

STATE OF MARYLAND  
BOARD OF CONTRACT APPEALS  
6 St. Paul Street  
Suite 601  
Baltimore, Maryland 21202-1608  
Telephone: (410) 767-8228  
Toll Free Telephone: 1-800-827-1135

SUMMARY ABSTRACT  
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2498	Date of Decision: 11/09/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: SHA Contract No. W03145177	
Appellant/Respondent: American Paving Corporation State Highway Administration	

Decision Summary:

Bid Bond Defect - Where a bid bond containing a defect accompanies a bid, the bid may nevertheless be accepted if the Procurement Officer reasonably determines that the bid bond is enforceable by the State against the surety.

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BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of American Paving )  
Corporation )  
)  
) Docket No. MSBCA 2498  
)  
)  
Under SHA Contract No. WO3145177 )

APPEARANCE FOR APPELLANT:                    Scott A. Livingston, Esq.  
   Lydia B. Hoover, Esq.  
   Rifkin, Livingston, Levitan &  
   Silver, LLC  
   Greenbelt, Maryland

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

APPEARANCE FOR INTERESTED PARTY:            Dan Friedman, Esq.  
(Pennsy Supply, Inc.)                            Saul Ewing LLP  
   Baltimore, Maryland

**OPINION BY CHAIRMAN HARRISON**

Appellant timely appeals the denial of its protest that the Interested Party's bid bond was defective and thus the Interested Party's bid was not responsive.

**FINDINGS OF FACT**

1. The captioned Contract relates to a State Highway Administration (SHA) Invitation for Bids (IFB) for highway resurfacing of MD 528 from 64<sup>th</sup> Street to the Delaware line in Worcester County.
2. On August 11, 2005, SHA opened bids for the Contract. Of the three bids that were received, the

Interested Party (Pennsy) submitted the apparent low bid of \$2,703,565.00. Appellant submitted the next lowest bid in the amount of \$2,964,568.25.

3. At the bid opening, Pennsy's bid was characterized as "irregular" because the bid bond accompanying its bid did not provide the Contract number or project description.<sup>1</sup>
4. Pennsy's bid bond<sup>2</sup> was contained within the package containing its bid for the Contract. Pennsy's bid bond was in a proper form and underwritten by a surety company authorized to do business in the state of Maryland. The accompanying Power of Attorney to the Pennsy bid bond was also in the proper form. The bid bond indicates that the Principal, i.e. Pennsy, submitted a bid in the amount of \$2,703,565.00. Pennsy's bid amount for the Contract was, in fact, this exact dollar amount. Pennsy's bid bond, however, did not provide a solicitation number or project description and was, as noted above, characterized as "irregular" at the bid opening and subject to further scrutiny by the SHA Procurement Officer.
5. Appellant filed a protest on August 11, 2005 as supplemented on August 18, 2005 on grounds that Pennsy's bid bond was defective and ambiguous, and thus the Pennsy bid was nonresponsive.
6. The SHA Procurement Officer reviewed the matter and concluded that the Pennsy bid bond, on its face, evidenced an intent by the surety to be bound and

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<sup>1</sup> The term "irregular" is used by SHA personnel to denote an area of further inquiry by the procurement officer. The term is not used as a determination of bid responsiveness or bidder responsibility.

<sup>2</sup> A copy of Pennsy's bid bond is attached as Exhibit A.

that there was not a reasonable possibility that the bond could apply to some other procurement. Therefore, the bond was deemed to be enforceable. Thus, SHA found the Pennsy bid to be responsive and denied Appellant's protest by final decision dated September 1, 2005. This appeal followed.

### **DECISION**

Appellant argues that SHA should find Pennsy's bid nonresponsive because Pennsy submitted a defective and ambiguous bid bond because the bid bond accompanying the Pennsy bid did not include a project number and a brief description of the project.

The issue before this Board is whether the alleged defects in the Pennsy bid bond, namely the failure to provide a description of the project and the captioned Contract number, renders Pennsy's bid nonresponsive<sup>3</sup>.

We first look to Section 13-208(a) of the State Finance and Procurement Article which sets forth the following with regard to bid security:

§ 13-208 Proper Security

(a) In General- Except as provided under subsection (b) of this section, if a procurement officer requires bid security, the procurement officer shall reject a bid or proposal that is not accompanied by proper security.

Bid security is defined by Section 13-207 of the State Finance and Procurement Article as cash or a bond provided by a surety company authorized to do business in this

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<sup>3</sup> While Appellant argued at the hearing that its protest covered other alleged defects in the Pennsy bid bond, this particular defect and the consequences thereof is the only issue raised in the protest and the only issue the Board has jurisdiction to consider. Matters raised for the first time at the hearing of the appeal may not and will not be considered.

