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

Docket Nos. 2463 & 2468	Date of Decision: 04/12/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under SHA Contract No. FR4825132	
Appellant/Respondent: L.S. Lee, LLC State Highway Administration	

Decision Summary:

Signing of Bids - The failure to sign a bid may be waived as a minor informality pursuant to COMAR 21.06.02.04 if the bid is accompanied by other material clearly indicating the bidder's intent to be bound. The materials submitted with the bid in this case did not permit the State to waive the failure to sign the bid.

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BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of L.S. Lee,)
 LLC)
)
) Docket Nos. MSBCA 2463 & 2468
)
Under SHA Contract No.)
 FR4825132)

APPEARANCE FOR APPELLANT: Mark S. Dachille, Esq.
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 Columbia, Maryland

APPEARANCE FOR RESPONDENT: Scot D. Morrell
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APPEARANCE FOR INTERESTED PARTY: Scott A. Livingston, Esq.
(Guardrails, etc., Inc.) Rifkin, Livingston, Levitan
 & Silver, LLC
 Greenbelt, Maryland

OPINION BY CHAIRMAN HARRISON

The Board has consolidated the above captioned appeals for hearing and decision. Both were timely filed and deal with issues concerning the responsiveness of the bid of Guardrails, etc., Inc. (Guardrails), the Interested Party herein. For the reasons that follow, we shall sustain the appeals on grounds that the bid of Guardrails was not responsive.

Findings of Fact

1. The State Highway Administration (SHA) published the solicitation for the above captioned Contract in September of 2004. The Contract is a Design-Build contract for the installation of median traffic barriers on I-70 and I-270 in Frederick County, Maryland. The solicitation provided for

multi-step, sealed bidding under COMAR 21.05.02.17, pursuant to which unpriced technical proposals were to be initially submitted to SHA for evaluation. Following this evaluation, the entities that provided acceptable technical proposals were invited to submit a bid price for the project. Guardrails, Appellant, and all the bidders that SHA deemed to have acceptable technical proposals submitted a bid price for the Contract, which bids were opened on December 16, 2004.

2. Guardrails submitted a bid in the amount of \$4,150,000.00. Appellant submitted the next lowest bid in the amount of \$4,198,899.00.
3. At the time of the December 16 bid opening, SHA procurement personnel determined that Guardrails had failed to sign the Comprehensive Signature Page and announced Guardrails' bid as "irregular."¹ The Comprehensive Signature Page includes one signature line for both the bid and various required affirmations. Guardrails submitted all other required documents, including a Power of Attorney and accompanying bid bond executed by the Vice President of Guardrails², and the MBE/DBE Schedule of Participation Form also executed by the same executive of Guardrails.
4. In light of the announcement of its bid being deemed "irregular" at the time of the bid opening, Guardrails filed a timely bid protest. The basis for the protest was that Guardrails' bid for the Contract, although it contained an

¹The term "irregular" is used by SHA procurement personnel at bid openings to denote an area of further inquiry; it is not a determination of bid responsiveness or bidder responsibility.

²Appellant asserts that the bid bond was not properly executed by the surety. The Board does not decide herein whether the bid bond was properly executed by the surety. Assuming *arguendo* that the bid bond was properly executed, Guardrails' bid is nevertheless non-responsive for other reasons.

unsigned Comprehensive Signature Page, was accompanied by other executed documents indicating an intent to be bound. Guardrails requested that the failure to sign the bid be considered a minor irregularity that could be cured or waived by SHA under COMAR 21.05.02.12 and 21.06.02.04.³

5. On January 24, 2005, SHA's Procurement Officer issued the agency's final decision sustaining the Guardrails protest and waiving the lack of the signature on the Comprehensive Signature Page as a minor irregularity.
6. Appellant appealed the agency's final decision to this Board on February 3, 2005, and the appeal was docketed as MSBCA 2463.
7. By letter dated January 23, 2005, Appellant filed its own

³COMAR 21.05.02.12, Mistakes in Bids, provides, in part:

A. General. Technicalities or minor irregularities in bids, as defined in COMAR 21.06.02.04, may be waived if the procurement officer determines that it shall be in the State's best interest. The procurement officer may either give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is to the State's advantage to do so.

COMAR 21.06.02.04, Minor Irregularities in Bids or Proposals, provides:

A. A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.

B. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.

C. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

protest on the Contract asserting that the failure to sign the Comprehensive Signature Page was fatal and also raised issues concerning alleged defects in Guardrails' bid bond and MBE/DBE Schedule of Participation form.

8. SHA issued its final decision denying that separate protest on March 7, 2005, and Appellant appealed that denial to this Board on March 8, 2005.
9. The Board docketed the appeal as MSBCA 2468 and consolidated it with MSBCA 2463. The matter was heard on April 5, 2005.

Decision

Guardrails did not sign the Comprehensive Signature Page, which included the instruction at the top of the page in capital letters:

THE BIDDER IS HEREBY NOTIFIED THAT THIS DOCUMENT SHALL BE SIGNED IN INK IN ORDER FOR THE BID TO BE ACCEPTED. BY SIGNING, THE BIDDER CERTIFIES THAT HE/SHE WILL COMPLY IN EVERY ASPECT WITH THESE SPECIFICATIONS.

Such instruction is consistent with COMAR 21.05.02.03, which requires that a bidder sign the bid in ink.

Under Maryland procurement law, the requirement that a bid be signed has been treated by this Board as a matter of substance and not one of form. Apollo Paving Company, Inc., MSBCA 1092, 1 MSBCA ¶29 (1982); Daisy Concrete, Inc. of Maryland, MSBCA 2338, 6 MSBCA ¶532 (2003). The Board has recognized that without the signature of an authorized representative of the bidder's organization, the bid would not necessarily constitute an unqualified and binding offer to perform all the work set forth in the Invitation for Bids (IFB). Under such circumstances, the low bidder would be in a position of withdrawing its bid after reviewing the competitors' pricing, and it would thereby obtain the proverbial "two bites at

the apple.” The authorized signature of the bidder at the appropriate place in the bid has thus generally been required to establish the responsiveness of the bid. However, this Board has held that the failure of the bidder to actually sign the bid form is not automatically fatal to a bid.

A review of the Apollo and Daisy decisions cited above reveals that the failure to sign a bid may be waived as a minor irregularity under COMAR 21.06.02.04, and the bid may be found to be responsive, if the bid is accompanied by other material which may be used to satisfy the mandatory bid signature requirement. In this case, there is no dispute that Guardrails did not sign the Comprehensive Signature Page. Guardrails did, however, execute other documents contained in its bid package, raising the issue of whether these other documents properly may be used to satisfy the mandatory bid signature requirement set forth in COMAR and the solicitation. SHA and Guardrails argue that, based on the decisions of this Board in Apollo and Daisy, and based on other federal procurement cases, Guardrails bid package did, in fact, contain executed documents that should be found sufficient to satisfy the mandatory bid signature requirement.

In Apollo, *supra*, the procurement officer was presented with a situation where a bidder failed to sign the bid signature sheet, despite the fact that bidders were informed on the sheet that “[t]he bidder is hereby notified that this sheet must be signed in order for the bid to be accepted.” On appeal, this Board noted that, while Apollo, the low bidder, did not sign the bid form, the Apollo bid package did include two other documents executed by Apollo - the Minority Business Affirmation Action Certificate and the Anti-Bribery, Non-Collusion and Financial Disclosure Affidavit. No bid bond was required because of the bid of Apollo was less than the threshold of \$25,000.00 for bid bonds. In rejecting the procurement officer’s decision not to waive the failure of the low

bidder to sign the bid form as a "minor irregularity" under COMAR 21.06.02.03 (now COMAR 21.06.02.04), the Board concluded:

... the voluntary submission of this bid together with these executed documents would have been sufficient to overcome any attempt by [the low bidder] to disavow the bid and to upset any award made to it on the ground that the bid lacked an authorized signature. Accordingly, these documents were sufficient to bind [the low bidder], even though the bid sheet was not signed.

Apollo, at p. 5.

Twenty-one years later, the Board reaffirmed its rationale and holding in Apollo in its decision in the appeal of Daisy Concrete, Inc. of Maryland, supra. In Daisy, the bid of the low bidder, Gray & Son, Inc. (Gray) was deemed "irregular" and initially was rejected as "non-responsive" because Gray failed to sign the Proposal or Bid Signature Sheet (Bid Sheet). Gray, however, did sign and submit both a Certified MBE Utilization and Fair Solicitation Affidavit and Bid/Proposal Affidavit with its bid. Gray filed a protest with the Maryland Transportation Authority, arguing that the failure to sign the Bid Sheet was a minor irregularity in accordance with the decision in Apollo. After receiving advice of counsel, the procurement officer reconsidered his decision to reject the low bid based on responsiveness. Based upon the precedent set forth in Apollo, the procurement officer decided to award the contract to the low bidder, Gray. Daisy Concrete, Inc. of Maryland, the next lowest bidder, then appealed to this Board.

