

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

**In the Appeal of  
Delta Wheel Truing Solutions, Inc.**

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**Docket No. MSBCA 3182**

**Under Maryland Transit Administration  
RFP No. MTR-21-012-EQ**

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**Appearance for Appellant**

**Bret S. Wacker, Esq.  
Clark Hill, PLC  
Detroit, Michigan**

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**Appearance for Respondent**

**Gary S. Posner, Esq.  
Joshua L. Mitnick, Esq.  
Assistant Attorneys General  
Office of the Attorney General  
Contract Litigation Unit  
Baltimore, Maryland**

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**Appearance for Interested Party**

**Benjamin Rosenberg, Esq.  
Jamar R. Brown, Esq.  
Rosenberg, Martin, Greenberg, LLP  
Baltimore, Maryland**

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**OPINION AND ORDER BY MEMBER KREIS**

This competitive sealed proposal protest appeal (“Appeal”) came before the Maryland State Board of Contract Appeals (“Board”) for a hearing on the merits on December 15, 2021. After considering witness testimony, reviewing admitted exhibits, and considering arguments made by counsel both at the hearing and in their post-hearing briefs, the Board denies Delta Wheel Truing Solutions, Inc.’s (“DWTS” or “Appellant”) Appeal on the grounds that Appellant’s protest was untimely filed.

## FINDINGS OF FACT AND PROCEDURAL HISTORY

On October 21, 2020, the Maryland Transit Administration (“MTA” or “Respondent”) issued a Request for Proposals (“RFP”) seeking to procure a manufacturer to build, securely store (if necessary), and deliver an under-floor wheel truing machine for delivery to the Wabash Rail Facility in Baltimore, Maryland. Proposals were due on November 19, 2020. They were to be submitted in two parts with the first volume containing the technical proposal and the second volume containing the financial proposal. After separately evaluating and ranking the financial and technical proposals, the evaluation committee was required to give each offeror an overall ranking from Most Favorable to Least Favorable. The Procurement Officer (“PO”)<sup>1</sup> was then to recommend award of the contract to the responsible offeror that submitted a proposal determined to be most advantageous to the State. In making this determination, the technical proposal was to be given more weight than the financial proposal.

Proposals were required to address and conform to several specifications outlined in the RFP. Most relevant to the present Appeal was §4.40.6 of the RFP, which required offerors to agree to comply with the Federal Transit Administration’s (“FTA”) Buy America regulations contained in 49 U.S.C. 5323(j) and 49 C.F.R. Part 661, and to submit a completed Buy America Certification (Attachment P to the RFP).<sup>2</sup>

MTA received proposals from two offerors: Simmons Machine Tool Corporation<sup>3</sup> (“Simmons” or “Interested Party”) and Appellant. The Evaluation Committee reviewed the proposals and ranked Simmons’ technical proposal 1<sup>st</sup>, its financial proposal 2<sup>nd</sup>, and ranked it 1<sup>st</sup>

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<sup>1</sup> The PO on this RFP was Sharon Curtis.

<sup>2</sup> The Buy America regulations provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by the FTA or the product is subject to a general waiver.

<sup>3</sup> Simmons is now known as NSH America, Inc. To avoid unnecessary confusion, the Board will continue to refer to it as Simmons..

overall. The Evaluation Committee ranked Appellant's technical proposal 2<sup>nd</sup>, its financial proposal 1<sup>st</sup>, and ranked it 2<sup>nd</sup> overall. Both the Evaluation Committee and the PO determined that Simmons had submitted the required Buy America Certification. It was dated November 13, 2020, signed by Simmons' President/C.O.O., and certified that Simmons would meet the Buy America requirements.

The PO determined that it was most advantageous to the State to award the contract ("Contract") to Simmons. By a letter dated February 26, 2021, the PO notified Appellant that it had not been recommended for award. On March 1, 2021, the PO sent a Letter of Intent to Simmons notifying it that it had been recommended for award. Appellant requested a debriefing, which was conducted on March 10, 2021.

On March 17, 2021, Appellant filed a one sentence protest challenging the evaluation of its proposal, which the PO denied on March 24, 2021, as both untimely filed and for lacking the minimum requirements necessary to constitute a protest. No appeal having been taken, the protest was finally resolved.