State, and this Board has determined that the word "proper" in connection with such bid security in Section 13-208 means that the bid bond would be enforceable by the State against the surety in the event of a default by the contractor. FMC Technologies, Inc., MSBCA 2312, 6 MSBCA ¶527 (2003).

We next look at the Code of Maryland Regulations (COMAR) which provides prospective bidders with a preferred form of bid bond. COMAR 21.06.07.02D(1) ("Bid Security"). In fact, neither Pennsy nor Appellant used COMAR's preferred bid bond form to accompany their bids. Use of the preferred bid bond is not mandatory, however, and the IFB herein does not direct bidders to use a specific or particular form of bid security. Thus, the only requirement for a proper (and thus enforceable) bid bond herein is that it evidences that the surety is obligated to pay the appropriate penal sum if a bidder fails to perform on the bid. See Pinnacle Electronic Systems, MSBCA 1967, 5 MSBCA ¶404 (1996) ("to be a 'proper' bid bond, it must evidence that a surety is bound to provide at least 5% of the bid...").

In making this determination that the bond is enforceable, the Procurement Officer must rely on information apparent from the face or the four corners of the bid bond to determine that the surety intended to be bound; i.e., clear indicia of intent to be bound leading to a reasonable conclusion that the bond is enforceable by the State against the surety must be gleaned from the bond itself. The test is thus an objective one with the result to be gleaned from the document itself and not testimony concerning what someone intended it to mean. However, this does not mean, as asserted by Appellant, that the

procurement officer is prohibited from looking at any other document. The procurement officer may look at and consider other documents and apply common sense in making the determination of whether the bond is enforceable. Each case will have to be viewed on its own merits regarding the reach of the procurement officer's review, where, as here, a specific form and content for the bid bond is not mandated.

Appellant asserts that "COMAR 21.06.07.02 requires the (a) name of the principal (i.e., the bidder); (b) the name of the obligee (i.e., the Maryland Department of Transportation); (c) the penal amount; (d) the project number; and (e) a brief description of the project to be provided." Appellant then argues that the bid bond supplied by Pennsy is not sufficient because it "failed to provide required information on the face of its bid bond—the project number and a description of the project." Presumably, Appellant's argument that the five elements are required contents for an appropriate bid bond is culled from the bid bond form provided in COMAR 21.06.07.02D(1).<sup>4</sup> However, the bid bond form provided in COMAR 21.06.07.02D(1) is not a required form, it is only the "preferred form of a bid bond."

Neither Pennsy nor Appellant elected to use a bid bond identical to the preferred bid bond form provided in the regulation. Instead, the surety companies for Appellant and Pennsy issued bid bonds on forms other than the preferred bid bond form. However, the regulation allows for alternative forms. COMAR 21.06.07.02D(2) provides:

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<sup>4</sup> A copy of this bid bond form is attached as Exhibit B.

*Unless prohibited by the solicitation, a bid bond on a form other than the preferred form under §D(1) of this regulation may be accepted if the form provides that the principal and the surety shall be liable under the bond in an amount at least equal to the difference between the amount of the principal's bid and such other amount or amounts for which the obligee may contract with another party to perform as required by the solicitation for which the principal's bid was submitted.*

Appellant does not argue that the Pennsy bid bond did not correctly identify the principal (Pennsy), the obligee (the State) or provide the correct amount for the penal sum as required by the solicitation (5% of the total bid price). Instead, Appellant argues that Pennsy did not provide information - the project number and a description of the contract - that is set forth in the preferred form (WHEREAS, the Principal has submitted a bid for (Identify project by number and brief description)).

The language of COMAR 21.06.07.02D(2), however, does not set forth such specifics. Notwithstanding, Appellant argues that the absence of a project number and brief description result in an ambiguous and nonresponsive bid bond. Simply stated, the issue is whether these alleged defects in the Pennsy bid bond raise a reasonable doubt as to its enforceability. In making such a determination as to enforceability, Appellant claims that SHA's decision must be "based solely on information found on the face of the bid bond..." Appellant claims that the Procurement Officer is precluded from evaluating anything outside the "four-corners" of the bid bond.

