

**BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In the Appeal of )  
M. Luis Construction Co., Inc. )  
)  
) Docket No. MSBCA 2636  
)  
Under )  
SHA Contract No. PG5715177 )

APPEARANCE FOR APPELLANT: Philip M. Andrews, Esq.  
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Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Jason D. Couch  
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Baltimore, Maryland

**OPINION BY BOARD MEMBER DEMBROW**

This bid protest presents procedural procurement processing issues concerning the necessity, permissibility and significance of communications made to secure confirmation of price extensions after the expiration of the time period set forth by regulation for which responses to an invitation for bids (IFB) are irrevocable.

**Findings of Fact**

1. By contract no. PG5715177, the Maryland State Highway Administration (SHA) sought the services of a private contractor in order to perform certain road work in connection with the improvement of Riggs Road (MD 212) in Prince George's County, for which bids were due on May 22, 2008.

2. A total of six (6) bids were received for this project, including bids from M. Luis Construction Company ("Luis"), the apparent low bidder, with a bid of \$2,568,200.00, appellant Rustler Construction, Inc. ("Rustler"), the second lowest bidder, with a bid of \$2,571,618.50, and Civil Construction, LLC ("Civil"), which submitted the third lowest bid at \$2,590,781.00.
3. The difference between the Luis low bid and Rustler's second lowest bid was the sum of only \$3,418.50, or about .13%; the difference between the Luis low bid and Civil's third lowest bid was the amount of \$22,581.00, or about .88%; and the difference between Rustler's second lowest bid and Civil's third lowest bid was \$19,162.50, or about .75%.
4. According to the specifications of the IFB, low bidder Luis, which was itself a disadvantaged business enterprise/minority business enterprise (DBE/MBE), was mandated to perform at least half of the work on the project by its own employees and, from the other half of the price of the contract, to subcontract at least 30% of the total value of the contract to other DBE/MBEs, or in other words, 60% of value of the contract eligible for subcontracts, a requirement which Luis attempted in good faith to meet but was unable to meet allegedly because of its inability to locate a sufficient number of available capable subcontractors, as a result of which Luis requested a partial waiver of the stated 30% DBE/MBE subcontract requirement from total contract value.
5. On May 22, 2008, C. Alan Krimm (Krimm), SHA's Team Leader on the Contract Awards Team, notified Luis that it had submitted the lowest competitive bid for this contract and simultaneously requested that Luis provide additional documentation concerning the efforts employed by Luis to meet the high DBE/MBE goal specified by the contract. (Joint Exhibit No. 1.)

6. Luis responded in timely fashion to SHA's inquiries concerning DBE/MBE subcontract participation, providing detailed information in response to SHA requests, which information was supplemented by additional correspondence dated June 18 and 19, 2008. (Joint Exhibit Nos. 2, 3 and 4.)
7. SHA never determined whether or not to grant appellant's request for partial waiver of the DBE/MBE requirement, which delayed the completion of SHA's evaluation of bids.
8. Pursuant to the mandate set forth in the Code of Maryland Regulations (COMAR) 21.05.02.19A, all bids on this project were irrevocable for a period of ninety (90) days following bid opening on May 22, 2008, or until August 20, 2008.
9. By letter dated July 28, 2008, SHA requested that Luis extend its bid price until August 31, 2008.
10. An authorized representative of Luis executed the aforementioned written request for bid extension and returned the same to SHA by facsimile (fax) transmitted on August 4, 2008, which was received and recognized by SHA as evidence of the intention of Luis to extend its bid price as well as the desire of low bidder Luis to be awarded the contract at the bid price it offered, such bid price extension being specifically requested and authorized through August 31, 2008. (Joint Exhibit No. 5.)
11. COMAR 21.03.05.02A provides: "Each solicitation and contract shall state whether electronic transactions are permitted or required for that procurement."
12. The foregoing regulation specifically classifies communication by fax as a means of "electronic transaction."
13. The IFB at issue here failed to state whether electronic transactions were permitted or required.
14. COMAR 21.03.05.03 states: "An attempt by a bidder, offeror or contractor to conduct an electronic procurement transaction may not be considered by the procurement officer

unless the solicitation or contract specifically authorizes the electronic means for the specified transaction.” (Emphasis supplied.)

