

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

Docket No. 2583	Date of Decision: 09/25/07
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DNR Project No. P-031-070-010	
Appellant/Respondent: Mediterranean Construction Co., Inc. Department of Natural Resources	

Decision Summary:

Representation - COMAR 21.10.05.3 A. states that a corporation "Shall be represented by an attorney at law licensed to practice in Maryland." Entities required by COMAR to be so represented must be so represented before the MSBCA.

Irregularities in Bid - Irregularities in competitive sealed bids may be waived if the procurement officer determines such a waiver is in the State of Maryland's best interest.

Responsibility - Cure After Bid Opening - Matters of responsibility may be cured after bid opening.

Discretion - Procurement Officer - Minor irregularities and responsibility - The procurement officer acted completely within the scope of discretion granted by COMAR regarding the minor irregularities regarding responsibility at issue.

Discretion - Agency - The Board has a well-founded reluctance to substitute its judgment for that of an agency.

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

In The Appeal of Mediterranean)
Construction Co., Inc.)
)
) Docket No. MSBCA 2583
)
Under DNR Project No. P-031-)
070-010)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Paul J. Cucuzzella
Assistant Attorney General
Annapolis, Maryland**

**APPEARANCE FOR INTERESTED PARTY: Samuel N. Shapiro, Esq.
(Decker Contracting, Inc.) Silver Spring, Maryland**

OPINION BY CHAIRMAN BURNS

Appellant appeals from a final decision of the Maryland State Department of Natural Resources regarding an Invitation to Bid for certain rehabilitation work on the Toll House, a dwelling located in Susquehanna State Park.

For the reasons that follow this bid protest is denied.

Findings of Fact

1. On or about May 18, 2007 the Maryland State Department of Natural Resources (DNR) issued Invitation for Bids (IFB) K00S0229750.
2. DNR is a Maryland State Government agency.
3. The purpose of the IFB was to procure services to repair and rehabilitate the Toll House, a dwelling

- located in Susquehanna State Park in Havre de Grace, Maryland.
4. The contract was to be awarded by use of the Competitive Sealed Bidding procurement process.
 5. The contract was to be awarded to the "lowest responsive and responsible bidder."
 6. DNR provided a Bid Form with the IFB.
 7. The Procurement Officer was Jordan Loran.
 8. An on-site pre-bid conference was held by DNR on May 31, 2007.
 9. On or about June 4, 2007, DNR issued Addendum Number 1 (Addendum) to the IFB.
 10. Among other things, Addendum Number 1 informed potential bidders that the existing exterior paint on the Toll House was lead-based and should be handled in a manner consistent with the Maryland State Department of the Environment (MDE) guidelines for lead paint.
 11. Addendum Number 1 also provided that the contractor receiving the award "must have Lead Paint Accreditation and all workers must have Lead Paint Certification from the Maryland Department of the Environment."
 12. Addendum Number 1 included a Revised Bid Form that provided an area for listing the bidder's "Lead Paint Certificate" number and requested a "copy of certificate with bid."
 13. The bid due date, as revised by the Addendum, was June 21, 2007.
 14. DNR received five bids on June 21, 2007.
 15. Among the five bids received by DNR were bids from Decker Contracting, Inc. (Decker) - which was the lowest bidder, the contract awardee, and is the Interested Party herein - and Mediterranean

Construction Co., Inc. (Mediterranean), the Appellant herein.

16. The low bid of Decker was for \$44,875.95.
17. The bid of Mediterranean was for \$67,700.00.¹
18. The Procurement Officer began a review of the five bids received on or about June 25, 2007 and found that while Decker had acknowledged receipt of the IFB Addendum concerning lead paint, Decker had not utilized the Revised Bid Form in submitting its bid and had not included a copy of an MDE Certificate of Lead Paint Accreditation.
19. The Procurement Officer contacted Decker on or about June 25, 2007 and instructed Decker to provide a copy of a valid MDE Lead Paint Accreditation Certificate.
20. On or about June 26, 2007, the Procurement Officer received a valid MDE Lead Paint Accreditation Certificate from Decker.
21. This MDE Lead Paint Accreditation Certificate had been issued to K & S Environmental Services, Inc. (K & S).
22. Decker also notified the Procurement Officer by way of a letter that K & S would be utilized by Decker as its subcontractor for all of the lead paint removal and disposal for the Toll House project.
23. The Procurement Officer determined that Decker was a responsive and responsible bidder based on Decker's sealed bid and the timeliness of the follow-up documentation requested and received after bid opening, including the Lead Paint Accreditation Certificate.
24. The Procurement Officer further determined that the use by Decker of the original Bid Form, and not the revised

¹ According to the Agency Report and the "Tabulation of Bids" Exhibit provided therein, Mediterranean's bid was actually the third lowest bid out of the five bids received.

