

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

Docket No. 2209	Date of Decision: 08/10/04
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under SHA Contract No. AW 6975186	
Appellant/Respondent: Midasco, Inc. State Highway Administration	

Decision Summary:

Rejection of all bids and resolicitation - Discretion - When a procuring agency and/or a procurement officer decide to reject all bids and resolicit bids, that decision will not be disturbed absent clear evidence that the decision was not fiscally advantageous to, or otherwise not in the best interest of, the State to such an extent that the decision was fraudulent or so arbitrary as to constitute a breach of trust.

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BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Midasco, Inc.    )  
  )  
  ) Docket No. MSBCA 2209  
Under SHA Contract No. AW        )  
  6975186                             )

APPEARANCE FOR APPELLANT:             Michael J. Jack, Esq.  
  Baltimore, Maryland

APPEARANCE FOR RESPONDENT:            Scot D. Morrell  
  Assistant Attorney General  
  Baltimore, Maryland

APPEARANCE FOR INTERESTED             None  
PARTY:  
(Rommel Engineering &  
Construction)

OPINION BY BOARD MEMBER BURNS

Appellant appeals the rejection of its protest of the State Highway Administration's (SHA) determination to reject all bids on the above-captioned Contract.

Findings of Fact

1. The Contract is for the furnishing and installation of advanced traffic management equipment on I-83, I-795 and I-70 in Baltimore County. SHA plans to resolicit the project with a revised scope of work and correct at least one quantity error in the readvertised Schedule of Prices.
2. Bids for this project were opened on August 24, 2000. Although 14 different companies purchased the bid documents, only two bids were received. Appellant was the apparent low bidder on the Contract with a bid in the amount of \$948,900.00. The Interested Party, Rommel Engineering and Construction, was the second low bidder with a bid in the amount of \$1,229,000.00.

3. One day prior to bid opening, the Appellant advised SHA that there was an error involving Bid item 8048. This estimated quantity bid item is for the furnishing and installing of 4-inch Schedule 80 Multi-Duct PVC Conduit-Direction Bored. The Index of Quantities indicates 430 linear feet for this item and Appellant's takeoff from the plans indicated 465 linear feet. The Schedule of Prices, however, where the bidders set forth their bids, indicated 8,215 linear feet for the conduit item. However, the Procurement Officer was not advised of the discrepancy until his receipt of the report discussed in Findings of Fact No. 6.
4. Appellant bid one penny per linear foot for this item resulting in an extended price of \$82.15. The Interested Party bid \$15.80 for the same item resulting in an extended price of \$129,797.00. The \$15.80 price bid by the Interested Party was approximately 65% of the SHA estimated price (engineers estimate) for this item. The record reflects that \$25.00 per linear foot was a probable actual cost.
5. SHA determined that such a discrepancy in the quantity for this item, for which Appellant bid one penny, could necessitate the use of the Variation in Estimated Quantities provision of the Contract, GP-4.04. The SHA Procurement Officer's decision reflects concern that negotiation for pricing of this item may or may not lead to Appellant's bid resulting in the lowest ultimate cost to the State.
6. The Procurement Officer's decision also reflects concern that Appellant's bid may be materially unbalanced. However, the Procurement Officer declined to reject Appellant's bid on such ground as recommended by his subordinates in a report prepared by his subordinates dated September 19, 2000 and testified that, in his opinion, the bid by the Appellant was not an unbalanced bid.

7. The report presented to the Procurement Officer was prepared pursuant to an SHA policy requiring analysis of bids where the low bid was either 10% over the engineer's estimate or 15% under the engineer's estimate (over/under<sup>1</sup> review).
8. Ultimately, the SHA Procurement Officer determined to reject all bids pursuant to COMAR 21.06.02.02C and resolicit the project to clarify and correct the discrepancy for all potential bidders pursuant to COMAR 21.06.02.02. COMAR 21.06.02.02C provides:

C. Rejection of All Bids or Proposals.

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:

(a) The absence of a continued need for the procurement;

(b) The State agency no longer can reasonably expect to fund the procurement;

(c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;

(d) Prices exceed available funds and it would not be appropriate to adjust

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<sup>1</sup>Because Appellant's bid was more than 15% below the engineer's estimate, such a review was undertaken. SHA issues approximately 300 - 350 procurements annually. Of this number over/under reviews are triggered by the low bid in approximately 20% of the procurements. This review process leads to a determination to reject all bids and resolicit approximately 3 to 5 times a year. Sometimes SHA will not reject the bids and resolicit a procurement even where the over/under review process reveals errors in the bid documents.

quantities to come within available funds;

(e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;

(f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or

(g) All otherwise acceptable bids or proposals received are at unreasonable prices.

(2) A notice of rejection of all bids or proposals shall be sent to all vendors that submitted bids or proposals, and it shall conform to §B(2).

9. On October 2, 2000, SHA notified all bidders of its decision to reject the bids and to readvertise the project at a future date.
10. Appellant filed a bid protest on October 5, 2000 protesting SHA's decision to readvertise the project.
11. SHA's Procurement Officer issued a final decision dated October 23, 2000 rejecting Appellant's bid protest and on November 3, 2000 Appellant filed a Notice of Appeal with this Board.
12. The Maryland State Board of Contract Appeals issued a decision dated January 31, 2001. The Board at that point in time consisted of only two members, Chairman Rosencrantz and Member Harrison. Chairman Rosencrantz wrote a decision sustaining Midasco's appeal. Member Harrison wrote a decision denying Midasco's appeal. A tie resulted.
13. In order to deal with this situation, the two Board members agreed that "the only fair way to resolve a division among

Board Members is to have the Appellant prevail where one of the two Board Members finds that the Appellant's appeal should be sustained." Opinion of Chairman Rosencrantz at p.9.

14. Respondent State Highway Administration filed a petition for Judicial Review of the Board decision in the Circuit Court for Baltimore City on February 28, 2001.
15. By an order dated September 24, 2001, Judge John N. Prevas<sup>2</sup> found that the Board's decision represented "neither a split or divided decision nor a majority decision" and that the Board's opinion did not represent a "decision" which the Circuit Court could review. Accordingly, Judge Prevas remanded the appeal to the Board (which at that point once again had three members) for a decision.<sup>3</sup>

#### **Decision**

Respondent has filed a Motion for Dismissal, or, in the alternative, for Summary Disposition.

The Maryland Court of Appeals has ruled that although agencies are permitted to dispose of cases by summary disposition, this Board is required to promulgate proper descriptions and procedures through formal rulemaking before it may dispose of cases by summary disposition. Engineering Management Services, Inc. v. Maryland State Highway Administration, 375 Md. 211, 236 (2003).

Although the Board has submitted proposed rules dealing with summary disposition procedures, those rules have not been formally approved.

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<sup>2</sup>The "True Test Copy" of the Order forwarded from the Clerk of the Circuit Court for Baltimore City to the Board has the stamped name of Judge Joseph Pines as the signatory of the opinion. At the Hearing held on June 1, 2004, counsel for both parties agreed that the Circuit Court Clerk's Office had made an error in attaching Judge Pines' name to the Order and that Judge Prevas had issued the Order.

<sup>3</sup>Further delay in the issuance of a decision by a full Board resulted, in part, from the protracted illness of Board Chairman Rosencrantz.

The Board, therefore, is without authority to grant Respondent's Motion for Summary Disposition at this time.

The Board also declines to grant Respondent's alternative Motion for Dismissal. Due to the unique factual and procedural circumstances of this case, the Board finds that granting Respondent's Motion to Dismiss would be inappropriate at this point in the proceedings.

Be that as it may, the Board will adopt Chairman Harrison's Dissenting Opinion in the non-decision of January 31, 2001 and deny Appellant's protest.

In the context of the provisions of the General Procurement Law and COMAR regarding rejection of all bids and resolicitation, a procurement agency's decision to reject and resolicit may not be disturbed unless it can be shown that the decision was not fiscally advantageous or otherwise not in the best interest of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust. Megaco, Incorporated, MSBCA 1924, 5 MSBCA ¶385 (1995) p. 5.

In this case, pursuant to COMAR 21.06.02.02, the SHA determined it was "in the best interest of the State of Maryland to reject all bids" and resolicit the project (although the resolicitation never occurred).

After a review of the record, we agree with Chairman Harrison's conclusion from his dissenting opinion that "the record herein fails to reflect that the Procurement Officer's decision to reject all bids and resolicit when he became aware of the problem, particularly given the magnitude of the error in the Schedule of Prices, was fraudulent or so arbitrary as to constitute a breach of trust. See In the matter of the Admin. Appeals of Solon Automated Services, Inc., Circuit Court for Baltimore County, Misc. Law Nos. 82-M-38 and 82-M-42 (1982); State v. Scarpulla, Inc., Case No. 84 347 041/CL28625 Circuit Court for Baltimore City, May 31, 1985;

Megaco, Incorporated, MSBCA 1924, 5 MSBCA ¶385 (1995) p. 5.”

The Board noted in Megaco, Incorporated, supra, that “[W]hile there may be factual scenarios where prejudice to bidders and harm to the competitive process outweighs the agency’s interest in resolicitation, this is not one of them.”

The Board finds that to be the case in this situation as well. Therefore, Appellant’s appeal is denied.

Wherefore it is Ordered this                    day of August, 2004 that the appeal is denied.

Dated:

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Michael W. Burns  
Board Member

I Concur:

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Robert B. Harrison III  
Chairman

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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 2209, appeal of Midasco, Inc. under SHA Contract No. AW 6975186.

Dated:

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Michael L. Carnahan  
Deputy Recorder