UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1624

September Term, 2014

MARYLAND MASS TRANSIT ADMINISTRATION

v.

ADVANCED FIRE PROTECTION SYSTEMS, LLC

Wright,
Reed,
*Hotten,

JJ.

Opinion by Reed, J.

Filed: March 7, 2016

*Michele D. Hotten, J., participated in the hearing of this case while still an active member of this Court but did not participate in either the preparation or adoption of this opinion.

The Maryland Mass Transit Administration ("MTA"), appellant, appeals from the Circuit Court for Baltimore County's reversal of the Maryland State Board of Contract Appeals ("Board") ruling that a state procurement bid protest filed by Advanced Fire Protection Systems, LLC ("Advanced"), appellee, was not timely. Appellant presents the following question for review:

> Was the Board legally correct in refusing to consider Advanced Fire's bid protest where there was substantial evidence in the record to support the Board's finding that the protest was late?

For the reasons that follow, we shall answer in the affirmative, and accordingly reverse the judgment of the circuit court and affirm the Board's ruling that the request was not timely.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case are largely undisputed. On June 7, 2013, appellant issued an Invitation for Bids ("IFB") for Contract No. T-8000-0424 ("Contract"), entitled "Metro Fire Suppression System Inspection and Testing. The IFB was issued to "solicit bids from fire suppression systems firms who specialize in systems inspections testing and maintenance" to "ensure that the fire suppression systems included in th[e] IFB are maintained in accordance with code and are in good working condition reducing the need for future renovations."[1]

[1] All [sic].

Importantly in this case, the IFB included a subcontract participation goal, where at least 15% of the total contract dollar amount was to be provided by a certified Disadvantaged Business Enterprise ("DBE").[2] According to appellant,

> A bidder for work on State transportation projects with a DBE goal may only utilize certified DBE subcontractors and suppliers to achieve that goal. The Maryland Department of Transportation ("MDOT") pre-certifies DBE firms in particular areas of work "identified by NAICS[3] codes, supported by equipment, staffing, experience and/or other resources necessary to provide services or goods within the NAICS Code."

Along with their bid, prospective bidders were required to attach "MDOT DBE Forms A, B, C and D," where the prime contractor provided the DBE subcontractor's information for participation in federally-funded projects and certifying compliance with the participation goal. Important here is Form D, where the bidder provided the subcontracting DBE's NAICS code, "Work Item, Specification Number, Line Items or Work Categories (If Applicable)," and "Description of Specific Products and/or Services."

[2] "Disadvantaged business enterprise or DBE means a for-profit small business concern—
(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it." 49 C.F.R. § 26.5 (2014).

[3] "The North American Industry Classification System (NAICS, pronounced Nakes) was developed under the direction and guidance of the Office of Management and Budget (OMB) as the standard for use by Federal statistical agencies in classifying business establishments for the collection, tabulation, presentation, and analysis of statistical data describing the U.S. economy." *North American Industry Classification System Frequently Asked Questions*, U.S. CENSUS BUREAU, http://www.census.gov/eos/www/naics/faqs/faqs.html (last visited August 5, 2015).

On the bid due date of July 19, 2013, the controlling MTA procurement officer, Karen Elsey ("Elsey"), created a "Tabulation of Bids," listing each bid, as referenced below from lowest to highest:

1. Advanced Fire Protection, LLC $195,930.00
2. BFPE International $285,638.96
3. Wayman Fire Protection $294,374.52

Thus, by almost $90,000.00, appellee was the apparent low bidder.

