

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2338	Date of Decision: 06/23/03
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Transportation Authority Contract No. LH-511-000-002	
Appellant/Respondent: Daisy Concrete, Inc. of Maryland Maryland Transportation Authority	

Decision Summary:

Signing of Bids - The failure to sign a bid may be waived as a minor informality pursuant to COMAR 21.06.02.04 if the bid is accompanied by other material clearly indicating the bidder's intent to be bound.

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

In The Appeal of Daisy)
Concrete, Inc. of Maryland)
)
Under Maryland Transportation) Docket No. MSBCA 2338
Authority Contract No. LH-)
511-000-002)

APPEARANCE FOR APPELLANT: Jo C. Bennett, Esq.
McDonnell, Bennett & Griffin
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Sandra E. Clifford
Gisele M. Mathews
Assistant Attorneys General
Baltimore, Maryland

**APPEARANCE FOR INTERESTED
PARTY:** Scott A. Livingston, Esq.
Lydia B. Hoover, Esq.
(Gray & Son, Inc.) Rifkin, Livingston, Levitan
& Silver, LLC
Baltimore, Maryland

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from a final agency decision, which rejected its protest of the proposed award of the above-referenced contract to Gray & Son, Inc. (Gray), the Interested Party, resulting from the Maryland Transportation Authority's (MdTA) solicitation for the resurfacing of Northbound Interstate 95 (I-95) from Maryland Route 24 to the Millard E. Tydings Memorial Bridge, along with Safety Improvements to the John F. Kennedy Memorial Highway.

Findings of Fact

1. In November 2002, the MdTA issued an Invitation for Bids (IFB) in connection with the captioned contract.
2. On January 14, 2003, four (4) bids were received in response to the IFB. At the bid opening the bid amounts were announced, and

Gray was announced to have submitted the apparent low bid in the amount of \$4,586,000.00. Appellant submitted the second lowest bid in the amount of \$4,812,019.62. At the time of the bid opening, the Procurement Officer initially reviewed Gray's bid documents and announced that Gray had not signed the Proposal or Bid Signature Sheet (Bid Sheet) and that Gray's bid was "irregular" as a result. The Bid Sheet stated at the top in capital letters, "THIS SHEET MUST BE SIGNED IN ORDER FOR THE BID TO BE ACCEPTED. BY SIGNING, THE BIDDER CERTIFIES THAT IT WILL COMPLY IN EVERY ASPECT WITH THE SPECIFICATIONS."

3. The record reflects that Gray did execute the Bid Guarantee and Bid Bond sheets and the Certified MBE Utilization and Fair Solicitation Affidavit and Bid/Proposal Affidavit.
4. On January 14, 2003, a letter was sent to Gray rejecting its bid on grounds that the failure to sign the Bid Sheet made the bid non-responsive. The letter also advised Gray that it was a final agency decision.
5. On January 17, 2003, Gray's attorney filed a bid protest arguing the failure to sign the Bid Sheet was a "minor irregularity" and requesting that the Procurement Officer rescind his decision based on this Board's decision in Apollo Paving Co., Inc., MSBCA 1092, 1 MSBCA ¶29 (1982) (Apollo).
6. On January 21, 2003, Gray's attorneys filed a Notice of Appeal with this Board noting that on January 14, 2003 it had received a letter from the Procurement Officer purporting to be a final agency decision even though Gray allegedly had not yet filed a bid protest.
7. On February 11, 2003, the Procurement Officer's final agency decision was issued denying Gray's bid protest filed on January 17, 2003 on grounds that Gray's failure to sign the Bid Sheet made the bid non-responsive. From this decision Gray took a second appeal to this Board.

