

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

In the Appeal of	*	
First Fruits Excavating, Inc.	*	
	*	Docket No. MSBCA 3261
Under DGS	*	
Solicitation No. G-022-231-010	*	
Appearance for Appellant:	*	Kenneth K. Sorteberg, Esq.
	*	Huddles Jones Sorteberg &
	*	Campbell
	*	Columbia, Maryland 21044
Appearance for Respondent:	*	Mary Cina Chalawsky, Esq.
	*	Contract Litigation Unit
	*	Office of the Attorney General
	*	Baltimore, Maryland 21202

* * * * *

OPINION AND ORDER BY MEMBER CARNAHAN

The Board conducted a merits hearing in this matter on March 26, 2024. The issue here is whether the bid bond submitted by Appellant First Fruits Excavating, Inc. (“Appellant”) in response to the solicitation was defective. At the close of Appellant’s evidence, Respondent Department of General Services (“DGS” or “Respondent”) moved for judgment, and the Board granted Respondent’s motion. As explained more fully below, we find that the procurement officer’s rejection of Appellant’s bid as non-responsive was not arbitrary, capricious, unreasonable, or in violation of law and, therefore, deny the Appeal.

FINDINGS OF FACT

- On September 12, 2023, Respondent issued an Invitation for Bids for roadway maintenance, repairs, and restoration to Bear Pond Access Road in Washington County, Maryland, under Solicitation No. G-022-231-010 (the “IFB”).

- Bid opening was held on October 10, 2023. Appellant timely submitted a bid of \$177,562 and was the apparent low bidder.
- On November 3, 2023, the Procurement Officer notified Appellant that its bid was rejected as non-responsive because “it failed to include a project number and a brief description of the project on its bid bond” and, therefore, “the [bid] bond is defective and not enforceable by the State against the surety.”
- On November 8, 2023, Appellant filed a bid protest challenging the Procurement Officer’s decision.
- On January 10, 2024, the Procurement Officer issued a final decision denying Appellant’s protest, determining that the bid was properly rejected because the bid bond lacked any indicia that correlated the bid bond to the bid itself.
- On January 19, 2024, Appellant appealed DGS’s decision to this Board.

STANDARD OF REVIEW

In appeals concerning bid protests, appellants bear the burden of showing by a preponderance of the evidence that a procurement officer’s actions were biased, arbitrary, capricious, unreasonable, or in violation of law. Absent this showing, a procurement officer’s decision will not be overturned. *See Montgomery Park, LLC v. Maryland Dep’t of General Servs.*, MSBCA No. 3133 (2022) at 36 – 37, *rev’d on other grounds, Montgomery Park, LLC v. Maryland Dep’t. of Gen. Servs.*, 254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023), *Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6.

DECISION

Under Maryland Procurement Law, bidders must provide bid security on procurement contracts for construction if the bid price will likely exceed \$100,000. State Finance & Procurement (“SF&P”) § 13-207(a). “The procurement officer shall reject a bid or proposal that is not accompanied by proper security.” SF&P § 13-208(a).

When determining the responsiveness of a bid, procurement officers may look to the bid bond for factors such as “(1) a correct identification of the bid opening date, (2) an accurate description of the type of services sought (e.g., a project description and a solicitation number), and (3) a designation of a maximum penal sum in an amount which correlates with the amount of the bid.” *FMC Technologies, Inc.*, MSBCA 2312 at 5 (2003). A procurement officer may deem a bid responsive if “there is clear indicia on the face of the bid bond that identifies it with the correct solicitation.” *Id.* at 6; *see also American Paving Corp.*, MSBCA No. 2498 (2005).

Appellant argues that (1) Respondent should not have found Appellant’s bid non-responsive, (2) its bid bond was not defective, and (3) the bid bond was enforceable by the State against the surety. Appellant requests that the rejection of its bid be rescinded and that DGS award this contract to Appellant as the lowest responsive and responsible bidder.

Here, Appellant used DGS’s preferred bid bond form in submitting its bid. It is the same bid form found at COMAR 21.06.07.09D(1). It is undisputed and clear on the face of the bid bond Appellant submitted that it did not include the project number or a brief description of the project. However, Appellant asserts that the date on the Power of Attorney submitted with the bid bond – “10th day of October, 2023” – is sufficient to relate the bid bond directly to the IFB, because it is the same date as the bid opening. We reject this contention, and instead agree with the Procurement Officer that Appellant’s bid bond did not contain clear indicia of a proper bid security.

We find that the Power of Attorney reflects simply that it is effective as of October 10, 2023. There is nothing on the face of the Power of Attorney that indicates that it was submitted with a bid bond for this specific IFB or, for that matter, submitted by or on behalf of Appellant.

The facts in *American Paving* and *FMC Technologies* are clearly distinguishable. In *American Paving*, the bid bond, while missing the solicitation number and project description,

contained the exact dollar amount matching the total amount submitted with the bid for the contract. In *FMC Technologies*, the bid bond form submitted identified the correct solicitation number and described the project but contained an incorrect solicitation number elsewhere. In both cases, the procurement officers determined that there were clear indicia on the face of the bid bonds that related them back to the correct solicitations. In Appellant's bid bond, on the other hand, there is no indicia that it was specifically tied to the IFB.

There is little merit to Appellant's assertion that the use of DGS's preferred bid bond form was a "trap" to bidders, because the use of the form is "preferred," and not mandatory.¹ To the extent that Appellant's complaint concerning the preferred bid bond in its current form, as provided in COMAR 21.06.07.09D(1), has somehow caused confusion among bidders about what information was required, perhaps a simple amendment could potentially resolve that problem. It nonetheless remains the responsibility of the bidder to ensure that its submissions satisfy the State's requirements, and to the extent that Appellant failed to do so here, we must affirm the Procurement Officer's decision to reject Appellant's bid.

We conclude that Appellant failed to meet its burden of proving that the Procurement Officer's actions were arbitrary, capricious, unreasonable, or otherwise in violation of law. For these reasons, the Board grants Respondent's Motion for Judgment and denies the Appeal.

¹ COMAR 21.06.07.09D(2) provides:

Unless prohibited by the solicitation, a bid bond on a form other than the preferred form under §D(1) of this regulation may be accepted if the form provides that the principal and the surety shall be liable under the bond in an amount at least equal to the difference between the amount of the principal's bid and such other amount or amounts for which the obligee may contract with another party to perform as required by the solicitation for which the principal's bid was submitted.

ORDER

Based on the foregoing, it is this 2nd day of May 2024, hereby:

ORDERED that Respondent's Motion for Judgment is GRANTED, and the Appeal is DENIED.

/s/
Michael L. Carnahan, Jr.
Member

I concur:

/s/
Sonia Cho, Esq.
Chairman

/s/
Senchal Dashiell Barrolle, Esq.
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 contested cases.

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 ten 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 hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3261, Appeal of First Fruits Excavating, Inc. under Maryland Department of General Services Solicitation No. G-022-231-010 Contract No. BA0385180.

Date: May 2, 2024

_____/s/_____
Ruth W. Foy
Clerk