15. By letter dated August 20, 2008, SHA again requested that Luis extend its bid price, this time until September 30, 2008. (Joint Exhibit No. 6.)
16. An authorized representative of Luis again executed SHA’s written request for bid extension and returned the same to SHA by fax transmitted on September 3, 2008, which was again received and recognized by SHA as evidencing the consent and desire of Luis to extend its bid. (Joint Exhibit No. 6.)
17. By letter dated September 18, 2008, SHA again requested Luis to extend its bid prices, this time until October 31, 2008. (Joint Exhibit No. 7.)
18. Unlike the first two letters requesting that bidders extend their price offers for an additional month, SHA’s third request for extension dated September 18, 2008 included a new concluding clause as follows: “if SHA does not receive a response your bid will be removed from consideration.” (Joint Exhibit No 7.)
19. An authorized representative of Luis executed SHA’s September 18, 2008 written request for bid extension and returned the same to SHA by fax transmitted on September 29, 2008 yet again evidencing its desire to extend its bid and that fax was again received and recognized by SHA as evidencing the consent and desire of Luis to extend its bid. (Joint Exhibit No. 6.)
20. By correspondence dated October 18, 2008, SHA yet again requested that Luis extend its bid price, this time until November 30, 2008, and in that letter, sent by certified mail, SHA requested Luis also to provide its surety’s written consent to the contract extension, the concluding paragraph in that correspondence stating as follows: “For your bid to remain valid, you must also provide SHA with

written consent from your surety agreeing to the full extension of your bid price before October 31, 2008 (date bid/bond expires)." (Joint Exhibit No. 8.)

21. The bid bond submitted on May 22, 2008 by Luis to SHA as a part of its bid on this project set forth no expiration date at all, being expressly conditioned by its terms only upon SHA's acceptance of the Luis bid offer and the resulting formation of a contract by SHA's acceptance of the bid offered by Luis. (State's Exhibit No. 2.)
22. SHA's October 18, 2008 correspondence to Luis referenced in Paragraph No. 20 above was actually mailed on October 22, 2008 but, for reasons which remain unknown, was never received by Luis even though it was directed to Luis at the correct address which Luis has used since 1994 and continues to use, namely, 7705 Poplar Hill Lane, Clinton, Maryland 20735. (Joint Exhibit No. 13.)
23. On November 23, 2008 the subject letter was returned to SHA by the post office, the envelope having been noted in hand writing for purported attempted delivery of the certified mail to Luis on October 23, October 29 and November 7, 2008 and thereafter marked by computer label "return to sender," "unclaimed," and "unable to forward." (Joint Exhibit No. 13.)
24. The tracking and confirmation of delivery website records of the post office for the subject certified mail from SHA to Luis bearing receipt no. 7006 2760 0000 8776 5252 reflects that the letter arrived "at Unit" in Clinton, Maryland at 11:00 a.m. on October 23, 2008, with notices left (presumably for the recipient, Luis) at 11:34 a.m. and 3:48 p.m. the same day; that it was marked "unclaimed" about two (2) weeks later, specifically at 11:30 a.m. on November 8, 2008; and that it was finally returned to the sender, SHA, at 1:51 p.m. on November 24, 2008, some three (3) weeks after it was marked unclaimed and more than five (5) weeks

- after it had actually been mailed by SHA to Luis by certified mail. (State's Exhibit No. 1.)
25. On Friday, November 7, 2008 a representative of Luis met with Krimm and inquired into the status of the award of the contract for which Luis had been notified on May 22, 2008 that it was the low bidder, but at that time Krimm did not know that Luis had not received SHA's October 18, 2008 request for bid and surety extension, so Krimm did not advise Luis that SHA would deem Luis no longer eligible for contract award.
  26. On Monday, November 10, 2008, Krimm examined the procurement file, noted that neither Luis nor the second lowest bidder had extended their bids pursuant to SHA requests, and therefore directed an e-mail to others at SHA stating that the contract "needs a low bid letter to be sent to Civil construction [the third lowest bidder, which offered a price \$22,581.00 more than Luis]." (Joint Exhibit No. 9.)
  27. On November 12, 2008 Luis e-mailed to SHA a message "to avoid any kind of Communication Glitches," notifying SHA of a new office address in downtown Baltimore in addition to its longstanding office address in Clinton, and on the same date SHA faxed to Luis a copy of its October 18, 2008 letter requesting that Luis and its surety document its bid extension before October 31, 2008, in response to which Luis, on the same date of November 12, 2008 advised Krimm that Luis had never received SHA's October 18, 2008 letter sent by certified mail. (Joint Exhibit No. 11.)
  28. Also as a part of the flurry of communications that occurred between Luis and SHA on November 12, 2008, Luis sent to SHA a signed bid extension through November 30, 2008 as well as its surety's written consent thereto, as SHA sought to obtain in October, unbeknownst by Luis.
  29. On November 18, 2008 Luis inquired of SHA into the status of the contract award and was advised at that time that SHA had

determined on November 10, 2008 to award the contract to the third lowest bidder, Civil.

