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SUMMARY ABSTRACT  
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. MSBCA 2224	Date of Decision: 6/20/01
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under SHA Contract No. PG 3415173R	
Appellant/Respondent: Pile Foundation Construction Co., Inc. State Highway Administration	

Decision Summary:

Bid Protest - Timeliness - A protest filed more than seven (7) days after a protestor knew or should have known of the grounds for protest is late and the Board is without jurisdiction to hear the appeal from the denial of the protest.

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BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Pile Foundation )  
Construction Co., Inc. )  
)  
) Docket No. MSBCA 2224  
Under SHA Contract No. )  
PG 3415173R )  
)

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OPINION BY BOARD MEMBER HARRISON

Appellant Pile Foundation Construction Co., Inc. (Pile) timely appeals from a decision by the State Highway Administration (SHA) denying on the merits and dismissing as untimely Pile's bid protest. Pile submitted a protest against the award to the apparent low bidder, Tidewater Construction Corp./Kiewit Construction Co./Clark Construction Group, Inc., a joint venture (TKC), of a contract for construction of the foundation of the new Woodrow Wilson Bridge (Bridge). The protest

was filed on April 3, 2001 and SHA rendered its decision on April 9, 2001. The instant appeal was filed with the Appeals Board (Board) on April 20, 2001. SHA decided that execution of the Contract must be made without delay to protect substantial State interests. Execution (award) and notice to proceed occurred on May 16, 2001. On May 17, 2001 the Circuit Court for Anne Arundel County denied and dismissed with prejudice Appellant's Complaint for Temporary Restraining Order and Injunctive Relief. The Board heard evidence and argument on both the merits of the protest and its timeliness on June 11<sup>th</sup> and 12<sup>th</sup>, 2001 and this opinion follows.

#### Findings of Fact

1. The original Woodrow Wilson Bridge, which spans the Potomac River at the southern section of the Washington Beltway to connect the Maryland and Virginia segments, was constructed in 1961. From both structural and traffic capacity perspectives, the original bridge has limited remaining useful life. Designed to carry a 75,000 vehicle per day load for the next twenty years, that capacity was reached in only eight years. The bridge remains congested, carrying close to three times the original design traffic volume.
2. Maryland, Virginia, the District of Columbia, and the federal government are the jurisdictions concerned with the bridge. Because of the need to alleviate the structural and capacity issues, these jurisdictions have agreed that the a new bridge (Bridge) will be constructed, parallel to the original span, as a replacement for the original bridge. Hence the Woodrow Wilson Bridge Project (Project).
3. The Project is a public works undertaking by the State of Maryland, which will construct the Bridge and the Maryland roadways and interchanges, and the Commonwealth of Virginia, which

will construct the Virginia roadways and interchanges. The Project is seven and one half miles long and begins, on the Virginia side of the Potomac River, west of Telegraph Road, near the Claremont interchange. It crosses through the Telegraph Road and US Route 1 interchanges and proceeds over the approximately one mile long river crossing, joining Rosalie Island with the Maryland shore. The Project extends through the I-295 and Maryland Route 210 interchanges, ending east in the vicinity of Livingston Road.

The Project includes:

(a) the Bridge

- side by side twin drawbridges
- Bridge sited on an alignment immediately south of existing bridge
- drawbridges with 70 foot minimum navigational clearances
- Bridge to open with ten lanes with a provision for two additional lanes of HOW/express bus/transit; and

(b) Mainline I-95 expressway reconstruction and adjoining interchanges.

4. The four interchanges adjacent to the Bridge, which are part of the Project, will be constructed to allow for smoother traffic flow, increased access, and roadway widening. These interchanges include:

- Telegraph Road
- US Route 1
- I-295

- Maryland Route 210.

In addition, some improvements along cross streets are envisioned.