In its bid, appellee identified Amigos Labor Services, Inc. ("Amigos") as their DBE. Amigos is a certified DBE with MDOT under NAICS Code 561320 to provide "Temporary Help Services (Specifically: Construction Laborers)." Under "Description of Specific Products and/or Services," appellant stated Amigos would "[p]rovide labor to assist with contract requirements." By contrast, the second lowest bidder, BFPE International ("BFPE") identified Total Building Solutions, Inc. ("Total") as their DBE subcontractor. Total is also a certified DBE with MDOT, but is instead listed under NAICS Code 238210 to provide "Electrical Contractors and Other Wiring Installation Contractors (Specifically: Low Voltage-Fire Alarm System Electric Only; Lighting System Installation; Telecommunications Equipment and Wiring (Except Transmission Line) Installation Contractors)." BFPE stated Total would provide "Inspection of Detection Systems" for "Scope of Work 2.4.2.6," the section of the IFB referring to "[d]etection systems and alarms associated with the deluge systems to the control panels in the valve rooms."

After informing appellee that it was the lowest bidder, appellant e-mailed appellee on June 30, 2013, stating that they should expect the contract documents by FedEx. On

August 14, 2013, Elsey emailed appellee to say that she was "getting the contract ready for the approvals." This presumably meant that she was waiting for the appellant's Office of Fair Practices ("OFP") to conduct a review of all bids to "ensure compliance with the Contract's DBE goals."

On September 4, 2013, OFP sent Elsey a memorandum advising her that OFP had determined that appellee's bid was "not in compliance" with the Contract's DBE requirements because "[t]he subject project is a maintenance contract that provides for testing and maintenance service for Metro's fire suppression system. The scope of work does not contain line items for 'Construction Laborers' or construction work." In short, OFP concluded that Amigos' NAICS code classification rendered their services inapplicable for this particular project. That same day, OFP informed Elsey that BFPE's bid *was* in compliance with the Contract's DBE requirements, and the next day, Ms. Elsey notified BFPE that it was the successful bidder.

On September 17, 2013, appellant informed appellee in writing that its bid was rejected ("Bid Rejection Letter"). The Bid Rejection Letter, under a subject line reading "REJECTION OF BID," stated that appellee's bid was "not responsive" because "the DBE firm you chose is not in the correct category for this particular kind of work."

Charles Peters ("Peters"), President of Advanced, ultimately testified that he was initially "confused" by the Bid Rejection Letter, and "did not understand why the bid was rejected." Within "a day or two" of receiving the letter, Peters called Elsey "to obtain more information on why the bid was now rejected, and requested a debriefing." According to

Peters, when Elsey returned his call, she did not know why OFP determined that appellant's bid was non-responsive, and directed him to call Paula Cullings ("Cullings"), the Director of OFP. Peters estimated that a few days later, either September 23rd or 24th, after leaving several messages for Cullings, he was finally able to get in touch with her. After explaining to Cullings that Elsey had instructed him to contact her regarding the OFP's decision, Cullings apparently "reprimand[ed]" Peters for contacting her, and explained that she "ha[d] no information in front of her" and that he was to only contact Elsey in the future.

After another delay in trying to reach Elsey, Peters finally got in touch with her by telephone on or about October 7, 2013. Elsey informed Peters that, for some reason, she was unable to send him the OFP rejection memorandum, but she could instead read it to him over the telephone. Peters' notes from the telephone call were as follows:

> AFPS submitted Amigos Labor to meet [the] 15% DBE goal established for this project to provide labor to assist contract requirements. Further review of this DBE profile indicates that this firm is classified under NAICS Code 561320, Temporary Help Services, specifically in providing construction laborers. The subject project is a maintenance contract that provides for testing and maintenance services. The scope of work does not [have a] contract line item for construction labor or construction work. Therefore it has been determined that AFPS is not in compliance with the DBE requirements.

According to appellee, this was "the closest to a debriefing in this process" and "[t]herefore, it took [][appellant] almost a month to provide any coherent explanation of the apparent acceptance than rejection of the bid."

Appellee filed their bid protest the next day, October 8, 2013. Appellee argued that the NAICS Code used for Amigos "has not been presented as a means for rejection of

[appellee's] bids in the past, for Amigo's Labor can perform the work and has performed the work in the past."