30. Luis protested that determination the following day, namely, November 19, 2008.
31. SHA issued its final decision denying the Luis protest on December 11, 2008.
32. On December 19, 2008 Luis timely filed its Notice of Appeal to the Board of Contract Appeals (Board), which assigned the appeal MSBCA No. 2636.

### **Decision**

The crux of the difficulty in this procurement appears to be that SHA elected unnecessarily to impose upon itself the consequence of considering bids to have been withdrawn unless expressly extended beyond the 90-day period of irrevocability mandated by the Code of Maryland Regulations (COMAR) §21.05.01.19A. In fact, bids do not automatically lapse 90 days after submission; they merely become revocable. To avoid any surprises, when a State agency is unable to make a recommendation for contract award within the initial 90-day period of review, the Board considers it to be good procurement management practice for the State to confirm that indeed, all bid prices remain pending. Therefore the Board ordinarily would not be obliged or empowered to review such communication minutiae of bid evaluation. But the methods by which SHA acted in this particular procurement were in violation of regulation. Furthermore, in this procurement SHA's communications with its prospective vendors interfered unduly with the agency's rightful and lawful exercise of its own discretion in identifying and securing the best value for the State by facilitating fair and robust competition designed to obtain the lowest pricing available.

In response to the IFB here at issue, appellant Luis was the

apparent low bidder and was so notified when bids were opened on May 22, 2008. The DBE/MBE goal established by this procurement was substantial, constituting 60% of total contract funds available for subcontracting. Luis had difficulty meeting such a high goal and advised SHA accordingly, not only in its original bid submission but also in multiple subsequent responses to agency inquiries concerning its DBE/MBE outreach efforts. For reasons that remain unknown, its waiver request nonetheless remained pending for six (6) months, as a result of which SHA determined that it should secure specific confirmation of bid extensions during such inordinate delay. Unfortunately, SHA opted to seek such bid confirmation not for example, by simply notifying each bidder that its bid would be considered by SHA to remain pending unless and until revoked by the maker, or in the alternative, making a phone call to each bidder to request whether they sought to extend their bid and then recording a note in the procurement file after obtaining authorization from each bidder to the effect that its bid price remained unmodified. Instead, SHA sent letters by certified mail, some but not all of which inexplicably stated, "if SHA does not receive a response your bid will be removed from consideration." By doing this, SHA unnecessarily limited the very competition its procurement activity was intended to promote. To complicate the process further, when it accepted facsimile responses as adequate to extend bid pricing, SHA recognized impermissible electronic communications from bidders on this contract in direct violation of COMAR §21.03.05.03.

In response to SHA's first request for bid extension, Luis provided by fax response transmitted August 4, 2008 its assurance that it wished to remain under consideration for award of the contract for which it had already been advised it was low bidder. Technically, because the IFB here at issue failed to state whether fax communications from bidders were permissible, they became disallowed pursuant to COMAR §21.03.05.03 and therefore



were expressly barred from being considered by the procurement officer. However, SHA apparently ignored this prohibition, not only with respect to communications from Luis, but also from every other bidder as well, routinely accepting faxed responses to its multiple requests for bid extension. The same error occurred when SHA requested a second bid extension from Luis, which Luis provided by fax on September 3, 2008, and a third time when SHA again accepted the faxed extension of Luis' bid price on September 29, 2008, all in violation of COMAR §21,03.05.03. This aspect of the procurement process here at issue was not raised as a ground of appeal, but the Board *sua sponte* noted the defect at the hearing, as it is bound to uphold the requirements of law and regulation in rendering our decisions.