5. Maryland's portion of the Project consists of more than twenty phases and is expected to cost approximately \$1 billion. SHA will construct the centerpiece of the Project, the Bridge, remove the existing bridge, and perform all of the highway and interchange work located in Maryland. The first construction phase of the Project, the initial dredging work in the Potomac River, was completed in February 2001. The next construction phase involves the Contract at issue in this appeal.
6. The Contract at issue in this appeal, Contract No. PG3415173R (Contract) is for construction of pier foundations for the Bridge. This work extends from just west of Rosalie Island in Prince George's County, at the east end, to Jones Point Park in Alexandria, Virginia, at the west end, for a total distance of 1.136 miles.
7. The Contract includes construction of various foundations, including pier pedestals, pile caps, piles, post-tensioning bars and tendons, submarine cable pipes, stand pipes, and electrical systems for lighting. This work requires installation of cofferdams, excavation, dewatering, and other activities needed for completion of the foundations. Additionally, a steel sheet pile bulkhead will be installed along the Virginia shoreline in Jones Point Park. Monitoring the existing bridge for vibration and movement and dredging are also part of the Contract.
8. The solicitation documents, as amended, set the time and date for public opening of sealed bids at noon on March 22, 2001. By the appointed time, five bids for the Contract had been received. At the bid opening, the name of each bidder and the total of its bid was announced. The five bidders and their total bids are listed

below, together with the unit price of each bidder for Line or Bid Item 4001 - an approximate quantity of 44,700 Cubic Yards of Dredging, the item that is of concern in this appeal.

	Total <u>Bid</u>	Item <u>4001</u>
TKC	\$125,396,511	\$ .01
Pile	128,480,712	11.20
Jay Cashman, Inc.	134,122,525	25.00
Potomac River Constructors	134,454,905	5.00
Modern Continental Construction Co., Inc.	187,347,360	25.00

9. Several Pile representatives attended the March 22, 2001 bid opening, including Pile's President, Mr. Rivera. At sometime after the bids had been read aloud, Mr. Rivera and another person employed by Pile who worked for Mr. Rivera were shown to the table where Mr. Krimm of SHA, who was in charge of the opening of the bids, was sitting. One of the Pile representatives (Mr. Rivera or his employee) asked to see the bid documents submitted by TKC, the apparent low bidder. Mr. Rivera and his employee were provided the TKC bid book. In Mr. Krimm's presence, the two Pile representatives (Mr. Rivera and his employees) inspected "page by page" TKC's Schedule of Prices which were set forth in sixty-one line items at pages 886-899 at the back of the 2-3 inch thick 918 page bid book. While Mr. Rivera and his employee were engaged in reviewing the TKC Schedule of Prices, Mr. Rivera heard someone at the table say that the bid prices submitted by the bidders would be posted on the Internet at some later time. Upon hearing this, Mr. Rivera decided to wait until the prices were on the Internet to further review the prices and so he returned the bid book to SHA and left the building.

The Board finds that Appellant was afforded a reasonable opportunity at bid opening to review the TKC bid, did review the bid and then chose to wait to further review the bid prices when they became available on the Internet.

10. On April 3, 2001, twelve days after the bid opening, Pile filed by facsimile, a bid protest with SHA. Asserting that its protest was timely, Pile protested that because TKC's unit price for Bid Item 4001 - Dredging was \$.01 per cubic yard, TKC's bid was unbalanced and such bid for Bid Item 4001 rendered TKC's bid non-responsive and TKC non-responsible.
11. At the hearing of the appeal Mr. Rivera testified that he considered the provisions of GP-2.17B(3)(b) to require the State to reject the TKC bid as being non-responsive and TKC as being non-responsible because the amount bid for Bid Item 4001 was not enough to do the work involved.
12. GP-2.17 Rejection of Individual Bids or Proposals provides:
  - (a) Any bid may be rejected in whole or in part when it is in the best interest of the State to do so.
  - (b) Reasons for rejection of a bid may include but are not limited to:
    - (1) The bid is not responsive i.e., it does not conform in all material respects to the solicitation.
    - (2) Unreasonable price.
    - (3) The bidder submitting the bid is determined to be nonresponsible. A determination of nonresponsibility may be made for, but is not limited to any of the following reasons:
      - (a) Bidder debarred or ineligible and period of debarment

or ineligibility not expired.

- (b) The unit prices contained in a bid are unbalanced.
- (c) Evidence of collusion among bidders.
- (d) Inadequate quantity and /or quality of experience, plant, equipment, financing, manpower or other resources required to perform the Contract.
- (e) Bidder's workload which, in the judgement of the Administration, might hinder or prevent the prompt completion of the subject work if awarded.
- (f) Default by the bidder on other Contracts.
- (g) Failure to pay or satisfactorily settle all reasonable and just bills due for labor and material on prior or current Contracts.
- (h) The same person has an interest in more than one bid on a Contract exclusive of being named by another bidder as a subcontractor.
- (i) Failure to perform satisfactorily on other Contracts awarded, and the conditions leading to unsatisfactory performance remain unresolved.

