

**BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of American            )  
Innovations, Inc.                    )  
  )  
  ) Docket No. MSBCA 2469  
  )  
Under DGS Invitation to Bid        )  
No. 001IT815315                    )

**APPEARANCE FOR APPELLANT:**               None

**APPEARANCE FOR RESPONDENT:**           Douglas G. Carrey-Beaver  
  Assistant Attorney General  
  Baltimore, Maryland

**OPINION BY CHAIRMAN HARRISON**

This appeal concerns the procurement of 200 explosive-proof trash receptacles. The low bidder, Mistral Security, Inc. (Mistral), submitted a bid of \$350,000.00, and Appellant submitted the second lowest bid of \$575,000.00. Pursuant to COMAR 21.02.01.04B(8), the Department of General Services (DGS) awarded the contract for the trash receptacles to Mistral on October 6, 2004. The instant appeal from a final agency decision denying Appellant's protest concerning the award was filed on March 10, 2005.

**Findings of Fact**

1. On July 16, 2004, DGS sought bids for 200 explosive-proof trash receptacles. Attached to DGS's Invitation to Bid (ITB) were specifications and performance requirements for the trash receptacles that DGS sought to procure on behalf of the Maryland Transit Administration (MTA).
2. Prior to the scheduled bid opening date of August 17, 2004, Mistral, in an August 4, 2004 letter, alleged that the

specifications were restrictive due to certain testing limitations and performance requirements allegedly drawn from Appellant's advertisements.

3. DGS considered Mistral's allegations, and, after conferring with the MTA, for whom these trash receptacles were being obtained, DGS issued an Addendum to the solicitation in order to address issues that Mistral raised and to change the bid opening date to August 20, 2004.
4. Bid opening occurred online via emarylandmarketplace and bids were available for public inspection immediately after bid opening on August 20, 2004.
5. By letter dated August 18, 2004, Appellant protested DGS's decision to eliminate the requirement in §12(e) of the original solicitation for a test report that included post-detonation photos and supporting video footage.
6. By letter dated August 20, 2004, DGS's Procurement Officer denied the Appellant's August 18 protest, concluding that "the State's minimum needs do not require a test report including post detonation photographs and supporting video footage," and further concluding that "the State's interest can be adequately protected without revising the specifications to reinstate the deleted requirements."
7. On October 6, 2004, DGS awarded the contract to Mistral, the low bidder.
8. After the award to Mistral, Appellant submitted its November 5, 2004 protest (received by DGS on November 8, 2004), which is the subject of this appeal. In that submission, Appellant again protested the Addendum's removal of the test report requirements of the original specifications and requested that (1) DGS closely examine the information provided by Mistral;

(2) DGS engage an "independent source" to certify that Mistral's product complies with the specifications and is reliable; (3) the State test samples, as well as the entire shipment when received, of Mistral's product; and (4) DGS reverse the contract award to Mistral and cancel Mistral's contract. Appellant asserted that Mistral's manufacturing and testing procedures did not include testing for Mistral's product to successfully withstand side wall and bottom center detonations; that Mistral's product violated §4 of the specifications because Mistral's trash can has a lid, lock and hinge directly in the blast path and those parts will fragment during an explosion; and, that Mistral's product did not comply with §7 of the specifications because the trash capacity of Mistral's product is less than 37 gallons.

9. By letter dated November 22, 2004, DGS acknowledged receipt (on November 8, 2004) of Appellant's November 5 protest, and on February 24, 2005, DGS issued a final agency decision denying Appellant's November 5, 2004 protest.
10. In DGS's February 24, 2005 decision, the Procurement Officer noted that Appellant's protest regarding test report requirements had been denied in DGS's August 20, 2004 decision, which Appellant had not appealed, which was therefore binding upon, and could not be raised again. The Procurement Officer also denied the other grounds of Appellant's November 5, 2004 protest asserting that the other grounds of that protest should have been raised by no later than August 27, 2004 - seven days after bid opening - and were thus untimely. Finally, the Procurement Officer concluded that Appellant did not have standing regarding issued of contract administration.

11. On March 10, 2005, Appellant appealed the February 24, 2005 decision denying its November 5, 2004 protest to this Board.
12. Appellant's Comment on the Agency Report was filed by its President<sup>1</sup> and focused on allegations of impropriety by Mistral and the alleged inferiority of Mistral's products to include the products offered in the instant procurement.
13. Appellant did not comment on the procedural grounds for dismissal of its appeal based on timeliness set forth in the Agency Report, nor did it respond to Respondent's April 5, 2005 Motion for Summary Decision and Dismissal of Appeal, which raised similar procedural grounds for dismissal of the appeal based on timeliness. Neither party requested a hearing on either the merits or the Motion for Summary Decision.