As SHA's consideration of Luis' waiver request continued to languish, on October 22, 2008, SHA sent to Luis a fourth request for bid extension, by letter dated October 18, 2008, this time also requesting proof that its surety had also been extended. None of this was necessary. The State asserts that its request for extension of the surety was justified by the reasoning set forth *In the Appeals of Kinsley Construction, Inc.*, MSBCA 2384 & 2399, ¶546 (March 15, 2004), but *Kinsley* is inapposite to the circumstances here. In *Kinsley*, each of the bidders on the job used the same prescribed form for their bid bonds, which were expressly effective only for a period of 180 days, after which time the surety lapsed according to the terms set forth in the bid bond. Here, the bid bond presented to the State from Luis contained no express expiration date. Quite the contrary, it remained binding without regard to the time at which any prospective contract between SHA and Luis might be formed. The low bid offered by Luis never lapsed, nor was it ever revoked or rescinded, not by Luis election nor by operation of law nor otherwise. Its surety never lapsed either. SHA's demands for the various redundant assurances it requested from Luis were

without necessity and served unfairly and without good cause to render ineligible the low bidder for this contract.

The State rightfully contends that Luis should also have monitored this procurement carefully and should have noted that its bid was expressly extended repeatedly, first until the end of August, then until the end of September, then until the end of October, but not beyond that point in time, even though the contract as of the end of October had yet to be awarded. This observation is correct, but does not change the status of Maryland common law, by which an offer which is not withdrawn or revoked remains pending and subject to acceptance until it has lapsed. The Board does not by this oversimplified restatement of contract law intend any *dicta* which might create precedent in determining whether an offer which is unnecessarily extended by a bidder at the request of the State thereafter becomes automatically withdrawn upon expiration of the period of the unnecessary but express extension of the bid for a specific period of time. Such a conclusion might not serve the interest of the State or its private sector contractors. Suffice it to say that it was never necessary for SHA to request affirmative bid extensions in this procurement in the fashion it elected, and in response to what was done, Luis consistently and repeatedly acted reasonably and responsibly to inform and assure the State that it wanted the job for which it submitted the low bid.

Finally, because the October 22, 2008 mailing of the October 18, 2008 letter was sent by certified mail, SHA knew or should have known that Luis never received it. The capability to secure that knowledge is a fundamental part of the purpose of sending a letter by certified mail, for which the State evidently deemed the additional cost of mailing to be worthwhile. Eventually the last letter to Luis was returned to SHA, but that did not occur until November 24, 2008, long after SHA had determined to disqualify Luis for the job and award the contract to the third lowest bidder, Civil, at a cost of \$22,581.00 more than the

pricing offered by Luis. Such a result is somewhat bizarre especially given that Luis had on multiple prior occasions expressed its unwavering desire for the contract at issue, combined with SHA's knowledge that each of its requests for bid extension that had been received by Luis had been promptly answered in the affirmative, and that agents of SHA and Luis specifically discussed the contract award on November 7, 2008 without SHA then disclosing to low bidder Luis that its bid was actually disqualified.

The Board is sympathetic to the State's argument that SHA advertises 300-400 contracts annually and that it is not realistic to expect every procurement officer to recall the details of each one of them. But this argument does not adequately excuse the multiple problems which SHA itself created in the course of arbitrarily exercising the various obligations it unnecessarily imposed upon bidders for this procurement with the unfortunate consequence of disqualifying responsive bidders, limiting competition for the job, and thereby increasing costs. The procurement officer on November 7, 2008 should have checked the file and more importantly, should not have eliminated Luis from consideration simply because it failed to respond to a fourth request for bid extension that the State should have known Luis never received.

The Board is now informed by SHA's Post-Hearing Brief filed June 5, 2009 that the third lowest bidder, Civil, also requested a waiver of the DBE/MBE participation goal in this procurement and that since the hearing on this matter, that waiver request has been denied. So as a result of over a year of delay in approving a contract to perform this roadwork, the State may seek to award the contract at even greater cost to the fourth lowest bidder on the job, all because SHA opted to regard bids as having been withdrawn if not extended under unnecessary conditions which SHA imposed and implemented contrary to State procurement regulation governing the forms of acceptable means of transaction

communications.

For all of these reasons, this appeal is sustained.

Wherefore, it is this                    day of June, 2009 Ordered that  
the above-captioned appeal is sustained.

Dated:

\_\_\_\_\_  
Dana Dembrow  
Board Member

I Concur:

\_\_\_\_\_  
Michael Burns  
Board Chairman

\_\_\_\_\_  
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 2636, appeal of M. Luis Construction Co., Inc. under SHA Contract No. PG5715177.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk