

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

DATE: May 30, 1990

TO: Sharon Brown  
Systems Products, Inc.  
1706 New Hampshire Avenue, N.W.  
3rd Floor  
Washington, D.C. 20009

Howard S. Schwartz  
Assistant Corporation Counsel, D.C.  
Administrative Law Section  
613 G Street, N.W., Room 916  
Washington, D.C. 20001

RE: Protest of Systems Products, Inc., CAB No. P-87

Enclosed is a copy of the Board's decision in the above-referenced case.



ROSE M. GILLISON  
Clerk to the Board

Enc.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD**

**PROTEST OF:**

**SYSTEMS PRODUCTS, INC.**

**Under IFB No. 8082-AA-75-0-8-PF**

)  
) **CAB No. P-87**  
)

**For the Protester: Sharon Brown. For the Government: Howard S. Schwartz,  
Assistant Corporation Counsel.**

**Opinion by Administrative Judge Claudia D. Booker with Administrative Judges  
Marlin and Davis concurring.**

**OPINION**

On October 9, 1987, the Department of Administrative Services (DAS) issued Invitation for Bids No. 8082-AA-75-0-PF (IFB) in the sheltered market<sup>1/</sup> in order to provide photocopier paper for District agencies. See, the District of Columbia's Agency Report (Agency Report), filed with the Board<sup>2/</sup> on April 12, 1988, at 2. At the time of the bid opening on November 13, 1987, six bids had been received and Systems Products, Inc. (SPI), was found to be the apparent low bidder. (Agency Report at 3.)

As part of its responsiveness evaluation, the District then proceeded to test the paper samples submitted by the bidders. Thereafter, on or about December 8, 1987, Ms. Freeman, DAS's assistant contracting officer, was notified by DAS's printing division officer that the sample submitted by SPI had jammed the photocopier machine and therefore did not meet the criteria of the IFB.<sup>3/</sup> On December 9, 1987, an SPI

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<sup>1/</sup>Minority Contracting, D.C. Code, 1981 ed., §§ 1-1141 - 1-1151.

<sup>2/</sup>This case originated during the period when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Order No. 9, D.C. Code, Supplement V (1987), as amended by Mayor's Order 86-65, 33 DCMR 3006 (May 16, 1986). Pursuant to the D.C. Procurement Practices Act of 1985 (PPA), D.C. Code, §1-1189.1 (1987), a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to the jurisdiction of all cases before the previously established Board.

<sup>3/</sup>Page 5 of the IFB required samples to be submitted with the bid to be copier paper "suitable for high speed copiers." (Exhibit A, at 5.)

(continued...)

representative telephoned Ms. Freeman regarding the results of the bid paper samples test. Ms. Freeman advised the SPI representative that its sample had failed the test. SPI then asked if it could submit another sample for testing. Ms. Freeman spoke with DAS's contracting officer, who stated that SPI could only have "one bite at the apple" and could not submit another sample of paper. Ms. Freeman then communicated this information to SPI. See, affidavit of Phyllis R. Freeman, submitted to the Board by the District on March 22, 1989.

On January 28, 1988, DAS awarded the copier paper contract to Gray Paper Products, Inc. (Gray). On February 4, 1988, SPI filed this protest with the Board.

SPI challenges the District's determination of nonresponsiveness. The protester contends that its paper could not have been the cause of the copier jamming and, in fact, that it was more likely a failure of the tester to make a minor adjustment to the machine's calibration. The protester alleges that its paper complies with the terms and criteria set out in the IFB and, therefore, its bid is responsive.

Furthermore, SPI contends that it never received official notification that its paper had failed the sample test and that this rendered the bid nonresponsive. In addition, SPI argues that it did not learn that its bid had been rejected until February 3, 1988, when it received notice of the contract award to Gray Paper.

It is the District's position that the protest is untimely and, therefore, the Board lacks jurisdiction to hear and decide the merits of this protest.

The District alleges that the protester learned of the grounds for this protest on December 9, 1987, when it was informed that its paper had failed testing and that it would not be allowed another opportunity for testing.

The District contends that the language of the IFB clearly and concisely states that the failure of a bid sample to meet the criteria set out in the IFB requires the rejection of the bid, and that SPI is deemed to have knowledge of that IFB provision. (Agency Report at 2). It is the District's position that once the assistant contracting officer informed SPI that its paper had failed testing and that it would not be allowed to submit another sample, SPI knew or should have known that its bid was rejected.

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<sup>3/</sup>(...continued)

In addition, the IFB provided the particular characteristics of the copier paper which would be tested:

11. Samples With Bid: Samples are required in accordance with NOTE on page following item [page 5]. These samples shall be tested and evaluated as to paper weight and type capability of accepting printing, typing and writing. \*\*\*Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation.

Failure of samples to conform to all such characteristics will require rejection of the bid. . . . (Exhibit A, at 8.)



Therefore, it is the District's position that SPI had 10 working-days from that date in which to file a protest. However, SPI did not file this protest until nearly two months later.

In response to the protester's allegation, the District contends that it conducted the testing of SPI's copier paper in accordance with the specifications set forth in the IFB. Moreover, according to the District, a reasonable method was used in testing the copier paper, i.e., the edges of the paper were ruffled and the machine properly loaded. However, some of SPI's samples were found to be defective even after repeated tests.

The District's position on the issue of timeliness has merit.

It is the Board's view that when SPI was informed that its bid had failed testing, SPI knew or should have known that its bid was rejected given the mandate of IFB provision #11. Although SPI had not received written notification of the contract award to Grey, at that time a reasonable bidder would have known from the statements made by the District on December 9 and IFB provision #11 that its bid was rejected. Let the protester note that under the District's procurement regulations, the District is not required to notify a bidder that its bid has been rejected prior to the award of the contract to another bidder.

Section 1-1189.8(b) of the PPA prescribes the time limit in which a protester may file a protest with the Board. It states:

For a protest pursuant to subsection (a) of this section, the aggrieved person shall file a protest with the Board within 10 working days after the aggrieved person knew or should have known of the facts and circumstances upon which protest is based.

The Board has addressed the issue of timeliness in numerous decisions and has consistently held that the timely filing of a protest is a prerequisite to the Board having jurisdiction to hear and decide the protest on its merits. The Board has previously held that the ten-day filing requirement is statutorily mandated and thus must be strictly applied. In Datacom Systems Corporation, CAB No. P-64 at 27 (D.C. CAB January 11, 1988), the Board stated:

. . . once a party knows or should have known of all the facts and circumstances necessary to form the basis of a protest, it simply cannot, without the consequence of dismissal, delay filing a protest with the Board for more than ten working days. . . .

See, also the protest of MTI Construction Company, Inc., 1 P.D. 66 at 70 (CAB 1987), and the protest of Ebone Inc., CAB No. P-153 (CAB April 5, 1989).

SPI has failed to comply with the timeliness requirement established by the PPA and the Board's protest rules and, therefore, SPI's filing was untimely. Consequently, the Board is without jurisdiction to hear and decide this protest on its merits.

Accordingly, the protest is dismissed with prejudice as untimely.

DATE: May 30, 1990

Claudia Booker  
CLAUDIA D. BOOKER  
Administrative Judge

CONCUR:

David H. Marlin  
DAVID H. MARLIN  
Administrative Judge

William L. Davis  
WILLIAM L. DAVIS  
Chief Administrative Judge