

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Daly Computers Inc.)	
)	
Under Dept. of Budget & Fiscal)	Docket No. MSBCA 1727
Planning)	
RFQ DP 0100)	

August 17, 1993

Timeliness - COMAR 21.10.02.03B Provides:

In cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

It is the factual determination on a case by case basis of what a reasonable bidder knew or should have known at a given time in the bidding process which commences the running of the seven day period. A reasonable diligent bidder must have facts available to it to actually or constructively know its basis for protest.

APPEARANCE FOR APPELLANT:

Scott A. Livingston, Esq.
Lori Ann T. Lange, Esq.
Bastianelli, Brown & Touhey,
Chartered
Washington D.C.

APPEARANCE FOR RESPONDENT:

Mark S. Dachille
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:

William M. Ferris, Esq.
Krouse & Ferris
Annapolis, MD

OPINION BY MR. PRESS

This is an appeal from a final decision of the Department of Budget and Fiscal Planning (DBFP) denying Appellant's protest. DBFP denied the protest as untimely as well as the merits. Appellant filed a timely appeal to this Board and DBFP has filed a Motion to Dismiss the appeal on the grounds that the protest is untimely. The parties have submitted memoranda and evidence was afforded to the Board and a hearing on the Motion and the merits was conducted.

Findings of Fact

1. On October 6, 1992, DBFP (in conjunction with the Department of General Services' Purchasing Department) issued a Request for Quotation (RFQ) which solicited bids for certain baseline personal computers. Under the solicitation, DBFP intended to enter into a

one year requirements contract and the procurement method utilized was multi-step sealed bidding.

2. Pursuant to the IFB section of COMAR under the multi-step sealed bidding, offerors were to first submit technical offers or samples which DBFP evaluated as to their technical acceptability.¹ Awards could ultimately be made in sections or the entire contract to one vendor. It is important to note State computer networks run on Novell software. Novell Laboratories have a procedure to certify that computer network hardware of various vendors will operate correctly on Novell software. In this way the State would be assured by third party testing and certification that the computer hardware purchased from one or multiple vendors would in fact function cohesively.
3. Technical offers were submitted on November 16, 1992 and DBFP received thirty technical offers in response to the solicitation. Appellant and Mini-Micro each submitted technical offers for two different types of "baseline limited service personal computers". The computers supplied under the baseline were 386 and 486 microcomputers and required Novell certification.
4. The solicitation contained technical specifications and functional requirements for each category of computer equipment. The 386 and 486 computers to be supplied obligated offerors to provide certification as follows:

*Certification: FCC class B
UL - Underwriters Laboratories
Novell, OS/2*

The solicitation in addition provided that failure to include the required certifications with the technical offer may cause the offer to be unacceptable. This type of requirement is a definitive functional characteristic and mandatory under this procurement, since it assures the State that the network will function as required.

¹ COMAR 21.05.02

.17 Multi-Step Sealed Bidding.

A. Definition. "Multi-step sealed bidding" means a two-phase process in which bidders submit unpriced technical offers or samples, or both, to be evaluated by the State and a second phase in which those bidders whose technical offers or samples, or both, have been found to be acceptable during the first phase have their price bids considered.

5. DBFP conducted a pre-bid conference on October 19, 1992. During the conference one of the items discussed pertained to the requirement for Novell certification. One of the potential offerors asked the following:

MR. YOUSSEFI: The question is, there are so many new PCs on the market that -- certification, but previous -- answers to those PCs have -- does have the Novell and OS/2 certification. What is the situation regarding those PCs? For instance, Compac, or IBM may announce a new PC that hasn't gone through the certification as of yet, but most of their previous lines are -- certified PCs.

John Pirro, the procurement officer responded:

MR. PIRRO: The best answer I can give you, I think that's addressed where I told you to look, in the objective section. It says, "Explain yourself," basically.

In addition, the DBFP received written questions concerning the requirement of Novell certification. At least one bidder questioned whether DBFP would accept computers which were merely Novell "compliant." Specifically, another offeror inquired:

Attachment I, p. 4 Certification: Our PC's are Novell and OS/2 compliant. Certification with Novell and IBM costs thousands of dollars, so most manufacturers will certify that their PC's are Novell or OS/2 compliant. Is the manufacturer's certification sufficient for this specification?

DBFP responded to this question in a written amendment # 1 to the RFQ² dated October 23, 1992.