In Daisy, as in the instant appeals, the low bidder failed to sign the Bid Sheet. In a similar instruction to the one provided in the instant multi-step IFB, bidders were informed in capital letters at the top of the Bid Sheet:

THIS SHEET MUST BE SIGNED IN ORDER FOR THE BID TO BE ACCEPTED. BY SIGNING, THE BIDDER CERTIFIES THAT IT WILL COMPLY IN EVERY ASPECT WITH THE SPECIFICATIONS.

However, the Board ruled that the execution of the Bid Guarantee and Bid Bond sheets, a bid bond being required due to the estimated value of the procurement, combined with the voluntary submission of the Certified MBE Utilization and Fair Solicitation Affidavit and Bid/Proposal Affidavit was sufficient to overcome any attempt to disavow the bid and upset an award on the grounds that the Bid Sheet was not signed. The Board upheld the State agency's determination to waive the failure to sign the Bid Sheet as a minor irregularity pursuant to COMAR 21.06.02.04 because the bid was accompanied by other executed material clearly indicating the bidder's intent to be bound. In affirming the procurement officer's final decision, the Board noted that "while the Board's observations and holdings in Apollo were drawn in large measure from federal determinations of the issue, we believe the Board's rationale was appropriate in 1982 and remains so today." Daisy, at p. 4. We have been asked to revisit Daisy regarding its continued viability under Maryland's General Procurement Law and COMAR.

In its final agency decision in these consolidated appeals, SHA determined that Guardrails' bid was responsive despite failure to sign the Comprehensive Signature Page because the bid was accompanied by other executed documentation that clearly demonstrated Guardrails' intent to be bound. Specifically, the SHA Procurement Officer found that Guardrails' execution of a bid bond that fully identified the accompanying Contract, combined with the voluntary submission of the bid following acceptance of its technical proposal and execution of the MBE/DBE Schedule of Participation Form, would suffice to overcome any attempt by Guardrails to disavow the bid and upset an award on grounds that the Comprehensive Signature Page was not signed. Upon making such

findings, the SHA Procurement Officer determined to waive Guardrails' failure to execute the Comprehensive Signature Page as a minor irregularity pursuant to COMAR 21.05.02.12.

While we would urge bidders to sign their bids in conformance with COMAR and mandatory solicitation instruction, the execution of other documents may, in appropriate instances, be used to satisfy the bid signature requirement. However, the documents executed in this procurement, we find, do not satisfy the mandatory bid signature requirement. This is because Guardrails did not execute the same type of documents found sufficient in Apollo and Daisy. In Apollo and Daisy the Board noted that execution of the Minority Business Affirmation Action (MBE) certification, along with execution of certain bid and contract affidavits (and in Daisy an executed bid bond⁴), in concert with the voluntary submission of the bid would suffice to overcome any attempt to disavow the bid for failure to sign the bid form or Bid Sheet.

In the instant appeals, Guardrails submitted its technical proposal, and, upon its acceptance, it submitted its price bid. Guardrails also submitted with its price bid an executed MBE/DBE Schedule of Participation (MBE) form and an executed bid bond. Appellant has challenged the legal sufficiency of the bid bond submitted by Guardrails on grounds that a required signature on behalf of the surety is missing⁵. Appellant also argues that the MBE/DBE Schedule of Participation form submitted by Guardrails is defective in that it was allegedly not properly or completely filled out, required information being set forth on the wrong page. Regardless of the merit of Appellant's challenges to the legal

⁴In Apollo there was no bid bond requirement, Apollo's bid being less than \$25,000.00.

⁵We make no determination concerning the validity of the bid bond submitted by Guardrails. We note it appears to differ in form from the bid bond set forth in COMAR 21.06.07.02.

efficacy these two documents, the failure to sign the Comprehensive Signature Page, which provides for the signature for the various bid and contract affidavits as well as the bid itself, results in the absence of executed affidavits unlike Apollo and Daisy where the affidavits were contained and executed in separate documents from the Bid Sheet. In the absence of the executed affidavits, the execution of a bid bond and MBE form herein does not substitute for the absence of a signed bid and does not allow the State to conclude that the bidder could not successfully disavow the bid. Nor is the result changed by the fact that two signatures appear in Guardrails' unpriced technical offer respecting certifications of the factual accuracy of the technical offer. Such voluntary submission and statements of intent to provide specific service in the technical proposal submission do not overcome the absence of a bid signature in the bid package subsequently submitted herein. The bid of Guardrails is non-responsive.

