, Bid/Proposal Administration. All three signs in the lobby have arrows pointing bidders in the direction of BPA. One sign is on a column about 30 feet inside the doorway to the building, just to the left of the guard station which is the first thing one encounters upon entering the lobby. Another sign is located in the south side of the lobby about one-third of the way down the lobby toward BPA. The third sign is on the north side of the lobby, opposite the Preston Street or north entrance (which was closed).
6. BPA time-stamps bids and proposals as they are received. The time-stamper only records in whole minutes; it does not record seconds. It is the policy of BPA to set and adjust the time-stamp clock to the nearest whole minute in accordance with the time given by Bell Atlantic over the telephone and to use within the nearest minute that time-stamp clock, and no other, as the official clock determining deadlines for receipt of the bids and proposals. As she does on a daily basis when bids are expected, prior to the 11:30 a.m. deadline on February 16, 1999, Ms. Colleen Hayes of BPA called Bell Atlantic to see if the time-stamp clock of BPA agreed with Bell Atlantic's time. She confirmed that it did.
7. By the 11:30 a.m. deadline on February 16, 1999, eight proposals were received.¹
8. Ms. Fran Wheeler, a DGS employee working in BPA near the counter checked the time by inserting a piece of paper into the time-stamp which registered 11:30 a.m. She then waited until she had heard the BPA time-stamp clock click at 11:31 a.m., whereupon she left the counter and went to sit down at her desk. Shortly thereafter, Mr. David Camak, a delivery man from United Parcel Service (UPS), entered BPA at Room L-100 and attempted to leave a box on the counter.
9. Mr. Camak had first attempted to deliver Appellant's proposal to the eighth floor mail room of the State Department of Assessments and Taxation (SDAT) at 301 West Preston Street. While an SDAT employee signed for the package at 10:24 a.m., SDAT would not accept the package. Mr. Camak then proceeded to drop packages off on 4 or 5 different floors² between the eight floor and the first floor of 301 West Preston Street, arriving at Room L-100 shortly after the time that proposals were due. He testified that when he entered Room L-100, no personnel were at the counter.

¹ Apparently two of these proposals have subsequently been excluded or withdrawn. There are thus six vendors remaining whose proposals are to be considered for award. It is the intention of DGS to select six vendors who may potentially be awarded contracts.

² Counsel for Respondent moved shortly after the hearing to reopen the record so as to receive a log produced (pursuant to subpoena) by UPS a day or two after the hearing showing that several persons had signed for deliveries addressed to personnel ranging the floors above the BPA. The latest delivery signed for before Mr. Camak arrived at the BPA was stamped 10:29. Appellant argues that this does not prove that Mr. Camak was not at the door of the BPA while securing the signature. While the Board grants the motion to reopen and admits this evidence as Respondent's Exhibit H to the Agency Report, we note that the Board had already made the decision set forth in this opinion, and its opinion is not modified as a result of the exhibit or Appellant's arguments thereon.

10. Upon hearing Mr. Camak's entry into Room L-100, Ms. Wheeler came to the counter and asked Mr. Camak what was in the box. Mr. Camak did not know what was in the box. Nothing on the outside of the box identified it as a bid proposal. The side of the box contained printed labeling for "Oxford Ring Binders." Ms. Wheeler was not sure the box was being delivered to the correct location, but she generated a time-stamp on a blank scrap of paper: 11:33 a.m.
11. Ms. Wheeler and Mr. Camak determined to open the box to see what it contained. When Ms. Wheeler saw that it contained a proposal, she affixed the 11:33 a.m. scrap of paper to the box, and immediately walked around the partition behind the counter and said to Mr. Robert Taylor, a DGS employee who is Chairman of the Evaluation Committee for this procurement who was observing the proposal opening proceedings, "we have a late bid" (or words to that effect).
12. The box in which Appellant's proposal was shipped correctly identifies the addressee as "Bid/Proposal Administration, Dept. of General Services, 301 W. Preston St., W. Lobby, Rm. L-100, Baltimore, MD 21201."
13. By letter dated February 19, 1999, the DGS Procurement Officer notified Appellant that DGS determined that Appellant's proposal was submitted late and would not be accepted.
14. By letter dated February 24, 1999, as supplemented by letter dated March 4, 1999, Appellant protested against DGS's refusal to consider Appellant's proposal.
15. DGS denied the protest by decision dated March 15, 1999 and Appellant appealed.

Decision

A proposal received after the time set for receipt of proposals is late. The proposal is late even where the proposal is received only a few seconds or, as in the instant appeal, a minute or so after the time set for receipt of proposals. COMAR 21.05.03.02F provides that in procurement by competitive sealed proposals, late proposals may be received only as permitted by COMAR 21.05.02.01, the regulation governing late bids submitted under competitive sealed bidding. COMAR 21.05.02.01B authorizes the acceptance of a late bid only if the bid "would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees."

In this appeal the record reflects that DGS personnel directing the employment activity or their employees were not responsible for the Appellant's proposal not being delivered to the proper location until sometime after 11:31 a.m.

COMAR 21.05.02.10B does not permit the acceptance of a bid or proposal which is late due to actions of a private carrier. See Pioneer Oil Company, Inc., MSBCA 1060, 1 MSBCA ¶16 (1982); Delmarva Drilling Company, MSBCA 1096, 1 MSBCA ¶36 (1983).

Nor can the action or inaction of State Department of Assessment and Taxation employees be attributed to DGS so as to authorize the acceptance of Appellant's late proposal. SDAT and its eighth floor mail room employees at 301 West Preston Street are not "State personnel directing the procurement activity or their employees." The language of the regulation clearly refers only to employees of the agency conducting the procurement. Therefore, the attempt to deliver the proposal to SDAT may not be attributable to DGS. See PATCO Distributors, Inc., MSBCA 1270, 2 MSBCA

¶128 (1986); R.R. Donnelley & Sons Company, MSBCA 1463, 3 MSBCA ¶213 (1989).

The procurement regulations provide that a late proposal “may not be considered” unless it “would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees.” Under the facts of this appeal there is no basis under the law for DGS to accept Appellant’s proposal because the proposal would not have been timely “but for the action or inaction of State personnel directing the procurement activity or their employees.”

Accordingly, the appeal is denied. Wherefore, it is Ordered this 20th day of May, 1999, that the appeal is denied.

Dated: May 20, 1999

Candida S. 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 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 2122, appeal of Viron Energy Services under Department of General Services Project No. 98-EPC-IDC.

Dated: May 20, 1999

Mary F. Priscilla
Recorder

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