On April 26, 2021, Appellant sent an email to the PO requesting a copy of the final Contract awarded to Simmons. In an April 28, 2021 email, the PO informed Appellant that its Maryland Public Information Act ("MPIA" or "PIA") request for the final contract had been forwarded to MDOT's PIA unit for processing.<sup>4</sup> She further stated that the documents requested would not be available until May 5, 2021 because there is no contract until the Board of Public Works ("BPW") approves it.

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<sup>4</sup> The Appellant's email stated that its request was made per FOIA, which the Board believes to refer to the Federal Freedom of Information Act. Since this was a State of Maryland procurement, the PO properly treated it as a request under the MPIA.

Later the same day, David Meyers, the MDOT MTA PIA Representative, sent the formal denial letter to Appellant that stated: “Pursuant to the State Finance and Procurement Article §13-210, Annotated Code of Maryland, the State may not release the contents of the proposal prior to award. The MDOT MTA now considers this request closed.” The denial letter further advised Appellant of both its appeal right and its right to speak with the Public Ombudsman about the denial determination.<sup>5</sup> Appellant did not pursue either of these options, and the denial became final.

Approximately 10 days prior to the May 5, 2021 BPW meeting, the meeting agenda was made available for public review. It indicated that the proposed award to Simmons was up for approval. At the May 5, 2021 meeting, BPW approved the Contract.<sup>6</sup>

Appellant did not contact the PO in the days immediately following the May 5, 2021 Contract approval by BPW. On or about May 19, 2021, approximately two weeks after Contract approval, Appellant emailed a second MPIA request to Tim Perry, the MDOT MTA PIA Manager (“Perry”) requesting an opportunity to inspect and copy all public records concerning the Contract awarded on May 5, 2021. Perry asked Appellant to clarify the records it was requesting, and Appellant responded on May 19, 2021 that it wanted to know what model of

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<sup>5</sup> The MPIA generally requires responses within 30 days, although the custodian should not wait the entire 30 days if the time is not needed. Additionally, if it is going to take more than 10 working days to produce the documents for inspection, the custodian must notify the requester in writing or by email the amount of time needed and the reasons for the delay. In this case, the custodian issued a denial letter two days after the request because State law prohibits the release of the contents of a proposal before contract award. At the time the denial letter was sent, Respondent knew that the Contract was on the BPW agenda for approval on May 5, 2021. Although there was no guarantee it would be approved on that date, it was, in fact, approved, making the requested information publicly available before both the ten-day notice letter requirement (May 10, 2021), and the 30-day deadline (May 26, 2021) to respond to the request.

In short, had the custodian waited seven more days to respond to Appellant’s request, the custodian would have been obligated to produce the documents requested once they became publicly available on May 5, 2021. Since it did not, there was no outstanding request for documents as of April 28, 2021. Notwithstanding the foregoing, it is not this Board’s responsibility to determine whether a prompt denial or a voluntary production of responsive documents within the timeframe allotted to respond better serves the intent of the MPIA.

<sup>6</sup> Although approved by BPW on May 5, 2021, the contract was not signed by the State until May 6, 2021. The PO sent a Notice to Proceed letter to Simmons on May 10, 2021.

machine was purchased under the Contract. In a May 21, 2021 email to the PO, Perry confirmed that he had informed Appellant that the model contained in the Contract was the Hegenscheidt U2000-400.

On May 24, 2021, Appellant filed its second protest, which is the subject of this Appeal (“Protest”). It claimed that the Hegenscheidt U2000-400 Wheel Truing Machine proposed by Simmons is made in Germany and is not Buy America compliant. It further claimed it was not given the equal opportunity to use a foreign partner. The PO denied the Protest on June 14, 2021, and Appellant filed this Appeal on June 24, 2021.

On July 16, 2021, Respondent filed a Motion to Dismiss or in the Alternative for Summary Decision, asserting that there were various procedural issues, including that the Protest was untimely filed, that warranted a decision in its favor prior to a hearing on the merits. Appellant opposed the motion, and, on September 13, 2021, the Board denied it without a hearing on the grounds that there were genuine disputes as to material facts that prevented Respondent from prevailing as a matter of law.