We have not been made aware of any Maryland or federal procurement cases specifically on point regarding a bid

bond providing the correct, specific penal sum of the bid but omitting the contract number and project description. Faced with various bid bond defects, the federal Comptroller General has held that a bid bond may be accepted (i.e., 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 (April 17, 1991). In *dicta*, (this Board having dismissed the appeal on grounds the protest was not timely filed) this Board indicated it would follow the "clear indicia" rationale in making determinations concerning bid bond defects. FMC Technologies, *supra*. According to the Comptroller General, factors apparent from the bond itself that may be considered by the agency in applying this rationale include the correct identification of the bid opening date and the designation of a maximum penal sum in an amount which correlates with the amount of the bid. See, R.P. Richards Construction Co., 95-2 CPD ¶128 (July 17, 1995). Another consideration is whether there is a reasonable possibility that the bond could apply to another procurement. *Id.*

It is SHA's contention that the Pennsy bid bond is enforceable against the surety, providing clear indicia that it was for the captioned Contract and there is no reasonable probability that it could apply to another procurement. While the Pennsy bid bond did not indicate the bid opening date, SHA notes that the bid bond was provided with the bid package, submitted at the proper time and location for the bid opening. SHA also notes that the bid bond was issued by a surety company authorized to do business in Maryland in compliance with Section 13-207 of



the State Finance and Procurement Article. The bond provides that the surety is "bound unto the State of Maryland" "in the penal sum of five percent of amount of bid." Furthermore, the bond specifically provides that Pennsy Supply, Inc., as the Principal, submitted a bid in the amount of "\$2,703,565.00." This dollar figure correlates exactly to the total bid amount of Pennsy's bid for the Contract.

In FMC Technologies, Inc., *supra*, this Board dealt with an issue regarding the acceptability of a bid bond that included a previously cancelled solicitation number. The Board observed that one of the factors in determining clear indicia on the face of the bid bond that identify it with the correct solicitation is the designation of a maximum penal sum in an amount which correlates with the amount of the bid. FMC Technologies, Inc., *supra*, at p. 5. Common sense mandates that in order to determine whether the penal sum is in an amount that correlates with the amount of the bid, the agency must review the bid price which is set forth in another bid document. *See also, Pinnacle Electronic Systems, Inc.*, *supra*. In addition, the procurement officer in FMC Technologies, Inc., *supra*, factored in other information outside the "four corners" of the bid bond in determining whether the surety intended to be bound to the instrument. In that case, the procurement officer reviewed the previous solicitation number, considered the fact that the previous solicitation no longer existed, the dates that the accompanying Power of Attorney was executed for the previous solicitation and the solicitation at issue, and whether there were any other ongoing procurements to which the misstated solicitation number could refer. Following this review, the Procurement

Officer made the determination to accept the bid. Narrowly and technically speaking, such information is outside the four corners of the bid bond. However, this Board recognized that such factors were within the procurement officer's purview when making a determination of whether a particular bid bond was proper security. FMC Technologies, Inc, supra, at p. 5.

In the instant appeal, SHA's Procurement Officer looked at the numerical amount listed as the penal sum in Pennsy's bid bond (i.e., 5% of \$2,703,565.00), and compared that figure to the actual amount of Pennsy's total bid - \$2,703,565.00 as set forth on the bid form. The designation of a maximum penal sum in the Pennsy bid bond (5% of \$2,703,565.00) correlates exactly with the amount of the Pennsy bid, \$2,703,565.00. It is SHA's position that this exact correlation of the penal sum of the bid bond and the total bid price on a multi-million dollar project containing numerous bid items cannot be reasonably considered a coincidence. We agree. This correlation of dollar figures links the Pennsy bid bond to the Pennsy bid for this particular Contract. The FMC Technologies appeal rationale allows the procurement officer to make a determination as to whether there is a reasonable probability that the bond could apply to another procurement. Based on the exactly correlating dollar figures contained within the bid bond and the Pennsy total bid price, SHA concluded that there was no reasonable doubt that the bid bond provided in this solicitation by Pennsy was for this Contract.

Based on the above circumstances in this case, SHA determined that the bond would be enforceable against the surety in the event of default by Pennsy. It is not a

reasonable possibility that Pennsy's bid bond, in light of the amount of Pennsy's bid and the identical amount provided on the bond, could apply to another procurement. As such, the SHA Procurement Officer reasonably determined Pennsy's bid bond for this Contract is "proper" bid security under State Finance and Procurement Article, §13-208 and COMAR, and we find Pennsy's bid is, therefore, responsive. Accordingly, the appeal is denied.

Wherefore, it is Ordered this \_\_\_\_\_ day of November, 2005 that the appeal is denied.

Dated:

\_\_\_\_\_  
Robert B. Harrison III  
Chairman

I Concur:

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Michael W. Burns  
Board Member

\_\_\_\_\_  
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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2498, appeal of American Paving Corporation under SHA Contract No. W03145177.

Dated:

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Michael L. Carnahan  
Deputy Recorder