

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**IN THE APPEAL OF
P. FLANIGAN & SONS, INC.**

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**UNDER MD AVIATION ADMINISTRATION
SOLICITATION NO. MAA-CO-25-001**

DOCKET NO. MSBCA 3297

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Appearance for Appellant

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Appearance for Respondent

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**Appearance for Interested Party
Allan Myers MD, Inc.**

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OPINION AND ORDER BY MEMBER KREIS

The Maryland State Board of Contract Appeals (“Board”) conducted a merits hearing on July 23, 2025. After considering the written record submitted to the Board, all witness testimony, the admitted exhibits, and the arguments made by counsel, the Board sustains the appeal.

PROCEDURAL HISTORY AND FINDINGS OF FACT

On June 5, 2024, the Maryland Aviation Administration (“MAA” or “Respondent”) issued an Invitation for Bids (“IFB”) seeking a contractor to furnish all supervision, labor, materials, equipment, tools, and associated work necessary for the DX-DY Apron Reconstruction project at BWI Thurgood Marshall Airport (“BWI”). A portion of the work under this contract included removal of bituminous concrete and cement concrete and new concrete pavement construction.

In reviewing the IFB in preparation for submitting a bid, P. Flanigan & Sons, Inc. (“Flanigan” or “Appellant”) noticed a discrepancy. Although the contract work included converting an inlet into a manhole, which required the use of miscellaneous concrete, the IFB did not list a bid item for miscellaneous concrete, but only a bid item for flowable fill. Miscellaneous concrete and flowable fill are two distinct products with very different prices, with miscellaneous concrete costing approximately \$30 per cubic yard more than flowable fill. Flowable fill conforms to the shape of its container and is used to abandon utilities or stabilize voids. Conversion of an inlet to a manhole requires the forming and pouring of a top slab which requires miscellaneous concrete. It is not possible to perform this conversion using flowable fill. As allowed by the IFB, Flanigan sent a written question to the procurement officer asking her to address this discrepancy.

MAA issued Addendum No. 2 on July 8, 2024. It contained a Responses to Contractors’ Questions Section. Question 15 was Flanigan’s question attempting to address the discrepancy it discovered:

15. Sheet CD101 shows “Convert inlet to manhole.” Under which item is this work to be paid?

Response: This item shall be paid by the cubic yard cost of P-610-6.3 Miscellaneous Concrete required to fill the structure.

To comport the IFB to the Answer to Question 15, Addendum No. 2 replaced Part II Technical Provision, Technical Specifications, Item P-610 Concrete for Miscellaneous Structures and Part IV Technical Provisions, Bid Forms, Section 9 Bid Proposal pages BF.49 – BF.56. It also revised the contract drawings Item P-610-6.3 from Flowable Fill for Existing Utilities to Miscellaneous Concrete. Most relevant to this Appeal, Bid Item No. 24, Item No. (spec. ref.) P-610-6.3 on page BF.50 changed its description from “Flowable Fill for Existing Utilities” to “Miscellaneous

Concrete.” Finally, Addendum No. 2 replaced the original Procurement Officer with Monica Queen (hereafter “PO” or “Queen”).¹

MAA conducted a virtual bid opening via Microsoft Teams on August 12, 2024. The timely submitted bids were opened. Allan Myers MD, Inc. (“Myers” or “Interested Party”) was the low bidder at \$31,577,555. Flanigan was the next lowest bidder at \$32,749,929, and Atlantic Contracting & Material (“Atlantic”) was the highest bidder at \$32,803,603.

On August 14, 2024, Flanigan’s Contract Administrator Jill Keifer (“Keifer”) sent an email to the PO requesting to come to MAA’s office on Monday, August 19, 2024 to review Myers’ and Atlantic’s bids. Keifer received an automated out-of-office reply indicating that the PO was out on vacation until August 21, 2024, and directing inquiries in her absence to Jordan Byrd (“Byrd”) and Kareen Davis (“Davis”). Keifer made a similar request to Byrd and Davis and a meeting was set for August 19, 2024.