By letter dated October 11, 2013, Elsey denied appellee's protest, both on the merits and as being untimely. After reiterating the same grounds as the October 7th telephone call for rejecting appellee's bid on the merits, Elsey also referred to the applicable section in the Code of Maryland Regulations ("COMAR") for support in denying it as untimely. Specifically, Elsey cited to COMAR 21.10.02.03B, which states that "[all] protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."

According to Elsey's letter, the timeline of events was as follows:

1. September 17, 2013 – Bid Rejection Letter mailed
2. September 20, 2013 – Three days' allowance for possible receipt
3. September 27, 2013 – Required protest filing date
4. October 8, 2013 – Actual protest filing date.

Elsey concluded the letter by instructing appellee that the "decision could be appealed to the Maryland State Board of Contract Appeals in accordance with COMAR 21.10.07.02," which needed to be filed within 10 days.

On October 21, 2013, appellee filed its timely notice of appeal to the Board. Appellee argued that its bid protest was in fact timely because, while the Bid Rejection Letter was dated September 17, 2010, "said letter provides no information on the reason for the rejection." Appellee rather contended that the proper date for calculating the seven-day window was the October 7, 2013 telephone conversation between Peters and Elsey, because that, according to appellee, was when it "knew of the basis for the protest."

On February 12, 2014, the parties appeared before the Board for a hearing on the bid protest. By agreement of counsel, due to impending inclement weather, the Board only took testimony on the issue of whether the bid protest was untimely. Appellant's case consisted of several exhibits, demonstrating that appellee had submitted its bid protest more than seven days after receiving the Bid Rejection Letter. In response, appellee called Peters, its only witness, who testified that, despite his extensive experience dealing with procurement projects, he was under the impression that this were merely a clerical error. To him, it was a "very correctable situation" that was fixable with a telephone call because, to Peters, the situation was "not to a protest state yet."

On February 21, 2014, the Board issued a written opinion denying appellee's appeal. The Board found that appellee had failed to file a timely protest pursuant to COMAR 21.10.02.03, and that appellee knew or should have known why its bid was rejected and thus should have filed the protest sooner:

> The September 17, 2013 correspondence was more than a "vague statement" not affording [appellee] fair notice of the basis of a protest. . . . That letter included a subject line which plainly identified the correspondence as [appellant's] "REJECTION OF BID" and specifically informed [appellee] as the basis of the rejection that "the DBE firm you chose is not in the correct category for this type of work." The Board sees no reason why [appellee] could not have directed a timely letter of protest to [appellant] on or before September 27, 2013, indicating at that time its contention that Amigos was included in its bid in a proper labor category, rather than waiting 15 days before filing its protest.

While remaining sympathetic to appellee's position, the Board also found that much of the blame lay at Peters' feet, as he "testified that [he] is a highly experienced state

contractor and he well knew and understood that protests must be filed within 7 days after the basis for a protest is known." The Board found that, rather than filing a protest after receiving the Bid Rejection Letter, Peters "opt[ed] instead to elicit additional information, confidently believing at that time that its rejection was a mistake that could and would be corrected." The Board recognized that, while "the 7-day limitation for filing bid protests is as unforgiving as it is unambiguous," the Board had no choice but to deny the appeal because if it was permitted to proceed, "the 7-day limitation on filing bid protests would cease to exist."

On March 7, 2014, appellee filed a Petition for Judicial Review of the Board's decision in the Circuit Court for Baltimore County. After a one-day non-jury trial on September 16, 2014, the circuit court entered an order on September 29, 2014, reversing the Board's decision.

Appellant timely filed its notice of appeal on October 6, 2014.

DISCUSSION

A. Parties' Contentions

The parties' positions are relatively straightforward. Appellant asks us to reverse the circuit court's decision because the Board's decision to deny the protest was supported by "substantial evidence." To appellant, the appellee "knew or should have known the basis for its protest upon receipt of the Bid Rejection Letter." In short, appellant believes that, "[i]n view of mandatory statutory and regulatory language, and with substantial evidence before it, the Board's decision to dismiss the appeal was legally correct."