A merits hearing was conducted on December 15, 2021. Appellant called no witnesses and rested after the Board admitted a binder containing 18 Joint Exhibits (“JE”) the parties had stipulated to being admitted in evidence.<sup>7</sup> Respondent called one witness, the PO, who testified to the information contained *supra* in this section. The Board found the PO’s testimony to be credible.

All parties filed post-hearing briefs on February 1, 2022.

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<sup>7</sup> Simmons entered its appearance as an Interested Party in this Appeal and was represented at the hearing by counsel. However, Simmons’s participation was basically limited to concurring with the State’s positions.

## STANDARD OF REVIEW

A procurement officer's decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See Hunt Reporting*, MSBCA No. 2783 (2012).

## DECISION

COMAR 21.10.02.03 mandates that all protests other than those based on improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier....A protest received by the procurement officer after the time limits prescribed in §A or §B may not be considered." *Id.* The timeliness requirements of COMAR 21.10.02.03 are substantive in nature and must be strictly construed since the rights and interests of the parties are at stake. *See A.J. Billig & Co., LLC t/a A.J. Billig & Co.*, MSBCA No. 3096 (2018). The 7-day filing requirement is imposed by law, and it cannot be waived. *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984).

In determining when a statute of limitation accrues, Maryland has adopted the discovery rule. *Hecht v. Resolution Tr. Corp.*, 333 Md. 324, 335 (1994). Like COMAR 21.10.02.03B, the discovery rule provides that "a cause of action accrues when a plaintiff in fact knows or reasonably should have known of the wrong." *Poffenberger v. Riser*, 290 Md. 631, 636 (1981).

The dispute in this case revolves around whether Appellant should have known the basis for its claim earlier than May 21, 2021, when it was given the name of the machine Simmons was providing. Pursuant to its first MPIA request on April 26, 2021, Appellant knew that Simmons had been selected for award and that approval of the award was likely to take place at the May 5, 2021 BPW meeting. It also knew that the information requested would become

public information when the Contract was approved. *See JE Nos. 9 & 10.* As of May 5, 2021, Appellant could have discovered all the information it wanted about Simmons' proffered wheel truing machine, including its German name, which was all it ultimately relied on in claiming that Simmons failed to comply with the Buy America requirements in the RFP. Instead, Appellant took no action on May 5, 2021, or in the days immediately following, to obtain this information. It waited until May 19, 2021, two weeks after award, to file a MPIA request asking for the information. After receiving a prompt response, it filed its Protest on May 24, 2021.

The Board finds that Appellant did not make reasonable efforts to begin its inquiry as to the identity of the wheel truing machine in a timely manner. An unsuccessful offeror cannot just sit on its rights and wait. *See Initial Healthcare, Inc.*, MSBCA No. 2267 (2002).

We reject Appellant's argument that whenever a protest is based on information that a protestor discovers through its own investigation, the time for filing a protest should start running whenever the protestor decides to make its investigation. Under this interpretation a contractor could wait until weeks or months after bids are opened . . . so long as it protests within 7 days of finding the information. This interpretation does not comport with the rationale for a timely protest. . . .

*Id.* at 5. Appellant should have re-initiated its inquiry regarding the actual machine being proposed no later than the date when it knew that this information became publicly available, that is, on May 5, 2021, rather than waiting until May 19, 2021. The Board finds that Appellant was dilatory in performing its investigation and that it reasonably should have known the basis for its Protest more than seven days prior to filing its May 24, 2021 Protest. Accordingly, Appellant's Protest was untimely filed and its Appeal is denied.

### **ORDER**

Based on the foregoing, it is this 14th day of February, 2022, hereby:

ORDERED, that Appellant's Appeal is DENIED, and it is further





**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 Opinion and Order in MSBCA No. 3182, Appeal of Delta Wheel Truing Solutions, Inc., under Maryland Transit Administration RFP No. MTR-21-012-EQ.

Date: February 14, 2022

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/s/  
Ruth W. Foy  
Deputy Clerk