The State requires Novell and OS/2 certification. However, in Attachments I and II, there is an objectives section under Functional/Quality Control Requirements that requests the bidder to explain any non-compliance

² RFQ request for quotes is the same as IFB invitation for bids as distinguished from RFP request for proposals. Consideration of bids submitted under step two of a multi-step procedure is done in accordance with competitive sealed bid principles. Neoplan USA Corporation, MSBCA 1186, 1 MICPEL ¶76 (1984).

situation or substitutable situation. The bidder must certify his intention to comply with this requirement for all microcomputers proposed under Attachments I and II. If not already certified (a new model, for example) the vendor must detail steps taken or those that will be taken to meet this requirement.

6. Technical offers were due on November 16, 1992. Appellant's submitted offer was reviewed by the Technical Evaluation Committee for responsiveness and Appellant was sent a letter dated December 31, 1992 inviting Appellant to submit a price bid. The aforementioned letter contained the following reminder relative to the Novell certification requirement:

All vendors are hereby reminded that official network certification from Novell and IBM (OS/2) will be required to be submitted prior to contract award for microcomputers. Without the official certification, that vendor will not receive the contract award.

7. Mini-Micro submitted its technical offer on November 16, 1992. In response to the Novell certification requirement, its offer stated the following:

G. The PCs proposed for this contract meet or exceed all mandatory, optional and other requirements specified in the RFQ.

The only subject that is in question is the requirement for Novell and OS/2 certifications. All of our products are Novell and OS/2 compliant. Our division, the Advanced Micro Research (AMR) group works directly with technicians at Novell. However, as this is a mandatory requirement, Mini-Micro is prepared, upon award of the contract, to obtain full Novell and OS/2 certification for the equipment proposed for the contract. There will be absolutely no difficulty in obtaining this certification; it is merely a matter of the cost involved.

The Technical Evaluation Committee, reviewed Mini-Micro's offer and correctly concluded it to be "non-responsive," because of the absence of certifications. DBFP forwarded a letter to Mini-Micro dated December 21, 1992 as follows:

The two specifications that were most commonly not responsive, in accordance with the RFQ and amendment No. 1 to the RFQ, were technical specifications G [certifications] and H. Your proposal did not contain the required, minimum response to one or both of these specifi-

cations and (depending on the vendor) was deficient in other areas as well.

Subsequently, Mr. Michael Holt, Maryland sales representative for Mini-Micro³ telephoned the Procurement Officer relative to the Technical Committee's determination. The Procurement Officer apprised Mr. Holt that the Committee concluded Mini-Micro's offer as non-responsive due to the lack of certification plus other deficiencies. Mr. Holt indicated that Mini-Micro was prepared upon award of the contract, to acquire Novell certification. The Procurement Officer⁴ spoke with some of the Technical Committee members, and determined Mini-Micro's offer was acceptable.

8. The Procurement Officer on December 31, 1992 sent a letter to Mini-Micro requesting they submit a price bid, but this letter did not contain the reminder that offerors must have Novell certification as required prior to contract award⁵.
9. DBFP proceeded to evaluate price bids and offerors were sent letters on March 3, 1993 informing them that Mini-Micro had been selected for award of the computers. Mini-Micro's letter of notification of award stated the following:

The winning products must be delivered to Mr. Tim Cruttenden, Department of Health and Mental Hygiene, Room 522, 201 W. Preston Street, Baltimore, Maryland 21201 for inspection to ensure that the product meets the technical specification. Please coordinate your morning delivery on March 10, 1993 and your afternoon pickup on March 15, 1993 with Mr. Cruttenden (410-225-5118). Please be prepared to fully demonstrate your product(s), provide any written assurances, provide any performance certification, etc.

Mini-Micro on April 6, 1993 in response to a Procurement

³ Mr. Holt has no prior experience or knowledge of Novell software nor the Novell certification process.

⁴ The Procurement Officer had no prior experience with Novell certification and was unaware of the details of the process.

⁵ DBFP contends that Mini-Micro's December 31, 1992 letter did not contain notification that certification was required prior to contract award due to an administrative oversight.

Officer's request submitted marketing information to DBFP pertaining to the computers supplied as Novell certified, when in fact they were not Novell certified.