Appellee would rather have us adopt the position of the circuit court and remand the matter to the Board for further proceedings on the merits. Appellee feels that appellant's "vague explanation of [sic] bid rejection . . . cannot be a sufficient explanation" for notice purposes. The explanation, combined with Peters' difficulties in obtaining further information, leads appellee to conclude that they are being "penalized by the [appellant's] failure here." ***Id***.

B. Standard of Review

Our standard of review is firmly established. On appellate review of the decision made by an administrative agency, this Court reviews the agency's decision, not the circuit court's decision. *Anderson v. General Casualty Insurance Co.*, 402 Md. 236, 244 (2007); *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008), *cert. denied*, 406 Md. 113 (2008). "Indeed, our review is narrow, and we will not substitute [our] judgment for the expertise of those persons who constitute the administrative agency." *Gore Enter. Holdings, Inc. v. Comptroller of Treasury*, 437 Md. 492, 503-04 (2014) (internal quotation marks and citations omitted). Thus, a reviewing court's role is limited to determining whether "there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Motor Vehicle Administration v. Sanner*, 434 Md. 20, 32 (2013) (internal quotation marks and citation omitted).

In examining an agency's factual findings, "[s]ubstantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion.'" *McClure v. Montgomery County Planning Bd. of Maryland-Nat. Capital Park and Planning Commission*, 220 Md. App. 369, 380 (2014) (quoting *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998)). The test "requires us to affirm an agency's decision, if, after reviewing the evidence in a light most favorable to an agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Wilson v. Maryland Dept. of Environment*, 217 Md. App. 271, 283 (2014) (internal quotation marks and citations omitted). We "review the agency's decision in the light most favorable to the agency" because it is "prima facie correct" and entitled to a "presumption of validity." *Anderson v. Department of Public Safety & Correctional Services*, 330 Md. 187, 213 (1993) (internal quotation marks and citation omitted).

The overarching goal of judicial review of agency decisions is to determine whether the agency's decision was made in accordance with the law or whether it is arbitrary, capricious, or illegal. *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 274 (2012). We are not bound, however, to affirm those agency decisions based upon errors of law and may reverse administrative decisions containing such errors. *Catonsville Nursing Home*, 349 Md. at 569 (internal quotation marks and citations omitted).

C. Analysis

Appellant seeks to overturn the circuit court's reversal of the Board's opinion because appellee's protest was untimely and properly dismissed. Reviewing the Board's decision in the light most favorable to the agency, we agree with appellant and determine there was substantial evidence in the record that appellee either knew, or should have

known, the basis for the bid rejection, based on the September 17, 2013 Bid Rejection Letter.

COMAR 21.10.02.03B provides a seven-day time limit aggrieved bidders must abide by in order to timely file a protest regarding the denial of their bid. The Court of Appeals has held that this "strict timeliness requirement is reasonable generally for protests of alleged procurement" because normally, "both the awardee and the government proceed (presumably promptly) to expend time and resources on the completion of the procurement's goal." *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 606 (2014). "Allowing an extended period for protests to be brought forth would hinder the government's ability to obtain the needed item or service (and would increase costs for developers and contractors interested in government contracts)." *Id.*

It is undisputed that appellee received the Bid Rejection Letter by September 20, 2013. It is also undisputed that appellee sent notice of appeal more than 7 days after that, on October 8, 2013. Therefore, this appeal hinges entirely on whether or not the Bid Rejection Letter provided sufficient notice to appellee to start the seven-day "clock." The Board felt it did provide sufficient notice, and we are inclined to agree.

To the Board, the Bid Rejection Letter was "more than a 'vague statement,'" as appellee argued, because the subject line clearly stated the letter was a "REJECTION OF BID" and it "specifically informed" appellee that it was because "the DBE firm [appellee] chose is not in the correct category for this type of work." Furthermore, the Board also found that "Peters . . . testified that [he] is a highly experienced state contractor and the he

well knew and understood that protests must be filed within 7 days after the basis for a protest is known." That information, on its own, would appear to be a factual finding that a "reasoning mind reasonably could have reached."