#### Decision

Pursuant to COMAR 21.10.02.03B, unless a protest is based upon alleged improprieties apparent before bid opening, a protest "shall be filed not later than 7 days after the basis for a protest is known or should have been known, whichever is earlier."<sup>2</sup> "A protest received by the procurement officer after the time limits prescribed in § A [COMAR 21.10.02.03A] or § B [COMAR 21.10.02.03B] may not be considered." COMAR 21.10.02.03C. An appeal to this Board from an agency's denial of a bid protest "shall be filed" within 10 days after receipt of the notice of that final agency action. *Md. Code Ann., State Fin. & Proc. § 15-220(b)(1)*; COMAR 21.10.02.10A. Unless the appeal is sent by registered or certified

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<sup>1</sup>Appellant's President is not admitted to the practice of law in the State of Maryland. See COMAR 21.10.05.03.

<sup>2</sup>Where a protest is based upon purported improprieties that are apparent before bid opening, that protest "shall be filed before bid opening." COMAR 21.10.02.03A.

mail, an appeal that is filed after that ten-day period “may not be considered” by the Board.<sup>3</sup> COMAR 21.10.02.10B.

Appellant’s November 5, 2004 protest raises a number of issues. The protest raises the same test report issue that was raised in Appellant’s previous August 18, 2004 protest that DGS denied in its August 20, 2004 decision. In its August 18, 2004 protest, Appellant protested DGS’s decision, evidenced in the Addendum, to eliminate the requirement of the original solicitation for a test report that included post-detonation photos and supporting video footage. In its August 20, 2004 decision, DGS resolved that protest by denying it, determining that the State’s minimum needs did not require a test report that included photographs or video. Appellant had ten days upon its receipt on August 23, 2004 of DGS’s decision to appeal that denial to this Board. Appellant did not appeal the August 20, 2004 decision denying its protest. That final agency action is thus binding upon it on those test report issues, and this Board has no jurisdiction to hear such issues now.<sup>4</sup> *E.g.*, National Science Corporation, MSBCA 2083, 5 MSBCA ¶446 (1998); SA Instruments S.A., Incorporated, MSBCA 2133, 5 MSBCA ¶464 (1999).

In addition to raising the test report issues in its November 5, 2004 protest that were resolved against it in its previous protest and were not appealed, Appellant raises other issues that

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<sup>3</sup>An appeal of a denied protest may not be considered by the Board after the ten-day period “unless it was sent by registered or certified mail not later than the fifth day before the final date for filing an appeal... .” COMAR 21.10.02.10B.

<sup>4</sup>Appellant also asserts that the testing facility must be a U.S. testing facility. The Addendum changed the requirement that an official test report be provided from a recognized U.S. testing facility to an “Unaffiliated Independent” test facility. Appellant did not challenge this change in the Addendum issued prior to the August 20, 2004 bid opening. It was too late to challenge this change apparent before bid opening two and a half months after bid opening. COMAR 21.10.02.03A.

it knew or should have known the basis for more than seven days prior to filing the protest.

In its November 5, 2004 protest, Appellant requested that DGS more closely examine the information submitted by Mistral that supported Mistral's bid and that DGS seek a reliable independent source to certify that Mistral's offered product was compliant and reliable. Appellant asserted that Mistral's product was not properly designed, did not comply with the specifications and that a video provided to DGS showed that Mistral's trash receptacles failed when tested. Appellant requested that DGS test samples as well as the entire shipment of Mistral's trash receptacles when those receptacles were received.

Responding to the November 5, 2004 protest in the February 24, 2005 final agency decision, the Procurement Officer found that Appellant's complaints that Mistral's product could not or would not comply with the contract requirements were untimely. He advised that the problems that Appellant identified concerning the product that Mistral offered to provide, if true, would have been apparent from the Mistral bid that was opened on August 20, 2004, and thus Appellant was required to file a protest concerning those alleged defects and lack of compliance with the specifications by no later than August 27, 2004 - seven days after bid opening. However, Appellant waited until November 5, 2004 - two and one half months after bid opening and a month after contract award - to submit its protest to DGS.

We agree with the Procurement Officer that Appellant's protest about alleged defects and compliance with the specifications was untimely. Compliance with the mandatory seven-day requirement of COMAR is substantive in nature and must be strictly construed. Electronic Commerce and Catalogue Services, Inc., MSBCA 2100, 5

MSBCA ¶456 (1999). The Board has held that protests based on alleged defects apparent on the face of the bid documents (herein that the product offered by Mistral was not properly designed and did not comply with the specifications) must be filed within seven days of the bid opening when the bid is open to public inspection. See Pile Foundation Construction Co., Inc., MSBCA 2224, 5 MSBCA ¶501 (2001).