- 10 On April 14, 1993, the Board of Public Works approved the award of the contract and the Procurement Officer signed the contract on April 15, 1993 knowing the Novell certificate was not provided. Unknown to the bidders the Procurement Officer had decided not to wait for the Novell certificate but award without it, regardless of the expressed requirement in the bid documents, believing the certificate would be forthcoming.
11. Appellant upon receipt of DBFP's March 3, 1993 letter indicating Mini-Micro had been selected for award began making inquiries.⁶ On March 29, 1993, Appellant contacted Novell, Inc. telephone index pertaining to Appellant's own computer certification. This index which is an alphabetized list of computers for which Novell certification has been issued on a certain date. In examining for Appellant's certification, Appellant ascertained there was no listing under the name of Mini-Micro. Appellant was confused on March 29, 1993 and telephoned the Procurement Officer and was informed Mini-Micro's paper work was "in order". The Procurement Officer knew on March 29, 1993 that the Novell certificate was not in the file and that Mini-Micro's certificate was not in fact in order. Appellant was satisfied, about the apparent discrepancy and relied upon the Procurement Officer's superior knowledge. Appellant, had suspicions about the Novell certification of its competitor on March 29, 1993. This suspicion may have been enough taken by itself for this Board to find Appellant should have known its basis of protest. However, the additional fact that the Procurement Officer

⁶ Appellant on March 5, 1993, and supplemented on March 8 and 10, 1993 had protested the award to Mini-Micro. That protest was based on various technical and price issues but did not pertain to Novell certification. Appellant's protest was denied on March 19, 1993 and was not appealed.

incorrectly informed the Appellant as to Mini-Micro's certification makes such a finding unreasonable. The Procurement Officer knew the certification of Mini-Micro was not in the file but in the face of a direct inquiry by the Appellant led the Appellant to believe that Mini-Micro had filed the required certification. The Novell index lists the names of companies and products submitted for eventual and actual certification. However, there is a Novell reserve list⁷, not published, of products certified and a reasonably diligent offeror would not be able to ascertain whether or not a competitors computer had, in fact, completed the certification process. The index is incomplete and its information can be manipulated by Novell customers.⁸

On April 22, 1993 Appellant continuing his inquiries had a telephone conversation with Mr. Michael Dahlgren, Novell Labs Marketing Manager, relative to whether Novell had certified Mini-Micro's computers. Appellant was informed that Novell Labs was currently testing Mini-Micro's computer systems, but Appellant on the aforementioned date still believed he did not have a basis to protest the award as verification of which exact system was in test was not revealed. Appellant was still confused for Appellant assumed the Procurement Officer would not have awarded the contract unless Mini-Micro's computers were Novell certified in light of his prior letters and representations. On April 22nd the Procurement Officer advised Appellant he would be on vacation until May 3, 1993 and he would inquire into the matter upon his return. The April 22, 1993 conversation with the Novell representative did not definitely answer the Appellant's inquiry concerning Mini-Micro's certification since Appellant knew that the index

⁷ The reserve list is not available for public review.

⁸ Novell puts the name of the company and product given to it by its customers who can change this information up to and even after the certificate is issued.

could be in error or incomplete. Appellant was confused and correctly took his inquiry to the Procurement Officer. During the second telephone conversation with the Procurement Officer he was asked a direct question concerning Mini-Micro's Novell certification and the Procurement Officer refused to answer knowing the certificate was not in the file. The Procurement Officer continued to treat the bid information as secret⁹ even after the March 3, 1993 letter of intent to award. The Procurement Officer during March 3, 29 and up to the end of April 1993 did not make the technical offer of Mini-Micro available as required but kept the information private. If the Procurement Officer had told the Appellant when and where the Mini-Micro bid could be reviewed as required by COMAR 21.06.01.02D this Board could then reasonably find that Appellant knew or should have known on March 3, 1993 its basis of protest. The Procurement Officer during the hearing opined why this was not done. See transcript pgs. 1-52, 1-133-36, and 1-146.

12. On April 26, 1993 Margaret Chao, Appellant's attorney, telephoned the Assistant Attorney General for DBFP to discuss the Novell certification question. M's Chow was informed Appellant would have to wait for the return of the Procurement Officer.
13. On May 5, 1993 the Procurement Officer issued a stop work order to Mini-Micro until Mini-Micro provided evidence of Novell certification. Appellant on May 10, 1993 ascertained the available facts sufficient to provide it with the basis for protest and filed its protest on May 10, 1993, supplemented on May 12, 1993, with DBFP on the basis that Mini-Micro lacked Novell certification and requested the contract with Mini-Micro be rescinded and be awarded to Appellant. On May

⁹ The Procurement Officer has a duty to disclose information after bid opening since any documents submitted with the bid shall be open to public inspection. COMAR 21.06.01.02D.