(j) Any other reason affecting the bidder's ability to perform, or record of business integrity.

(k) Bidder not otherwise qualified and eligible to receive an award under applicable laws and regulations.

(4) The bidder or offeror fails to supply information to the procurement officer promptly, after notification from the procurement officer that such information is required in connection with a determination to be made pursuant to this GP-2.17.

13. Bid Item No. 4001 is for dredging, which is described in Category 400 of the Contract Special Provisions. Under the specifications at page 788 dredging includes "all dredging for the proposed access channel and staging/berthing area adjacent to the National Harbor site, as shown on the plans, dredging adjacent to the bulkhead at Jones Point Park [and other maintenance and debris removal]."

14. A portion of the dredging work covered by Item No. 4001 is "optional," i.e., the necessity for this portion of the dredging work will be determined by the bidder and will depend upon the bidder's choice of how to get its equipment to the work area. This "optional" aspect of the bid item is provided in Category 400 of the Special Provisions, in two places. At page 788, the Special Provisions state:

Dredging at the access channel and staging/berthing area, as shown on the Plans, is at the Contractor's option based on the Contractor's requirements for access to the staging area.

At page 793, the Special Provisions inform that:

The dredging of the access channel, staging/berthing area, the area adjacent to Rosalie Island, the Jones Point Park bulkhead area and the construction channel adjacent to the proposed bridge (previously dredged under an earlier contract), is for the convenience of the Contractor.

Thus, the need by the contractor to dredge in the areas described in these parts of the Special Provisions will be dictated by the contractor's means and methods for access to these areas.

- 15. TKC's bid for Line Item 4001 recognized the optional nature of certain of the dredging work. At SHA's request TKC explained the reasons for its penny bid to SHA in writing before the Procurement Officer decided the protest.
- 16. TKC stated that it had examined the plans and specifications and concluded that it would not have to dredge either the access channel or the staging/berthing area but would have to perform bulkhead dredging. Because only a single estimated quantity of 44,700 cubic yards had been given for Item 4001 and TKC wanted to distinguish between those quantities which it would have to perform and those which it would not, during the pre-bid process, TKC submitted the following question, which was answered by SHA for all potential bidders as Question 144.

Question 144: Can you provide a breakdown of the [State's] quantity for dredging of the optional access channel, optional staging area, and the required bulkhead area?

Response: The breakdown of dredging quantity is as follows:

- Access Channel 22,400 CY
- Staging Area 17,400 CY
- Bulkhead Area 4,900 CY

These quantities include the one-foot over dredge allowance.

Contract at page 107.

17. In its written response to the Appellant's protest, TKC went on to represent the rationale for its penny bid as follows:

TKC reasonably interpreted the bid documents to mean that of the 44,700 CY estimated quantity listed in the bid form, only 4,900 CY were required for contract performance. According to TKC's intended means and methods for performance of the work, it does not intend to perform the optional dredging. TKC evaluated Line Item 4001 and decided to submit a price \$0.01 per CY for substantially optional work "at its convenience" that it did not intend to perform, accepting a nominal fee for the small amount of associated required work.

TKC also asserted that the anticipated cost of the required portion of dredging under Item 4001 would be a "de minimis increase" to the cost of the large amount of dredging incidental to work under other bid items.

18. In the final agency decision on Pile's protest, the Procurement Officer accepted TKC's explanation.
19. In relevant part the Procurement Officer's Final Decision provided:

Pile, citing GP-2.217, claims that the TKC's bid must be rejected because it contained a penny bid for a unit price and is therefore unbalanced. As stated in your protest, GP-21.17 states that:

REJECTION OF INDIVIDUAL BIDS OR PROPOSALS

- (a) Any bid may be rejected in whole or in part when it is in the best interest of the State to do so.
- (b) Reasons for rejection of a bid may include but are not limited to: . . .

- (3) The bidder submitting the bid is determined to be nonresponsible. A determination of nonresponsibility may be made for, but not limited to, any of the following reasons: . . .

- (b) The unit prices are unbalanced.

(Emphasis added).

SHA has determined that TKC's responsibility is not impacted by the penny bid for Item 4001. Under the cited General Provision, the rejection of an unbalanced bid is tied to the procurement officer's discretionary determination of responsibility. In regards to responsibility determinations, the MSBCA has consistently held that the state procurement officer has broad discretion and latitude and the MSBCA will not disturb such a determination unless it is found to be unreasonable, arbitrary, an abuse of discretion or contrary to law or regulation.