Keifer and Andy Shaw (“Shaw”), an estimator for Flanigan, met with Byrd and reviewed the bids submitted by Myers and Atlantic. Shaw discovered that Myers submitted Bid Proposal page BF.50 from the original Bid Proposal form and not from the current Addendum No. 2 Bid Proposal form and, as such, the description for Bid Item No. 24 was still “Flowable Fill for Existing Utilities” instead of “Miscellaneous Concrete.” Keifer and Shaw discussed this issue in Byrd’s presence and asked for either a copy of the page or permission to take a photograph of the page. Both requests were denied.

The PO returned from vacation on August 21, 2024. Before consulting with Byrd about Flanigan’s review of the bids, the PO independently reviewed all bids and discovered the same

¹ Queen was not the PO responsible for issuing Addendum No. 2 but was the PO from the date of its issuance forward.

issue with Myers' bid that Flanigan had flagged. The PO took no immediate action but instead took time to research the issue and determine options.

On August 23, 2024, Flanigan filed a protest with the PO ("Protest"), asserting that Myers' bid was nonresponsive because it was based in part on the original bid documents rather than Addendum No. 2. Specifically, Myers failed to incorporate the revised bid form page BF.50 into its proposal and, as a result, Myers did not provide a bid for 3,250 cubic feet of miscellaneous concrete as required by the IFB.

In response to the Protest, Myers sent a letter to the PO on August 29, 2024, claiming that its bid was responsive because it conformed in all material respects to the requirements contained in the IFB. Myers acknowledged it had inadvertently included an old version of page BF.50 that included the wrong description for Bid Item No. 24. Myers stated it made a handwriting error when completing BF.50 and that when it printed the replacement page it mistakenly printed the older page. Asserting that the mistake had no bearing "on the price, quantity, quality or delivery" and that its bid reflects "its price for Item P610-6.3 and identifies the correct quantity of Item P610-6.3 as identified in Addendum 2," Myers characterized the mistake as a minor irregularity that could be cured or waived pursuant to COMAR 21.06.02.04.²

In an email dated September 5, 2024, the PO asked Myers to "please confirm that the bid provided specifically for line item 24 P-610-6.3 (Flowable Fill for Existing Utilities), which should be (Miscellaneous Concrete) is in fact an accurate bid and Allan Myers can provide the

² Although this letter containing extrinsic evidence of Myers' intentions was referenced in the PO's Final Decision and included as Exhibit 10 to MAA's Agency Report, neither party mentioned it at the hearing. The information was volunteered to the PO before she requested bid confirmation from Myers, making it hard to determine what the PO independently knew (that is, from the face of Myers' bid) versus what she learned from Myers.

service with its bid.” Less than 20 minutes later, Mr. Dugan of Myers responded: “Monica, Myers confirms that our bid is accurate for line item 24 for Miscellaneous Concrete. We have all the money required for the item. If you need anything else then please don’t hesitate to contact us.”

On October 23, 2024, the PO sent a memorandum to Kareen Davis, the Director/Chief Procurement Officer, titled Procurement Officer’s Determination to Waive a Minor Irregularity. The letter provides the PO’s justification for why Myers’ mistake should be deemed a minor irregularity and waived.³

On January 16, 2025, the PO issued a Supplemental Procurement Officer’s Determination to Correct Mistake in Bid which stated that, after further review, the PO determined that the award to Myers was justified in accordance with COMAR 21.05.02.12 - Mistakes in Bid. The PO said the mistake was obvious on the face of the bid because the footer on page BF.50 was different from every other page in the bid proposal which identified Addendum No. 2. The PO stated that she confirmed with Myers that it mistakenly used the wrong form and that it could complete the project with miscellaneous concrete as provided in Addendum No. 2.