8. On February 12, 2003, the MdTA's Agency Report in response to the January 21, 2003 Notice of Appeal filed by Gray was issued and filed with this Board and was sent to the interested parties (with exhibits omitted) including Appellant. In the Agency Report, MdTA counsel opined that under Apollo the Procurement Officer had the discretion to waive or not waive as a minor irregularity the failure to sign the Bid Sheet.
9. On February 28, 2003, after discussions with Gray's attorneys, the MdTA entered into a Settlement Agreement with Gray, and as a result, rescinded the Procurement Officer's decision of February 11, 2003. As part of the Settlement Agreement, the MdTA agreed to award the contract to Gray, and on March 4, 2003, the Notice of Intent to Award the contract to Gray was issued. On March 6, 2003, this Board dismissed Gray's appeals based on the request of Gray's counsel that the appeals be dismissed due to settlement.
10. On March 11, 2003, Appellant submitted a bid protest with the Procurement Officer. This bid protest was related to the MdTA's decision to award the instant contract to Gray alleging that such decision was an abuse of discretion because it constituted a reversal of the agency's prior decision without any explanation for the reversal. The protest also asserted that the Board wrongly decided Apollo and that the Gray bid was in fact non-responsive.
11. The protest was denied by the Procurement Officer's final agency decision dated April 1, 2003, and this appeal followed.

Decision

Appellant asserts that the Gray bid was non-responsive and that the Board wrongly decided Apollo. In Apollo Paving Co., Inc., MSBCA 1092, 1 MSBCA ¶29 (1982), whose continued vitality we shall confirm herein, the Board observed that:

The requirement that a bid be signed historically has been treated as a matter of substance and not one of form. The reason, of course, is that without the signature of an authorized representative of the bidder's organization, the bid would not constitute necessarily a binding offer to perform the work described in the invitation. The low bidder, under such circumstances, would have the opportunity to withdraw his bid after reviewing his competitors' prices, thus obtaining the proverbial "two bites of the apple." Such a system obviously would be extremely unfair and ultimately would subvert the integrity of the competitive bid procedure. For this reason, therefore, the authorized signature of a bidder is considered mandatory to [sic] establish both the intent of that bidder to be bound and the responsiveness of his bid. Compare Comp. Gen. Dec. B-192979, 79-1 CPD ¶ 65 (1979); Comp. Gen. Dec. B-123061, 34 Comp. Gen. 439 (1955). In the instant appeal, Appellant concededly did not sign its bid form. However, Appellant did properly execute a number of other documents contained in the bid package. The ultimate issue to be resolved concerns whether these other documents properly may be used to satisfy the mandatory bid signature requirement.

Apollo at p.3.

The Board further observed that the Comptroller General had opined that unsigned bids accompanied by other materials indicating the bidder's intention to be bound were acceptable to establish responsiveness. After a review of federal determinations and analogous federal regulations, the Board concluded that under COMAR 21.06.02.03 the failure to sign a bid may be waived as a minor informality if the bid is accompanied by other material clearly indicating the bidder's intent to be bound. The Board then observed that:

Appellant's bid package contained two documents that were signed by Appellant's President, the Minority Business Affirmative Action (MBE)

certification and the Anti-Bribery, Non-Collusion and Financial Disclosure Affidavit....

From this the Board concluded that:

...the voluntary submission of the bid, together with these executed documents would have been sufficient to overcome any attempt by Appellant to disavow the bid and to upset any award made to it on the ground that the bid lacked an authorized signature. Accordingly, these executed documents were sufficient to bind Appellant, even though the bid sheet was not signed.

Apollo at p.5.

While the Board's observations and holdings in Apollo were drawn in large measure from federal determinations of the issue, we believe the Board's rationale was appropriate in 1982 and remains so today.

In Apollo, the bid signature sheet provided that "The bidder is hereby notified that this sheet must be signed in order for the bid to be accepted." However, as in this appeal, the contractor in Apollo did not sign the bid signature sheet notwithstanding direction that the sheet must be signed for the bid to be accepted. The Apollo contractor did, however, sign the Minority Business Affirmative Action (MBE) certification and the Anti-Bribery, Non-Collusion and Financial Disclosure Affidavit leading the Board in 1982 to opine that such executed documents combined with the voluntary submission of the bid would be sufficient to overcome any attempt by the contractor to disavow the bid and upset an award on grounds that the bid sheet was not signed.

