

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of)
WILBANKS TECHNOLOGIES)
CORPORATION)
) Docket No. MSBCA 2066
)
Under SHA Contract No. ITD-98011)
)

June 16, 1998

Bid Protest – Timeliness – A protest based on alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals is required to be filed before the closing date for receipt of initial proposals.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Scot D. Morrell
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the final decision of the State Highway Administration's (SHA) Procurement Officer that the Appellant's bid protest was not timely filed.

Findings of Fact

1. The procurement for the Contract was by competitive sealed proposals. The Contract was to provide technical support and services for all SHA current and future licensed Bentley Systems, Inc. software products.
2. The project was advertised on February 19, 1998 and SHA mailed the Request for Proposals (RFP) to several potential offerors, including Appellant, on February 9, 1998. The solicitation disclosed the evaluation factors and their relative importance. The RFP also included the contents for the technical proposals and the price proposal.
3. The RFP informed offerors that all inquiries and questions were required to be submitted in writing to SHA by February 24, 1998.
4. By letter dated February 13, 1998, Appellant made the following request:
In an effort to adequately respond to your Bentley SELECT RFP, we would like to arrange for a tour of your facility at your earliest

convenience. Should you require any additional information, do not hesitate to contact me personally at [telephone number].

5. SHA addressed Appellant's request in Addendum No. 2 issued on February 24, 1998 as follows:

Q. Can we arrange for a tour of the SHA facility?

A. This request is denied.

Due to the fact that we have multiple facilities and that no verbal questions or computer access is permitted, there would be no advantage to seeing the machines located on individual desks. We have provided a breakdown of the number of currently licensed Microstation copies per individual divisions for your use in substitute of a tour.

6. Proposals for the RFP were due to SHA on March 3, 1998. Appellant and four other offerors submitted their proposals at that time. Along with its proposal, Appellant submitted a signed acknowledgment that it had received the February 24, 1998 Addendum No. 2. Based on the record, the Board finds that Appellant received the Addendum several days prior to March 3, 1998 and that Appellant had adequate time to file a written protest of the SHA denial of Appellant's request for a site survey (tour) prior to the proposal due date of March 3, 1998.
7. Appellant did not file a written protest of the SHA denial of its request for a site survey (tour) prior to the proposal due date of March 3, 1998.
8. By letter dated April 3, 1998, all offerors, including Appellant, received notification from SHA that HM Systems, Inc. had the highest rated composite technical/price score and had been selected for award of the Contract.
9. On April 9, 1998 Appellant filed a protest with SHA on grounds that its request for a site survey (tour) should not have been denied and that such denial adversely affected the quality of its proposal.
10. The Procurement Officer's final decision, dated April 21, 1998, denied the protest on grounds that a protest based on SHA's denial of the site survey (tour) was required by COMAR 21.10.02.03 to be filed prior to the March 3, 1998 closing date for receipt of initial proposals.
11. Appellant filed a notice of appeal with this Board on April 29, 1998.

Decision

The filing requirements of a protest¹ under COMAR 21.10.02.03 provide that:
Time For Filing

- A. A protest based upon alleged improprieties in a solicitation that 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

¹ Protests are required to be in writing and comply with the provisions of COMAR 21.10.02.04.

of initial proposals. For procurement by competitive sealed proposals, alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation shall be filed not later than the next closing date for receipt of proposals following the incorporation.

- B. In cases other than those covered in Section A, protests shall be filed not later than seven (7) days after the basis for protest is known or should have been known, whichever is earlier.
- C. The term “filed” as used in Section A or B means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall assure earliest receipt. A protest received by the procurement officer after the time limits prescribed in Sections A or B may not be considered.

(Emphasis added)

This Board has consistently held that the timeliness requirements of COMAR 21.10.02.03 are substantive in nature and are to be strictly construed. *See Delaware Elevator, Inc.*, MSBCA 1741, 4 MSBCA ¶333 (1993); *Motorola Communications and Electronics, Inc.*, MSBCA 1342, 2 MSBCA ¶154 (1987); *Transit Casualty Company*, MSBCA 1260, 2 MSBCA ¶119(1985) at pp. 37-38 (citations omitted). Failure to raise a timely protest will result in the individual interest of the offeror being outweighed by the public interest involved in assuring that state procurement proceed without delay. *Rolm Mid-Atlantic*, MSBCA 1094, 1 MSBCA ¶35 (1983) at p. 6.

The basis for Appellant’s protest is that SHA did not allow potential offerors to perform a site survey (tour) of SHA facilities. Addendum No. 2, issued on February 24, 1998, specifically addressed Appellant’s request by denying the site survey (tour) on grounds that SHA has multiple facilities and would not permit verbal questions to various SHA employees or computer access. As a substitute for the site survey, a list of the number of currently licensed microstation copies was provided for each individual SHA division. Appellant received the Addendum several days prior to March 3, 1998. Appellant thus knew about the alleged impropriety, i.e., the failure to permit a site survey (tour), prior to the due date for receipt of initial proposals.

Accordingly, Appellant was required to protest this alleged impropriety prior to the due date for receipt of initial proposals. By failing to protest this alleged impropriety prior to the due date for receipt of initial proposals Appellant waived its right to have the alleged impropriety considered on the merits; i.e., Appellant lost its right to protest. *See Transit Casualty Company*, *supra*. *See also National Elevator Company*, MSBCA 1252, 2 MSBCA ¶114 (1985); *American Air Filter Co.*, MSBCA 1199, 1 MSBCA ¶89 (1984); *DASI Industries, Inc.*, MSBCA 1112, 1 MSBCA ¶49 (1983).

The merits of this protest cannot, therefore, be considered by the Board which only has jurisdiction to consider protests that are timely filed.

Wherefore, it is ORDERED this 16th day of June, 1998 that the Appeal is dismissed with prejudice.

Dated: June 16, 1998

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 2066, appeal of Wilbanks Technologies Corporation under SHA Contract No. ITD-98011.

Dated: June 16, 1998

Mary F. Priscilla
Recorder