Later that same day, the PO also issued the Procurement Officer’s Decision and Final Agency Action on Bid Protest of P. Flanigan and Sons, Inc. (“PO’s Final Decision”), denying the Protest for essentially the same reasons as set forth in the Supplemental Procurement Officer’s Determination. The PO concluded that “the mistake and the intended correction was [*sic*] clear on the face of the bid form.”

³ The Board need not address this minor irregularity and waiver determination as the PO did not ultimately rely on it in the PO’s Final Decision that is the subject matter of this Appeal.

On January 24, 2025, Flanigan appealed the PO's Final Decision to the Board. At the merits hearing on July 23, 2025,⁴ Flanigan called Keifer, Flanigan's Vice President of Pre-Construction Thomas Williams, and the PO as witnesses at the hearing. Neither MAA nor Myers called any additional witnesses.

STANDARD OF REVIEW

A procurement officer's decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See Hunt Reporting Co.*, MSBCA No. 2783 (2012).

DISCUSSION

The Board finds that the correction is not clearly evident from the face of the bid documents, and the PO's decision to allow Myers to correct its mistake was in violation of law.

As the basis for allowing the correction, the PO's Final Decision relied solely on COMAR 21.05.02.12(C)(1) which states:

C. Confirmation of Bid. If the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn upon the written approval of the Office of the Attorney General if any of the following conditions are met:

(1) If the mistake and the intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

⁴ The merits hearing was originally set for May 6, 2025, but was rescheduled to July 23, 2025, based on the parties' Consent Motion to Reschedule Merits Hearing to Resolve a Discovery Dispute.

The PO Had Reason to Know a Mistake had been Made.

The PO testified that, upon returning from vacation on August 21, 2024, she independently reviewed Myers' proposal and determined it submitted the wrong page BF.50. She stated that the mistake was obvious because BF.50 was the only page of the Bid Proposal that did not reference "Addendum No. 2 – July 8, 2024" in the footer.

The PO May Request the Bidder to Confirm the Bid.

After conducting her research into mistakes in bids and potential fixes, the PO sent an email to Myers on September 5, 2024. She requested confirmation from Myers that Bid Item No. 24 Flowable Fill for Existing Utilities should actually be Miscellaneous Concrete, and that Myers would stand by its bid. Myers responded on the same day, confirming that the wrong form was used but that its bid was accurate for Miscellaneous Concrete.⁵ The Board finds that this exchange was not a confirmation of bid contemplated under COMAR 21.05.02.12, but rather a confirmation that Myer's bid contained a mistake.

The Mistake is Clearly Evident on the Face of the Bid Document.

There is no real dispute that the mistake was clearly evident on the face of the bid documents. The footer on page BF.50 was different from every other page of the Bid Proposal which identified Addendum No. 2. Additionally, Myers' acknowledgment of receipt and intent to incorporate Addendum No. 2 is additional evidence that the inclusion of one page from the original Bid Proposal form in the middle of the Addendum No. 2 Bid Proposal form was a mistake.

⁵ Requesting a confirmation in this case was further complicated by the fact that prior to the September 5, 2024 request, Myers had already responded to Flanigan's Protest and stated exactly what mistake it contended it had committed as well as the intended correction.

The Correction is Not Clearly Evident on the Face of the Bid Document.

“It is well settled that responsiveness must be determined from the face of the bidding documents.” *The National Elevator Co.*, MSBCA No. 1291 at 5 (1986). To preserve fairness in the competitive bidding process, the Board prohibits bidders from being allowed two bites of the apple and thus precludes extrinsic evidence of what was intended, where the intention cannot be determined from the face of the bid. *Porter Constr. Mgmt., Inc.*, MSBCA No. 1994 at 4 (1997).

The PO testified that she was not a subject matter expert for construction projects. She stated that she knew Addendum No. 2 changed Bid Item No. 24 from flowable fill to miscellaneous concrete but she did not know why. She only understood that the engineers had a reason to make the change. She further testified that when she discovered the mistake, she did not have any personal knowledge about the differences in the two products. More specifically, she did not know that miscellaneous concrete cost more than flowable fill by approximately \$30 per cubic yard. She only learned the differences later through a Google search.