Herein, we conclude that the execution by Gray of the Bid Guarantee and Bid Bond sheets combined with the voluntary submission of the bid and execution of the Certified MBE Utilization and Fair Solicitation Affidavit and Bid/Proposal Affidavit, documents similar to the documents that were executed in Apollo, would be sufficient to

overcome any attempt by Gray to disavow the bid and upset an award on grounds that the bid sheet was not signed.

Appellant also argues, while not conceding that Apollo is correct on the law, that the Procurement Officer acted in an arbitrary or capricious fashion (abused his discretion) by changing his mind regarding the responsiveness of the Gray bid without an explanation where the record does reflect any change in circumstances, and, in any event, did not exercise his personal judgement as required in making his determination as set forth in his Procurement Officer's final agency decision of April 1, 2003. Appellant also challenges the propriety of the Settlement Agreement.

It is true as pointed out by Appellant that the Procurement Officer several times declined to reverse his decision that the Gray bid was non-responsive due to Gray's failure to sign the Bid Sheet, and that when he did reverse his decision Appellant was not told why, only that MdTA rescinded its previous decision and intended to award the contract to Gray. It is also true as emphasized by Appellant that MdTA counsel defended the Procurement Officer's original determination not to waive the failure to sign the Bid Sheet in the Agency Report filed in connection with the Gray appeals. In this regard, the Procurement Officer testified that he sought legal advise from MdTA counsel and after receiving advise that he had discretion to waive or not waive the failure to sign the Bid Sheet determined not to waive the failure.

The Procurement Officer also testified that there came a time after his original determination not to waive the failure to sign the Bid Sheet that subsequent legal advise from MdTA counsel, after consultation with the Contract Litigation Unit within the central office of the Attorney General in Baltimore, was given to the effect that the Apollo case precedent should be followed in this procurement.

The Procurement Officer testified that he considered such

subsequent advise and determined in the exercise of his own judgement that it was appropriate to follow such advise. Thus, because the Apollo case facts were substantially similar to the facts in the procurement before him, he determined to waive the failure to sign the Bid Sheet as a minor irregularity pursuant to COMAR 21.06.02.04.

Appellant argues that this change of position represents arbitrary or capricious behavior. In the Procurement Officer's final agency decision on Appellant's protest, the Procurement Officer maintains that he has a right to change his mind. We agree. We also observe that COMAR 21.10.02.05 requires the Procurement Officer to submit a copy of the protest to the Office of the Attorney General and requires the Procurement Officer "unless clearly inappropriate" to consult with legal counsel. This right to counsel is predicated on *Section 15-218(b)(2)* of the *State Finance and Procurement Article*.

Finally, COMAR 21.10.02.09 requires the decision of the Procurement Officer to be reviewed by appropriate legal counsel.

We further do not find that the MdTA Settlement Agreement with Gray was improper. We observe that *Section 15-218(b)(1)(iii)* of the *State Finance and Procurement Article* (and COMAR 21.10.02.08) permits negotiations with the protester. Appellant complains that it is not evident from the Settlement Agreement that there was any consideration for the MdTA's agreement to rescind the Procurement Officer's previous decision and award the contract to Gray. We believe the consideration in this public procurement is the proposed award of a contract to the low responsive bidder based on an appropriate application of the General Procurement Law and COMAR Title 21.

It is clear from the record that the Procurement Officer changed his mind based on legal advise. However, we do not conclude that such change of mind is arbitrary or capricious where it is based on legal advise that, according to the Procurement Officer's testimony, was independently assessed by him in the exercise of his personal

judgement. This Board's decision in Apollo rendered in 1982 has not been changed by court decision, subsequent Board decision, statute or regulation in the ensuing twenty-one (21) years. Accordingly, we do not find the Procurement Officer's change of mind based on Apollo to be legally incorrect or to represent arbitrary or capricious behavior.

Accordingly, the appeal is denied.

Wherefore it is Ordered this day of June, 2003 that the appeal is denied.

Dated:

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
Board Member

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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2338, appeal of Daisy Concrete, Inc. of Maryland under Maryland Transportation Authority Contract No. KH-511-000-002.

Dated:

Michael L. Carnahan
Deputy Recorder