

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

Docket No. 2312	Date of Decision: 01/16/03
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Aviation Administration Contract No. MAA-CO-03-014	
Appellant/Respondent: FMC Technologies, Inc. Maryland Aviation Administration	

Decision Summary:

Bid Protest - Timeliness - COMAR 21.10.02.03(B) requires that a bid protest be filed no later than seven (7) days after the basis for the protest is known or should have been known, whichever is earlier.

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BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of FMC)
Technologies, Inc.)
)
) Docket No. MSBCA 2312
Under Maryland Aviation)
Administration Contract No.)
MAA-CO-03-014

APPEARANCE FOR APPELLANT: Daniel S. Katz, Esq.
Tydings & Rosenberg, LLP
Baltimore, MD

APPEARANCE FOR RESPONDENT: William A. Kahn
Louisa H. Goldstein
Assistant Attorneys General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None
(Oscar J. Boldt & Company)

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the Maryland Aviation Administration's (MAA) final agency action of November 8, 2002 denying Appellant's protest, challenging the proposed award of the above-captioned Contract for loading bridges to the Interested Party, Oscar J. Boldt & Company (Boldt). In its protest, Appellant alleged that Boldt's bid was nonresponsive because its bid bond incorrectly referred to the number of a previously cancelled solicitation. MAA rejected Appellant's protest as untimely and also rejected it on the merits. For the reasons that follow, we shall dismiss the appeal.

Findings of Fact

1. On or about July 9, 2002, MAA issued an Invitation for Bids (IFB), IFB No. MAA-CO-02-026, seeking bids for loading bridges at Baltimore/Washington International Airport. Bid opening was conducted on August 13, 2002. MAA received bids from

Appellant, Boldt and one other bidder. MAA rejected the bids of Appellant and Boldt as nonresponsive because they failed to use revised bid forms provided by addendum. After rejecting the two bids, on September 19, 2002, MAA cancelled this procurement because the third bidder's bid was unreasonably high. There was no protest of the cancellation.

2. On October 2, 2002, the Board of Public Works (BPW) approved a resolicitation for the loading bridges by expedited procurement utilizing direct solicitation and competitive bidding.
3. Prior to BPW approval, the resolicitation, IFB No. MAA-CO-03-014, was sent to potential bidders on September 24, 2002. The direct solicitation included a copy of the technical specifications, plans and bid forms. The potential bidders were informed that a pre-bid conference and site visit were scheduled for October 1, 2002, and that the public bid opening would be on October 16, 2002.
4. MAA subsequently changed the bid opening date, by addendum, to October 11, 2002.
5. MAA conducted a public bid opening on October 11, 2002. Appellant submitted its bid by overnight delivery. No representative of Appellant attended the bid opening. Three (3) bids were received.
6. At the public bid opening, the prices of the three (3) bidders were announced, and the bids and other documents included with the bids were available for public review and inspection. Boldt submitted the lowest bid at \$2,279,652.00; Appellant submitted the second lowest bid at \$2,450,151.00 and Standoff and McKeown General Contractors submitted the highest bid at \$2,897,777.00.
7. A representative of Standoff and McKeown requested permission to review the bids at the bid opening and was allowed to do

so.

8. Boldt's bid bond, which was submitted with its bid, was on the form provided with the resolicitation bid package for the Contract. Preprinted on the form at the bottom was the correct Contract number, No. MAA-CO-03-014; Boldt or its surety inserted the correct title of the contract: "Loading Bridges Replacement at Baltimore/Washington International Airport." However, in the space provided for the Contract number, Boldt or its surety incorrectly inserted the number of the prior, cancelled solicitation, MAA-CO-02-026.
9. Seven (7) days after the October 18, 2002 public bid opening, Appellant's counsel called MAA's Ms. Hattie Crosby, the bid opening officer for the procurement, and requested to inspect the bids. Because of Ms. Crosby's schedule, an inspection of the bids was not arranged that day, and Appellant did not inspect the bids until October 31, 2002, when a different representative, Mr. Torres, an employee of Appellant, visited MAA. However, Appellant's protest, complaining of the defective bid bond, was not filed until November 5, 2002, five (5) days after Mr. Torres had inspected the bids.
10. In a final agency action dated November 8, 2002, MAA rejected the protest on its merits and also because it was not timely filed. This appeal followed.

Decision

A. Timeliness

COMAR 21.10.02.03(B) provides that a bid protest must be filed no later than seven (7) days after the basis for a protest is known or should have been known, whichever is earlier. In this case, the basis for the protest was apparent from the bid bond itself, which was included with Boldt's bid. The bids and accompanying bid documents were available for public review and inspection at and after the bid opening on October 11, 2002. However, Appellant did

not attend the bid opening and did not inspect the bids until October 31, 2002. Appellant's bid protest was not filed until November 5, 2002.