As part of its determination regarding whether the bid was unbalanced, SHA reviewed TKC's unit bid prices to determine whether the bid is "mathematically unbalanced" and, if so, whether the bid is "materially unbalanced." In order to be rejected as unbalanced, a bid must be both mathematically and materially unbalanced.

A mathematically unbalanced bid is one in which the bid contains understated and overstated unit prices. TKC's letter of April 7, 2001 (Attachment B), explains their position that its bid is not mathematically unbalanced. TKC indicates it did not disproportionately allocate its costs to other items because of its bid on Item 4001.

Assuming arguendo, that TKC's bid is mathematically unbalanced, SHA then must determine whether the bid is also materially unbalanced. In this instance, the bid is materially unbalanced if there is reasonable doubt that award to TKC would not result in the lowest ultimate cost to SHA.

After reviewing the bids, we have determined that TKC's bid is not materially unbalanced. The difference between

TKC's total bid price and Pile's total bid price is over \$3 million dollars; while the difference between the two bids for this particular item is only \$500,193.00. Such a disparity would not displace TKC's bid as the lowest ultimate cost to SHA.

Nothing in Maryland's procurement law prohibits a bidder from bidding an item or a contract below cost. Pile's protest fails to even allege that TKC's bid may not result in the lowest cost to SHA. TKC submitted the lowest responsive bid for the contract. TKC's responsibility is not impacted by the issues raised by Pile.

Based on the above, we have determined that the TKC's bid is not materially unbalanced and that Pile's protest is not timely. Therefore, your protest is denied.

20. The Board has determined for reasons set forth below that the protest was not timely filed and the Board therefore lacks jurisdiction to entertain the merits of the appeal. However, we do not conclude that the Procurement Officer's determination would be in error nor does the record reflect that penny bids are not permitted on the Project.
21. SHA filed a Motion to Dismiss, Or In the Alternative, Motion For Summary Disposition on timeliness grounds. The Board de-ferred ruling on the Motion as a preliminary matter and heard evidence and argument on whether the protest was timely at the hearing of the appeal. Based on the evidence of record the Board concludes that Appellant failed to file its protest with SHA within seven days of when it knew or should have known of the basis for its protest. This failure required dismissal of the protest by SHA and requires dismissal of this appeal by this Board.

#### Decision

On April 3, 2001, SHA received a written protest from Appellant. The stated ground for the protest was that the TKC bid contained a penny bid price for Line Item 4001, Dredging and thus the unit price

for the dredging covered by Line Item 4001 was unbalanced. The written protest asserted that a bidder who submits an unbalanced bid is not responsible and that an unbalanced bid is non-responsive. At the hearing of the appeal it was argued by the Appellant that if any line item bid is unbalanced, the bid is unbalanced. SHA issued the Procurement Officer's Final Decision on April 9, 2001, denying Pile's protest on both timeliness and substantive grounds (i.e., the merits).

COMAR 21.10.02.03B states in relevant part that ". . . protests [other than those based on apparent deficiencies in the solicitation] shall be filed no later than seven days after the basis for the protest is known or should have been known, whichever is earlier." In relevant part COMAR 21.10.02.03C provides "[a] protest received by the procurement officer after the time limits prescribed in § A or §B may not be considered." The Board has concluded that such a filing is jurisdictional, and failure to file in a timely manner deprives this Board of jurisdiction to hear the appeal. ISMART, LLC, MSBCA 1997, 5 MSBCA ¶417(1997) (dismissing appeal on grounds the protest was at least one day late), affirmed, MSBCA v. ISMART, LLC, No. C97-034415 (Cir. Ct. for Howard County, March 17, 1998).

Pile's protest is on grounds that the TKC bid allegedly was unbalanced because it contained a penny bid for Line Item 4001 and it would cost more than one penny per cubic yard to do the work. Pile's protest is untimely because it either knew or should have known of the basis of its protest more than seven days prior to its April 3<sup>rd</sup> letter of protest. SHA conducted a public bid opening for the Contract on March 22, 2001. Several representatives of Pile attended the bid opening. At the bid opening, the names of the bidders for the Contract and their respective bid amounts were announced. TKC was the apparent low bidder with a bid in the amount of \$125,396,511.00. Pile had the next lowest bid of \$128,480,712.00.