Accordingly, the appeals are sustained, and the matter is remanded to SHA for appropriate action.

Wherefore it is Ordered this day of April, 2005 that the appeals are sustained.

Dated:

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
Board Member

CONCURRING OPINION BY BOARD MEMBER BURNS

I concur with the majority opinion in these appeals.

I would, however, reach the result of the majority opinion by taking a different route.

It is a mandatory requirement of Maryland procurement regulations that bidders must sign their bids. See, e.g., COMAR 21.05.02.03B.(4); COMAR 21.05.02.03B.(6); see also, Apollo Paving Company, Inc., MSBCA 1092, 1 MSBCA ¶29 (1982).

As the Board noted in Apollo Paving Company, Inc., *supra*, at p.3:

The requirement that a bid be signed historically has been treated as a matter of substance and not one of form. The reason, of course, is that without the signature of an authorized representative of the bidder's organization, the bid would not constitute necessarily a binding offer to perform the work described in the invitation. The low bidder, under such circumstances, would have the opportunity to withdraw his bid after reviewing his competitors' prices, thus obtaining the proverbial "two bites of the apple." Such a system obviously would be extremely unfair and ultimately would subvert the integrity of the competitive bid procedure. For this reason, therefore, the authorized signature of a bidder is considered mandatory to establish both the intent of that bidder to be bound and the responsiveness of his bid.

(Citations omitted).

It is a rule in several jurisdictions that an unsigned bid must be rejected. See, e.g., Thigpen Construction Company, Inc. v. Parish of Jefferson, 560 So. 2d 947 (La. App. 1990); Ace-Manzo, Inc. v. Town of Neptune, 609 A.2d 112 (N.J. Super. 1992; Yost v. State Public School Building Authority, 36 Pa. D & C 2d 631 (1965).

In this case the Comprehensive Signature Page clearly states - specifically in all capital letters:

THE BIDDER IS HEREBY NOTIFIED THAT THIS DOCUMENT SHALL BE SIGNED IN INK IN ORDER FOR THE BID TO BE ACCEPTED. BY SIGNING, THE BIDDER CERTIFIES THAT HE/SHE WILL COMPLY IN EVERY ASPECT WITH THESE SPECIFICATIONS.

FURTHER, I DO SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE CONTENTS OF THIS AFFIDAVIT (PARAGRAPHS A-M) ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.
(Underlining in original).

In the instant appeals, bidder Guardrails etc., Inc. (Guardrails) clearly did not sign the Comprehensive Signature Page. Guardrails, therefore, failed to comply with the requirements of both COMAR and the express language of the Comprehensive Signature Page. By failing to sign the Comprehensive Signature Page, Guardrails: has not signed the bid document in ink as required by the bid document and by COMAR; has not certified that it will comply in every aspect with certain specifications contained in the bid document; and, has not declared and affirmed under the penalties of perjury that the contents of the affidavit are true and correct.

I cannot find such omissions to constitute "minor irregularities" in the bid. COMAR 21.06.02.04A. (A minor irregularity is one which is merely a matter of form and not of substance.)

I am not anxious to create a procedural "minefield" for potential bidders of State contracts in Maryland to wade through. The "minor irregularities" provisions of COMAR make sense and have proven successful over the years in dealing with other signature situations.

It also makes sense, however, to enforce the signature requirements at issue in these appeals. It is not too much to ask potential bidders to make sure that, when a comprehensive signature page has been included in a bid form, it is properly signed - and that is all that this opinion would require.

I would hold that the failure of a bidder to sign a

Comprehensive Signature Page - such as was involved in the instant appeals - cannot be, by its very nature, a minor irregularity and that such a failure renders a bid incapable of acceptance by the State.

Since Guardrails failed to sign the Comprehensive Signature Page herein, I would sustain the protest of L. S. Lee, Inc. on that ground alone.

Dated:

Michael W. Burns
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 2463 and 2468, appeals of L.S. Lee, LLC under SHA Contract No. FR4825132.

Dated:

Michael L. Carnahan
Deputy Recorder