10, 1993 the conflict between statements made by the Procurement Officer and what was shown on the Novell index were resolved since the Procurement Officer made public his knowledge that the certification was not provided and reliance upon the prior incorrect statements after May 10, 1993 would be unreasonable. The actions of the Procurement Officer can be understood in the context of a complex procurement in that he would normally not reveal the contents of other bids prior to award, and in an abundance of caution, to protect bid information, the Procurement Officer was reluctant to speak to other bidders. However, by March 3, 1993 the letter of intent to award had been issued, and a question concerning a third party certification could not thereafter reasonably be withheld to other bidders. This Board will not constructively impose knowledge of the failure of Mini-Micro to provide the certificate prior to May 10, 1993 under the facts of this appeal, since material facts of the bid after award were distorted by the action and inaction of the Procurement Officer.

14. The Novell certification requirement at issue in this solicitation was a definitive functional criterion.¹⁰ DBFP in seeking certification from offerors of Novell certification required assurances that offerors computers met the standards established. The Procurement Officer's letter of December 31, 1992 reminded bidders that they would not receive the contract award without the Novell certificate. Mini-Micro was not a responsive offeror eligible for award on March 3, 1993 for it stated in its bid its products were only Novell and OS/2 compliant.
15. The Procurement Officer's conduct of the procurement process improperly allowed Mini-Micro to submit a price bid in the face of Mini-Micro's technical offer having been found by the technical committee to be rejected as "non-responsive" because

¹⁰ See COMAR 21.04.01.03

it did not respond with the required certification, nor did its bid outline the steps which it had taken to obtain such certification. The Procurement Officer in allowing Mini-Micro after assurances from its local sales representative it would acquire the needed certification afforded Mini-Micro another opportunity to acquire the mandatory certification treating the bid differently from other offerors.

16. On May 18, 1993 the Procurement Officer denied Appellant's protest and Appellant appealed to this Board on May 28, 1993.

Decision

COMAR 21.10.02.03, provides:

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 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 §A, 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 §A or §B means receipt by the procurement officer. Protesters are cautioned that protests should be transmitted or delivered in the manner that shall ensure earliest receipt. A protest received by the procurement officer after the time limits prescribed in §A or §B may not be considered.

This Board has consistently held that timeliness requirements of the foregoing regulation are substantive in nature and must be strictly construed since the rights and interests of so many interested parties are at stake. See Kennedy Temporaries, MSBCA 1061, 1 MICPEL ¶21 (1982) at p. 5; International Business Machines, MSBCA 1071, 1 MICPEL ¶22 (1982) at p. 5; Rolm/Mid-Atlantic Supply, Inc., MSBCA 1094, 1 MICPEL ¶35 (1983) at p. 5.

However, in this protest this Board finds Appellant's grounds for protest were not apparent before bid opening, nor apparent at bid opening or discoverable until May 10, 1993 since the protester reasonably relied on the Procurement Officer's information which it believed to be correct when in fact the information was known to be incorrect. The protester reasonably relied to his detriment. In light of this a reasonably diligent bidder should not have known its grounds for protest until May 10, 1993. The fact that Appellant saw the Novell index and knew of award by DBFP by March 29, 1993 must be weighed against the information provided it by the agency representatives in determining what a reasonably diligent bidder should know concerning its basis of protest.

On March 3, 1993 the Procurement Officer should have informed the bidders of the intent to award as well as that the contents of the bid and any document submitted with the bid would be open to public inspection pursuant to COMAR 21.06.01.02D(3), except for any proprietary or confidential information as provided for in COMAR. The certificate was not that type of protected information.

During the telephone conversation between Appellant and the Procurement Officer on March 29, 1993 the Procurement Officer was obligated to disclose to Appellant that Mini-Micro's bid was void of the required Novell certification. The Board finds from this record the Procurement Officer for whatever reason should not have mis-represented that Mini-Micro's bid was "in order". Therefore, this incorrect information given to Appellant when weighed against the information received from Novell makes it reasonable that the basis of protest was not known nor should have been known until May 10, 1993, since it was not until then that the true status of the Mini-Micro certificate was publicly expressed by the Procurement Officer.

The Procurement Officer in dealing with a bidder must ensure the fair and equitable treatment of all persons who deal with the procurement system of this State. COMAR 21.01.01.03B. On March 3rd and 29, 1993 Appellant did not receive the required fair and equitable treatment to which it was entitled.