Appellant's complaints about Mistral's product design and compliance with the specifications were untimely, having been made more than 7 days after the bid opening when bids were available for inspection. Such inspection would have revealed the product that Mistral was offering and based on Appellant's asserted knowledge of its competitor's product any alleged lack of compliance of such product with the specifications. Appellant would also have known upon inspection of the bids that Mistral's bid was the low bid, and thus Mistral would have been awarded the contract if Mistral's bid was found to be responsive and Mistral was found to be responsible.<sup>5</sup> Because Appellant did not comply with mandatory seven-day filing requirement, Appellant's protest concerning Mistral's offered product's alleged lack of compliance with the specifications must be dismissed.

We also agree with the assertions of the Respondent that even if the bid opening did not trigger the commencement of the seven-day filing period, Appellant's November 5 protest still remains untimely. First, the award of the contract to Mistral appeared in

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<sup>5</sup>We find that Appellant's protest of November 5, 2004 questions the responsiveness of Mistral's bid regarding whether the product offered met the specifications. To the extent the protest may be viewed as questioning whether Mistral was a responsible bidder (i.e., whether Mistral had the capability, integrity and reliability to perform), we find that Appellant was also aware of any such alleged shortcomings at the time of the August 20, 2004 bid opening.

the October 19, 2004 publication of the Maryland Contract Weekly, thus placing Appellant on notice that DGS had awarded the contract at issue here to Mistral. See *Md. Code Ann., State Govt. § 7-201 & 7-219*.<sup>6</sup> Even assuming *arguendo* that the bid opening did not trigger the start of the seven-day period for the filing of a timely bid protest, Appellant knew or should have known, upon the issuance of the October 19, 2004 Contract Weekly setting forth the award to Mistral, of the grounds for the complaints that it raised nearly three weeks later since at this juncture it was clear that (in order to make the award) DGS had found Mistral's low bid to be responsive and Mistral to be responsible. See COMAR 21.05.02.13D.

Second, in its March 10, 2005 appeal to this Board, Appellant states that it learned that Mistral was awarded the contract on October 25, 2004, and that, either 10 or 11 days later, it sent DGS, via facsimile, its November 5, 2004 protest.<sup>7</sup> Even if neither the bid opening nor the October 19, 2004 publication of the Mistral contract award commenced the seven-day period for filing a protest with DGS, that seven-day limitations period began on October 25, 2004, when Appellant states it knew that Mistral had been awarded the contract for the explosive-proof trash receptacles. Appellant, however, did not file its protest with DGS for another eleven days until November 5, 2004.

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<sup>6</sup>Section 7-219 states that “[u]nless notice by publication is insufficient in law or unless otherwise specifically provided by law, publication of a document under this subtitle gives a person who is subject to or affected by the document notice of the contents of the document.” Maryland Contract Weekly is a document published under the above-referenced subtitle. See SG § 7-201(e).

<sup>7</sup>In its March 10, 2005 appeal to this Board, Appellant states it faxed its November 5 protest to DGS's Procurement Officer on “the 4<sup>th</sup> business day” after October 29, 2004. That date would be November 4, 2004. However, DGS's facsimile receipt from Appellant of the November 5 protest shows a facsimile date of November 5, 2004, not November 4, 2004.



For any of the foregoing reasons we must conclude that the protest was filed out of time. As such, the protest may not be considered. COMAR 21.10.02.03C; Omegaman Sprinklers, MSBCA 2202, 5 MSBCA ¶455 (2000); Wacor Electronic Systems, MSBCA 2310, 5 MSBCA ¶526 (2002) and cases cited at p. 5.


For the foregoing reasons the appeal must be dismissed.

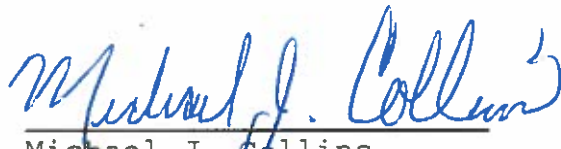
Wherefore it is Ordered this 27<sup>th</sup> day of April, 2005 that the appeal is dismissed with prejudice.

Dated: April 27, 2005

  
Robert B. Harrison III  
Chairman

I Concur:

  
Michael W. Burns  
Board Member

  
Michael J. Collins  
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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2469, appeal of American Innovations, Inc. under DGS Invitation to Bid No. 001IT815315.

Dated: *April 27, 2005*

  
Michael L. Carnahan  
Deputy Recorder