Bid Form, for submittal of the Decker bid was "immaterial in this case."

25. The Procurement Officer determined that the submittal of the Lead Paint Accreditation Certificate after bid opening was responsive and cured the minor irregularity of the use of the original Bid Form.
26. Based upon a review of the situation, the Procurement Officer determined that Decker was capable of performing the Toll House project as described in the IFB and the Addendum.
27. The Procurement Officer concluded that Decker - whose bid was more than \$3,000.00 lower than the next lowest bid and was almost \$23,000.00 lower than Mediterranean's bid - was the lowest responsive and responsible bidder and should, therefore, be awarded the contract.
28. Mediterranean and the other unsuccessful bidders were notified that they had not been awarded the contract by way of a letter from DNR dated July 10, 2007.
29. By way of an e-mail dated July 13, 2007, sent to the Procurement Officer by Mediterranean's President, Demetre Laskaridis, Mediterranean protested the award of the contract to Decker.²
30. Mediterranean's protest claimed that both of the bids received which were lower than Mediterranean's in the bid amount "were not certified by MDE and they didn't included [sic] a Lead Paint Removal certificate with their bid."³

² Pursuant to COMAR 21.10.05.03 corporations "shall be represented by an attorney at law licensed in Maryland." As of the issuance of this opinion, Mediterranean is not so-represented.

³ Apart from this assertion by Mediterranean, there is no evidence that the entity which submitted the second lowest bid received, Summer hill Cabinets, did not fully comply with the Lead Paint requirements of the IFB and the Addendum.

31. Mediterranean further claimed that since Decker and the other lower bidder were not MDE certified the contract could not be awarded to either of those two lower bidders and that the contract should be awarded to Mediterranean.
32. The Procurement Officer denied Mediterranean's Protest by way of a letter dated July 17, 2007.
33. The Procurement Officer noted in the denial letter to Mediterranean that Decker was found to be responsible based on documents submitted after bid opening and that information concerning a bidder's responsibility may be submitted after bid opening. Further, since the lead paint work represented only a portion of the scope of work, it was reasonable for the low bidder to submit a Lead Paint Accreditation Certificate from the subcontractor which was to do the lead paint work.
34. Mediterranean appealed the Procurement Officer's denial of its Protest by way of an Appeal dated July 19, 2007 and received and docketed by the Maryland State Board of Contract Appeals (Board) on July 23, 2007.
35. Mediterranean's Appeal states that Decker was not qualified for Lead Paint removal, did not include the Lead Paint Accreditation Certificate with his bid, and did not include the subcontractor's Lead Paint Removal qualifications at the time of the bid.
36. No comments from Mediterranean were received concerning the Agency Report.
37. There was no request by any party for a Hearing.

Decision

Mediterranean Construction Co., Incorporated, is a corporation. COMAR 21.10.05.03 A. states that a corporation

"shall be represented by an attorney at law licensed in Maryland." Mediterranean is not so represented. Since Mediterranean's Appeal is to be denied on the merits, the Board will simply note the above facts for the record and add that entities required by COMAR to be represented by licensed Maryland attorneys are advised to follow that regulation when bringing matters before this Board or be prepared to face the consequences of such a failure.

As to the merits of Appellant's Appeal, it is clear that technicalities or minor irregularities in competitive sealed bids may be waived if the procurement officer determines that such a waiver is in the State of Maryland's best interest. COMAR 21.05.02.12 A. "The procurement officer may either give a bidder the opportunity to cure any deficiency resulting from a technicality or minor irregularity in its bid, or waive the deficiency if it is in the State's advantage to do so." *Id.*

A minor irregularity is one which is merely a matter of form and not of substance or involves some immaterial or inconsequential defect or variation in a bid from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders. COMAR 21.06.02.04 A.