This Board has held that, where a bid is available for inspection at bid opening and the ground for protest would be apparent from a review of the bid, a protest upon such ground must be filed within seven (7) days of bid opening. EG&G Astrophysics, MSBCA 1468, 3 MSBCA ¶226(1989); Potowmac Engineers, MSBCA 2257, 5 MSBCA ¶ ____ (January 17, 2002); Pile Foundation Construction Co., Inc., MSBCA 2224, 5 MSBCA ¶501(2001); Alliance Roofing and Sheet Metal, MSBCA 2251, 5 MSBCA ¶502(2001); Clean Venture, Inc., MSBCA 2198, 5 MSBCA ¶486(2000). The bid opening herein was conducted on October 11, 2002, and the bids were available for public inspection at that time. Thus, Appellant's protest concerning the apparent defect in the bid bond should have been filed no later than October 18, 2002. Its protest, filed on November 5, 2002, was late.

Did MAA properly reject the protest as untimely? Appellant's obligation was to be diligent. DASI Industries, Inc., MSBCA 1112, 1 MSBCA ¶49(1983). Counsel for Appellant, by telephone, on the seventh (7th) day following bid opening, October 18, 2002, requested an opportunity to review the bids. Because of Ms. Crosby's schedule an inspection of the bids was not arranged that day.

Did this action operate to toll the running of the seven (7) days? There is no statutory or regulatory provision that tolls the time for protest. That time began to run from the date that bids were available for inspection, October 11, 2002, and we hold that it was not stopped by Appellant's delayed request to inspect on October 18, 2002, at least absent an "insuperable barrier," not present in this case. The operation of the deadline for protest, we conclude, like a statute of limitations, is not suspended once it begins to run. Walko Corp. v. Burger Chef Systems, Inc., 281 Md. 207(1977); see Hecht v. Resolution Trust Corp., 333 Md.

324(1994).

We further conclude that Appellant's inspection of the bids on October 31, 2002 did not start a new, seven-day period for protest. It was the seventh (7th) day after bid opening before Appellant, through counsel, asked to see the bids, which had been available for inspection on October 11, 2002. Because of Ms. Crosby's schedule, bids were not made available for inspection on October 18, 2002 and were not inspected until October 31, 2002. Thus, even if we were to conclude that the seven-day period for protest was interrupted during this interval, it resumed when Appellant's Mr. Torres inspected the bids on October 31, 2002. To enable itself to have made a colorable contention of timeliness, Appellant's protest should have been filed that day, and it was not.

A Procurement Officer, even if requested, may not extend the time for filing a protest, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 40-41(1984); and the record does not reflect that Ms. Crosby, speaking for the Procurement Officer, interposed any insuperable barrier during her telephone conversation with Appellant's counsel.

In short, Appellant's protest was not timely filed, and, accordingly, this appeal must be dismissed. Clean Venture, Inc., *supra*.

B. Merits of the Protest

Notwithstanding that we have concluded that we lack jurisdiction over the appeal because of the lack of a timely protest, we shall discuss the merits of the appeal, even though constituting *dicta*, so that the Board's view of the bid bond defect issue herein may be known regarding similar disputes in the future.

For its bid bond, Boldt used the proper form, which was supplied by MAA with the second (2nd) solicitation. However, Boldt inserted, as the solicitation number, No. MAA-CO-02-026, a solicitation number that was not correct and, because it had been

cancelled, no longer existed. Does the insertion of the previously cancelled solicitation number under the facts presented by this record raise a reasonable doubt concerning whether the bid bond would have been enforceable thus resulting in a nonresponsive bid which must be rejected?

We start with the statute. *Section 13-208* of the *State Finance and Procurement Article* (statute) requires "proper" security. We conclude that the intent of the General Assembly in use of the word "proper" in connection with bid security in the statute was that a bid bond be enforceable by the State against the surety in the event of a default by the contractor. Thus the issue for the Board is whether the inclusion of the incorrect, previously cancelled solicitation number on the bid bond raises a reasonable doubt as to the enforceability of the bond under the facts presented herein. If the record reflects that the surety intended to be bound notwithstanding the defect in the bond then the bond may be said to be enforceable. Intention to be bound must be evidenced on the face of the bid bond. Pinnacle Electronic Systems, Inc., MSBCA 1967, 5 MSBCA ¶404(1996). If intention to be bound is evidenced on the face of the bid bond then we have no reasonable doubt as to the enforceability of the bond. However, we emphasize that intention to be bound must be shown on the face of the bid bond. It is an objective test. Subjective intent gleaned by way, for instance, of witness testimony concerning what was intended will not be considered.