In consideration of the Procurement Officer's representations

this Board is unable to conclude Appellant should have known its basis of protest until 10 May. Compare Grady & Grady, Inc., MSBCA 1721, _____ MICPEL ¶ _____ (May 27, 1993).

It is the factual determination on a case by case basis of what a reasonable bidder knew or should have known at a given time in the bidding process which commences the running of the seven day period. A reasonably diligent bidder must have facts available to it to actually or constructively know its basis for protest. Grady & Grady, Inc., *supra*. See Oaklawn Development Corporation, MSBCA 1306, 2 MICPEL ¶138 (1986).

Turning to the merits of Appellant's protest, the Novell certification was required prior to award and is a definitive functional criterion that must be satisfied prior to award. Roofers, Inc., MSBCA 1129, 1 MICPEL ¶46 (1983); Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL ¶140 (1986). Mini-Micro's bid did not contain on March 3, 1993 the required mandatory certification nor an outline of steps taken or to be taken prior to award to obtain certification. Thus the bid failed to abide by the solicitation's requirements. The Procurement Officer in awarding the contract to Mini-Micro on March 3, 1993 this Board finds acted arbitrarily. Neoplan USA Corporation, *supra*.

In this procurement Mini-Micro's technical offer did not satisfy the mandatory requirement of Novell certification in order to be eligible for award since its bid was restrictive and was not offering a clear intention to be bound by the required Novell certification on March 3, 1993. McGregor Printing Corporation, MSBCA 1697, _____ MICPEL ¶ _____ (December 30, 1992). Mini-Micro's statement in its offer that it would obtain Novell certification if awarded the contract this Board finds makes its technical offer "non-responsive" and its offer should have been rejected as was originally and correctly found by the Technical Committee.

Therefore, it is this ^{17th} day of ~~August~~ ¹⁹⁹³ Ordered that the appeal of Appellant is sustained and remanded to DBFP for action consistent with this Decision.

Dated: August 17, 1993 Sheldon H. Press
Sheldon H. Press
Board Member

I concur:

Neal E. Malone
Neal E. Malone
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1727, appeal of Daly Computers, Inc., under Dept. of Budget & Fiscal Planning RFQ DP 0100.

Dated: August 17, 1993 Mary F. Priscilla
Mary F. Priscilla
Recorder

DISSENTING OPINION BY
CHAIRMAN HARRISON

I would dismiss the appeal on grounds that the Appellant's bid protest was not timely filed. I find from the record that by the end of April 1993, Appellant knew or should have known that an award of the contract had been made to Mini-Micro and that at the time of award Mini-Micro had not obtained Novell certification. Such knowledge, I find goes to all three issues delineated in Appellant's protest and appeal. I would thus dismiss the appeal for lack of Board jurisdiction over the issues raised.¹

A protester's seven days to file a timely protest pursuant to COMAR 21.10.02.03B is measured from the earlier of the time the protester knew or should have known of the grounds for protest. Application of such rule to my reading of the written record and


¹ Respondent filed a Motion to Dismiss on grounds the bid protest was not timely filed. The Board, after hearing evidence and argument, reserved its ruling on the Motion and heard the appeal on its merits.

observation of the witnesses who testified at the hearing compels me to find as follows:

1. Not later than April 30, 1993 Appellant knew or should have known that Mini-Micro had been awarded the contract.
2. Appellant knew or should have known not later than April 30, 1993 that Mini-Micro was representing itself as the manufacturer of the computers that were the subject of the contract at issue.
3. Appellant knew or should have known not later than April 30, 1993 that Mini-Micro was not listed as an entity with a computer certified by Novell on Novell's computer bulletin board.
4. Appellant knew or should have known not later than April 30, 1993 that two Mini-Micro computers were then being tested by Novell.
5. Appellant knew or should have known not later than April 30, 1993 that the two Mini-Micro computers being tested by Novell (referenced in finding no. 4 above) were the computers offered by Mini-Micro in the instant Maryland procurement.

Upon reaching such findings based upon my consideration of the entire record I further must find that the seven calendar days for filing Appellant's bid protest pursuant to COMAR 21.10.02.03B commenced to run at the latest by May 1, 1993. The protest filed on May 10, 1993 was therefore untimely and I would dismiss the appeal.

Dated: August 17, 1993


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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Dissenting Opinion by Chairman Harrison in MSBCA 1727, appeal of Daly Computers, Inc. under Dept. of Budget & Fiscal Planning RFQ DP 0100.

Dated:

August 17, 1993

Mary F. Priscilla

Mary F. Priscilla
Recorder