Moreover, the Board was also concerned with the possible precedent this case would set. COMAR 21.10.02.03C provides that "[a] protest received by the procurement officer after the [seven days] prescribed in §A or §B may not be considered." The Board points out that "[s]even days is a very short period of time, but presumably the reason for that rigid rule arises out of concern to expedite procurement contracts by resolving bid protests as quickly as possible." As a result, even a cursory glance at the Board's recent opinions reveals that the Board has consistently applied this time limit strictly.[4]

Here, it is clear from the record that appellee's argument to the Board did not fall on unsympathetic ears. The Board even went so far as to say that, "[a]s much as the Board would like to entertain evidence on the substantive merits of the appeal," it simply lacked the jurisdiction to do so. In short, the Board explained that, "If this appeal were permitted to proceed, the 7-day limitation on filing bid protests would cease to exist." This is

[4] *See, e.g., Aunt Hattie's Place, Inc.*, MSBCA No. 2852 at 4 (2013) ("This Board has strictly enforced this jurisdictional requirement, even if the bid protest was a day late." (internal quotation marks and citations omitted)); *Affiliated Computer Services, Inc.*, MSBCA No. 2717 at 3 (2010) ("[A] long history of other Board precedent has repeatedly emphasized the strictly construed seven (7) day limitation for noting a bid protest." (citation omitted)); *Abacus Corp.*, MSBCA No. 2712 at 7 (2010) (directing the reader to *Pessoa Construction Co. v. MAA*, MSBCA No. 2656 (2009) for a "litany of dozens of prior Board decisions" strictly construing the seven-day limitation).

certainly, from both an external public policy standpoint and internal efficiency standpoint, a reasonable approach for the agency to take.

Appellee cites to *Eisner Communications, Inc.*, MSCBA 2438, 2442, and 2445 (2005), for the proposition that:

> A protestor may properly delay filing its protest until a debriefing *where information provided to the protestor earlier left uncertain whether there was any basis for protest*. In addition, it is appropriate to resolve such doubts about timeliness in favor of the protestor.

Eisner at 16 (citations omitted) (emphasis supplied). Without the need to address the complex factual distinctions between these cases, we feel this appeal is readily distinguishable in that, here, the Board found *no* uncertainty or doubt that appellee received the basis for protest in the Bid Rejection Letter. Indeed, the Board clearly found that "[Peters] knew that [the apparently improper DBE/NAICS classification] was the basis of the bid rejection, but firmly and perhaps rightfully believed that determination was incorrect."

Appellee further maintains that, if the Board's decision was to be upheld, it would render the phrase "basis for" in COMAR 21.10.02.03B "superfluous" because it would "set the appeal deadline from when a rejection letter is sent, rather than when enough information is known, through a debriefing or otherwise, in which to submit an appeal with a basis." Appellee argues that here, the Bid Rejection Letter did not provide the basis for appeal, and in order to obtain it, appellee requested a debriefing with appellant in accordance with COMAR 21.05.03.06. That regulation provides, in pertinent part: "When a contract is to be awarded on some basis other than price alone, unsuccessful offerors may

submit a *written* request for a debriefing to the procurement officer within a reasonable time." COMAR 21.05.03.06A (emphasis supplied). Ignoring the fact that nothing in the record suggests that such a request was ever made in writing, appellee fails to explain how this regulation, which appears in a different subtitle than that pertaining to protests, is applicable to the situation presented in this appeal.

The substantial evidence in the record demonstrates that appellee had sufficient notice to comply with the seven-day deadline for filing a protest. Appellee's president took a seemingly calculated risk in solely trying to resolve the perceived discrepancy outside of the normal protest procedure, and as a result, that procedure is now unavailable to him. We hold that the Board's decision to decline exercise of its jurisdiction on account of an appeal not timely filed was supported by substantial evidence in the record and was not arbitrary and capricious.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.