Following the announcement of the bids, two representatives from Pile, Mr. Rivera and his employee, were permitted to review the bid documents<sup>1</sup> of the apparent low bidder, TKC. The Pile representatives were granted permission to review the TKC bid, and such review included looking at the Schedule of Prices form at the back of the bid book. By doing, Pile had an opportunity to determine if there were grounds for protest based on TKC's bid documents. The contents of TKC's bid, including the penny pricing for Line Item 4001 and the basis for Pile's protest, were made available on the date of the bid opening. Thus, the seven-day time limit started on March 22, 2001, the date that Pile knew or should have known of the basis of its protest. A timely protest was due seven days from that date, or March 29, 2001. Pile's protest was not received by SHA until April 3, 2001.

This Board has strictly construed the seven-day filing requirement. See ISMART, LLC, supra, (appeal dismissed on the grounds that protest was at least one day late); See also, AEPCO, Inc., MSBCA 1844, 4 MSBCA ¶370(1994) (while the allegations of the appeal are serious, the Board only has jurisdiction to hear them if the protest was filed timely), A.D. Jackson Consultants, Inc., MSBCA 1817, 4 MSBCA ¶366(1994) (if an offeror fails to file its protest in a timely fashion, the protest may not be considered by the Procurement Officer or by the Board).

The Board has held that protests based on alleged defects apparent on the face of the bid document are to be filed within seven days of the bid opening. Pile argued that the time frame began when the bid tabulations were posted on SHA's website because it was denied meaningful access to the bid documents and could not see the penny bid

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<sup>1</sup> As material to the protest and appeal herein, the bid documents are the documents included in the bid book.

item when Mr. Rivera and his employee flipped through the TKC bid book. The facts do not support these contentions. The Board finds that Appellant had meaningful access to the TKC bid documents at bid opening and could see the penny bid for Line Item 4001. Therefore, there are no exceptions to the general principle that the seven days commence to run at bid opening. This principle is illustrated in Century Elevator, Inc., MSBCA 2125, 5 MSBCA ¶466(1999). Therein, the protestor attended the bid opening on December 16, 1998 for the repair and maintenance of elevators, escalators and moving walkways at BWI Airport. At the conclusion of the bid opening, a representative of Century Elevator examined the bids, including the bid of the apparent low bidder, Millar. In oral conversation between the Maryland Aviation Administration (MAA) and Century Elevator at the conclusion of the bid opening and the next day, MAA officials conveyed to Century Elevator that they would perform a review of the bids to determine whether the apparent low bidder had in fact submitted the lowest responsive bid. On December 23, 1998, Century Elevator received notification from MAA that Millar was the successful low bidder. Century Elevator filed a protest to MAA on December 30, 1998 (fourteen days after the bid opening) claiming Millar's bid was not responsive because it failed to include a Certificate of Good Standing from the Department of Assessments and Taxation as was required in the Special Provisions. The Board held that the seven-day rule looks to the time the protestor has actual or constructive knowledge of the alleged defect, not the time the agency identifies the successful low bidder. The failure of Millar to include the Certificate of Good Standing was apparent at the time of bid opening and the protest was filed more than seven days after Century knew or should have known of the basis of its protest. Accordingly, the Board held it was without jurisdiction to consider the protest. See also The Traffic Group, Inc., MSBCA 1883 and 1888, 4 MSBCA

¶381(1995); Clean Venture, Inc., MSBCA 2198, 5 MSBCA ¶486(2000).

The facts developed in this appeal also require the Board to dismiss Appellant's appeal of the denial of the protest. The protest on the alleged "unbalanced" price issue was not filed until April 3, 2001. Appellant had at least constructive knowledge of this issue from the time the bids were made public at the bid opening on March 22, 2001. The protest was filed more than seven days after Pile had knowledge of the basis of its protest. Accordingly, the Board is without jurisdiction to hear the appeal since compliance with COMAR 21.10.02.03 is a jurisdictional threshold in the consideration of the protest. ISMART, LLC, supra. Thus, the appeal must be dismissed. Accordingly, it is Ordered this            day of            2001, that the appeal is dismissed with prejudice.

Dated:

\_\_\_\_\_  
Robert B. Harrison III  
Board Member

I concur:

\_\_\_\_\_  
Randolph B. Rosencrantz  
Chairman

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 2224, appeal of Pile Foundation Construction Co., Inc. under Contract No. PG 3415173R.

Dated:

\_\_\_\_\_  
Mary F. Priscilla  
Recorder