As to responsiveness and responsibility:

We have observed that, in contrast to matters of responsiveness, which concerns a bidder's "Legal obligation to perform the required services in exact conformity with the IFB specifications," responsibility concerns "a bidder's capability to perform a contract," and information concerning a bidder's responsibility may be submitted after bid opening.

E.g., Century Construction, Inc., MSBCA 2385, 6 MSBCA ¶547

at pp. 2-3 (2004); National Elevator, MSBCA 1252, 2 MSBCA ¶114 (1985).

Even where solicitation documents mandate submission of an item, a procurement officer may waive as a minor informality the failure to supply the requested documents or information at the time of bid opening. Century Construction, Inc., *supra*. The bidder may supply such requested information after bid opening but before the award of the contract. *E.g.*, *Id.*; DeBarros Construction Corporation, MSBCA 1467, 3 MSBCA ¶215 at p.4 (1989).

In this case, Appellant alleges that contract awardee Decker was not qualified for Lead Paint removal, did not include the Lead Paint Accreditation Certificate with his bid, and did not include the subcontractor's Lead Paint Removal qualifications at the time of the bid. Such allegations go to Decker's responsibility, not Decker's responsiveness. There is no allegation that Decker's bid was not responsive. The issue is, therefore, one of responsibility.

It is clear that Decker did not fill out the revised Bid Form included in the Addendum when making its bid, did not supply the requested MDE Lead Paint Accreditation Certificate, and did not include the subcontractors Lead Paint Removal qualifications at the time of the bid.

The Procurement Officer found that Decker had not utilized the Revised Bid Form in submitting its bid and had not included a copy of an MDE Certificate of Lead Paint Accreditation. Based upon a review of the situation, however, the Procurement Officer determined that Decker was capable of performing the Toll House project as described in the IFB and the Addendum. Specifically, the Procurement Officer judged the issue of the failure to file the MDE Lead

Paint Accreditation Certificate and use the revised Bid Form to be responsibility issues and gave Decker an opportunity to provide documentation, including the required MDE Certificate of Lead Paint Accreditation, which would satisfy these responsibility issues. Decker promptly provided the Procurement Officer such information and documentation, including the required MDE Certificate of Lead Paint Accreditation for its subcontractor, K & S (as well as notifying the Procurement Officer that K & S would handle the lead paint removal and disposal).

Matters of responsibility may be cured after bid opening. *E.g.*, Century Construction, Inc., *supra* at p.5; National Elevator, *supra*. The request for, and receipt of, the information and documentation requested by the Procurement Officer was perfectly permissible and was clearly legal.

The Procurement Officer acted completely within the scope of the discretion granted to him by COMAR. The Procurement Officer viewed the issues raised as merely technicalities or minor irregularities in Decker's bid. Furthermore, these issues were matters of responsibility, not responsiveness. The Procurement Officer determined that it was in the best interest of the State of Maryland to permit Decker to correct the omission of the MDE Certificate of Lead Paint Accreditation and to waive the requirement that the Decker's Bid be placed on the revised Bid Form at bid opening.

This Board has expressed well-founded reluctance to substitute its judgment for that of an agency, in part because it is the procuring agency that will have to "live with the results" of its decision. *E.g.*, Stronghold Security, LLC, *supra*; Klein's of Aberdeen, MSBCA 1773, 4

MSBCA ¶354 (1994) at p. 7. COMAR allows Procurement Officers wide discretion in matters such as the one at issue in this appeal and there is no evidence that the Procurement Officer herein acted in any manner that was illegal or in any way inconsistent with the requirements of COMAR.

The appeal of Mediterranean is, therefore, denied.

Wherefore, it is Ordered this day of September, 2007 that the above-captioned appeal is denied.

Dated:

Michael W. Burns
Chairman

I Concur:

Michael J. Collins
Board Member

Dana Lee Dembrow
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 2583, appeal of Mediterranean Construction Co., Inc. under DNR Project No. P-031-070-010.

Dated:

Michael L. Carnahan
Deputy Clerk