

Government of the District of Columbia

CONTRACT APPEALS BOARD

717 14TH STREET, N.W., SUITE 430
WASHINGTON, DC 20005



(202) 727-6597

Date: April 11, 1994

TO: James G. F. Coleman, President
Continental Flooring Company
5111 North Scottsdale Road
Scottsdale, Arizona 85250-7077

Howard S. Schwartz
Assistant Corporation Counsel
441 4th Street, N.W., Suite 1060
Washington, D.C. 20001

SUBJECT: CAB No. P-402, Protest of Continental Flooring Company

Attached is a copy of the Board's opinion in the above-referenced matter.

Rose M. Gillison / yjh
ROSE M. GILLISON
Clerk to the Board

Attachment

RMG/mjh

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

CONTINENTAL FLOORING COMPANY

Under Contract No. 9422-A1-72-AW

)
) CAB No. P-402
)

For the Protestor: James G.F. Coleman, President. For the Government: Warren Nash
and Howard Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León with Administrative Judges
Zoe Bush and Terry Hart Lee concurring.

OPINION AND ORDER ON MOTION TO DISMISS

Continental Flooring Company ("Continental" or "Protestor") filed its protest with the Board on February 16, 1994. Continental protests: (1) the refusal of the Department of Public and Assisted Housing ("DPAH" or "District") to waive its rejection of Protestor's late bid and accept the bid; and (2) DPAH's failure to purchase the goods at issue through the GSA schedule.

IFB No. 9422-A1-72-AW was issued on December 16, 1993 for "Tile Floor, Vinyl Composition". District's Motion to Dismiss, Exhibit 1. Two addenda were issued; one of which extended the bid opening date to Friday, January 21, 1994. Id. At bid opening, four bidders had responded. It is undisputed that Protestor's bid was not timely received by DPAH. Id., Exhibit 2; Protest, Attachment(s). It is also undisputed that Protestor's bid was received by DPAH on Monday, January 24, 1994. Protest, Attachment(s). Protestor communicated with the District by letters dated January 25 and 26, 1994 in an effort to persuade the District to accept its late bid. Id. By letter dated February 7, 1994, DPAH's Contracting Officer again reiterated the District's position that the late bid would not be accepted and, therefore, would not be considered. As previously stated, the protest was filed on February 16, 1994. The District filed its motion to dismiss on March 28, 1994. Pursuant to Board Rule 307.1, 36 DCR 2713 (April 21, 1989), Protestor was allowed seven days to respond to the District's motion.

No such response has been filed by Protestor.

This protest is dismissed, with prejudice based on the fact that it was untimely filed.

The Procurement Practices Act of 1985 ("PPA") establishes the Board's jurisdiction over bid protests. D.C. Code § 1-1189.3(1) (1987). Specifically, D.C. Code § 1-1198.8(b) states, in pertinent part:

(a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.

(b) 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 or circumstances upon which the protest is based.

See also Emerald Eviction Services, CAB No. P-343, November 10, 1992, 40 DCR 4700; Eastern Shield Security Systems, Inc., CAB No. P-369, March 2, 1993, 40 DCR 5001; CUP Temporaries, Inc., CAB No. P-263, August 31, 1993, 6 P.D. 5358.

The Board's rules, which serve to implement the PPA, require that a protest be filed not later than 10 days after the basis of the protest is known or should have been known, whichever is earlier. Board Rule 301.1, 36 DCR 2710 (1989); Anne Robertson Sellin, CAB No. P-238, July 2, 1991, 39 DCR 4247.

This 10-day filing requirement is a prerequisite to this Board's jurisdiction and cannot be waived. Macton Construction, Inc., CAB No. P-203, December 19, 1991, 39 DCR 4368 citing MTI Construction Co., Inc., D.C. CAB (June 1, 1987) and Southern International Corp., D.C. CAB (February 27, 1987).

The Comptroller General's regulations, to which we look for guidance, also contain a 10-working-day filing requirement. 4 CFR § 21.2(a)(2)(1989). In Tandy Construction, Inc., B-238619, February 22, 1990, 90-1 CPD ¶ 206, the Protestor argued that the basis for its protest was not clearly identified until the completion of a series of telephone calls during which the contracting officer clarified the government's position. An analogous situation exists in the instant case where Protestor holds the February 7th letter from the contracting officer to be the defining piece of correspondence from which its protest may be brought. Here, as in Tandy, the Protestor knew the basis of its protest prior to receiving a reiterated, definitive response from the government. In this case, that point of departure occurred when Protestor first realized that its bid was not timely submitted -- namely, at the latest, on January 21st when the bid was not

delivered. As clearly stated in Tandy and upheld previously by this Board, the timeliness requirements are not tolled by Protestor's attempts to persuade the agency to change its initial determination. CUP Temporaries, Inc., CAB No. P-263, August 31, 1993, 6 P.D. 5358.

As to the second protest ground -- that the GSA schedule should have been utilized, -- the Board has "adopt[ed] and ... adhere[d] to the traditional rule of law that protests based on alleged improprieties on the face of the solicitation must be filed with the Board prior to the closing date for receipt of proposals or bid opening. (citations omitted)." Koba Associates, Inc., CAB No P-325, December 1, 1992, 40 DCR 4730, 4733.

Protestor knew or should have known the bases for both grounds of its protest, at the latest, upon bid opening -- namely, as of January 21, 1994. This protest was not filed until February 16, 1994 -- nearly one month later.

Even if Protestor's filing was timely, the protest would not prevail on its merits. As to late bids, the Procurement Regulations at 27 DCMR § 1523 (1988) state the following:

1523.2 Any bid received at the place designated in the solicitation after the time and date set for receipt of bids shall be considered a 'late' bid unless it was received prior to the contract award and either of the following applies:

(a) It was sent by registered or certified mail not later than five (5) calendar days before the bid receipt date specified; or

(b) It was sent by mail (or telegram if authorized) and the contracting officer determines that the late receipt was due solely to mishandling by the District after receipt at the location specified in the IFB.

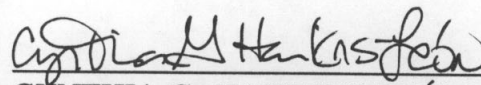
(emphasis added).

Neither of the two criteria for late bid acceptance applies to the instant case.

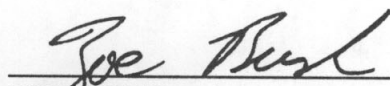
WHEREFORE, based upon the facts, legal precedent and reasoning set forth above, the District's motion to dismiss is **GRANTED**, and the protest is hereby **DISMISSED**, with prejudice.


So **ORDERED**.

DATE: April 11, 1994


CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

CONCUR:


ZOE BUSH
Chief Administrative Judge


TERRY HART LEE
Administrative Judge