The PO testified on multiple occasions that she sent the September 5, 2024 email request because she wanted to know whether Myers would honor the bid it had submitted. More specifically, she needed Myers to confirm that the same price would be honored for miscellaneous concrete as Myers’ bid for flowable fill. Significantly, however, the PO testified that she did not actually know whether Myers intended to bid flowable fill or miscellaneous concrete.

The uncontroverted evidence was that miscellaneous concrete was \$30 per cubic yard more expensive. It is telling that Flanigan’s bid for Bid Item No. 24 Miscellaneous Concrete was ten (10) times higher (\$10 per cubic yard or \$32,500.00) than Myers’ (\$1 per cubic yard or \$3,250.00). The PO did not recall what Atlantic bid for Bid Item No. 24. In deciding whether to

allow a correction, the PO “may review the prices submitted by other bidders relevant to the procurement at hand.” *M&J Powerwash, Inc.*, MSBCA No. 2362 at 10 (2003).

“[W]here a bid is subject to two reasonable interpretations under one of which it would be responsive and under the other nonresponsive, the bidder is not permitted to explain his intended meaning after bid opening and the bid is considered nonresponsive.” *Corcon, Inc.*, MSBCA No. 1804 at 8 (1994) (citing *International Signal & Control Corp.: Stewart-Warner Corporation*, B-185868, 76-1 CPD at 180 (1976)).

Here, it is impossible to determine, without resorting to extrinsic evidence, whether Myers just bid a lower number for miscellaneous concrete, or whether it bid a number intended for flowable fill but that it was willing to honor for miscellaneous concrete because this bid item amounted to only a small portion of the total contract value.⁶ Moreover, prior to determining whether the mistake was correctable, the PO had been provided extrinsic evidence of Myers’ intentions in both its August 29, 2024 Response to the Protest and in its September 5, 2024 response to the PO’s email confirming the mistake.

Because there are at least two reasonable possible interpretations of what was intended by the bid, and the PO admittedly did not know Myers’ intentions upon bid opening, her decision

⁶ At the hearing, MAA suggested that Bid Item No. 24 was a *de minimis* amount (.01%) of the overall \$32 million dollar contract, and that if the contract were awarded to Flanigan that it would cost MAA approximately \$1 million dollars more. This Board is not aware of a *de minimis* exception to responsiveness or COMAR 21.05.02.12(C)(1).

to allow Myers to correct its mistake, rather than finding the bid non-responsive, violated COMAR 21.05.02.12(C)(1).⁷

CONCLUSION

For the foregoing reasons, the Board SUSTAINS Appellant's Appeal.

ORDER

Based on the foregoing, it is this 11th day of August, 2025, hereby

ORDERED that P. Flanigan & Sons, Inc.'s Appeal is SUSTAINED.

/s/
Lawrence F. Kreis, Jr., Esq., Member

I CONCUR:

/s/
Senchal Dashiell Barrolle, Esq., Member

/s/
Michael J. Stewart Jr., Esq., Member

⁷ At the hearing, the Board raised the issue of whether MAA had the required written approval from the Office of the Attorney General ("OAG") to allow Myers to correct its bid. MAA submitted the alleged written approval as Board Ex. 1. It was an email exchange between the PO and an Assistant Attorney General ("AAG") in which the AAG made suggested edits to the January 16, 2025 Supplemental Procurement Officer's Determination to Correct Mistake in Bid. Although OAG approval might be implied from this email exchange, the Board finds it insufficient to meet the requirement in COMAR 21.05.02.12(C).

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 Opinion and Order in Docket No. MSBCA 3297, Appeal of P. Flanigan & Sons, Inc., under Maryland Aviation Administration Solicitation No. MAA-CO-25-001.

Date: August 11, 2025

_____/s/
Ruth W. Foy
Clerk