There are no decisions of this Board specifically on point regarding a defect in the solicitation number on a bid bond. As we do from time to time, we will look to relevant federal procurement cases for guidance where, as here, we have no Board cases specifically on point. The issue of the acceptability of a bid bond containing a defect that misidentifies the procurement has been considered by the federal Comptroller General. The

Comptroller General has for many years held that the submission of a required bid bond is a material condition with which a bid must comply at the time of bid opening to be considered responsive, and that the solicitation number referenced in a bid bond is a material element affecting the bond's acceptability. The general rule of the Comptroller General faced with a solicitation number defect is that the bid bond may be accepted (that is the bond is deemed enforceable by the government in the event of a default) "where there are clear indicia on the face of the bond that identify it with the correct solicitation." Grafton McClintock, Inc., 91-1 CPD ¶381 (B-241581.2, Apr. 17, 1991), citing Kirila Contractors, Inc., 67 Comp. Gen. 455 (1988). See also Joseph B. Fay Co., 91-1 CPD ¶234 (B-241769.2, Mar. 1, 1991).

According to the Comptroller General, factors apparent from the bond itself that may be considered by the agency in applying this rule include (1) correct identification of the bid opening date, (2) accurate description of the type of services sought, and (3) designation of a maximum penal sum in an amount which correlates with the amount of the bid. R.P. Richards Construction Co., 95-2 CPD ¶128 (B-260965, July 17, 1995). Another consideration is whether there is a reasonable possibility that the bond could apply to another procurement. Thus, if there are no "other ongoing procurements to which the misstated solicitation number could reasonably refer," *id.*, it may be reasonably concluded that the surety intended to bond the bid with which the bond was submitted. Thus, where other indicia of identification exist, bid bonds with defects involving solicitation numbers have been deemed acceptable. R.P. Richards Construction Co., *supra*; Seema, Inc., 94-1 CPD ¶256 (B-255884, Apr. 13, 1994); Todd's Clearing and Grading, 92-1 CPD ¶56 (B-245617, Jan. 13, 1992); Kirila Contractors, Inc., *supra*.

In this case, the Procurement Officer properly recognized

and applied the Comptroller General's general rule which we shall adopt. While the Boldt bond made no reference to the bid opening date, and while the maximum penal sum was stated as five percent (5%) of the attached bid rather than an amount stated in figures or words, the Procurement Officer determined that the following factors sufficiently indicated that the bond was intended to refer to the correct solicitation number:

1. The bid bond itself clearly (in the lower left hand corner) identifies the bond as applying to "MAA-CO-03-014," the correct solicitation.

2. The bidder (or its surety) correctly identified the procurement on the bond form as "Loading Bridge Replacement at Baltimore/Washington International Airport."

3. On its face, the bond could apply only to IFB No. MAA CO-02-026, then non-existent, or IFB No. MAA CO-03-014, the correct solicitation, the only solicitations identified on the bond form. The accompanying Power of Attorney was executed on October 1, 2002, after the first solicitation was cancelled, after the second solicitation was issued, and before the October 11, 2002 bid opening date. The October 1, 2002 date of the Power of Attorney reasonably ruled out IFB No. MAA CO-02-026, i.e., it ruled out that the bond was intended to apply to the previously cancelled solicitation notwithstanding that the Board of Public Works did not approve the resolicitation by expedited means until the next day, October 2, 2002. This meant, necessarily, that the bond was intended to bind the surety for the current solicitation. There was no other on-going procurement to which the misstated solicitation number could refer. No. MAA-CO-03-014 was MAA's only current solicitation for loading bridges. Because Boldt or its surety had identified, on the bond form, the subject of the procurement as loading bridges, there simply was no doubt that the surety intended to bond the bid to IFB No. MAA-CO-03-014 and no

other bid.

Based on these considerations, we find that the Procurement Officer properly determined that the bid bond was enforceable and thus could be accepted.

For the foregoing reasons concerning jurisdiction, the Board dismisses the appeal with prejudice and would deny the appeal on the merits.

Wherefore it is Ordered this day of January, 2003 that the appeal is dismissed with prejudice.

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 2312, appeal of FMC Technologies, Inc. under Maryland Aviation Administration Contract No. MAA-CO-03-014.

Dated:

Michael L. Carnahan
Deputy Recorder