

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

In the Appeal of)
Rustler Construction, Inc.)
)
) Docket No. MSBCA 2638
)
Under)
SHA Contract No. PG5715177)

APPEARANCE FOR APPELLANT: Michael C. Crowley, Esq.
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Falls Church, Virginia

APPEARANCE FOR RESPONDENT: Jason D. Couch
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OPINION BY BOARD MEMBER DEMBROW

This appeal raises the procedural issue of timeliness of filing as well as substantive questions surrounding the fashion and timeliness of forms of communication between State procurement officers and private contractors when the State elects to seek an extension of bid prices during procurement decision-making.

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. Apparent low bidder Luis requested a waiver of the disadvantaged business enterprise/minority business enterprise (DBE/MBE) requirements identified in the procurement, which delayed SHA's evaluation and processing of bids.
5. In accordance with the Code of Maryland Regulations (COMAR) §21.05.02.19A, "Unless otherwise provided in the invitation for bids, bid prices are irrevocable for a period of 90 days following bid opening."
6. The invitation for bids (IFB) here at issue did not specify any alternative period for bid irrevocability.
7. The price extended by appellant Rustler, like all other bidders on this job, was irrevocable for a period of ninety (90) days following bid submission, during which time the waiver request of the apparent low bidder Luis remained pending and recommendation for contract award remained undetermined while Luis' eligibility for award was being evaluated by SHA.
8. Had SHA rejected only the Luis bid, the Rustler bid would

have been next in line as the apparent low bidder for award of the contract.

9. Before the 90-day non-revocability period expired on the offered bid prices on or about August 20, 2008, specifically by correspondence dated July 28, 2008 from C. Alan Krimm, Team Leader for SHA's Contracts Award Team, bidders were requested to extend their bid prices until August 31, 2008. (Appellant's Exhibit No. 1.)
10. By separate correspondence dated August 20, 2008, also from Mr. Krimm, bidders were again requested to extend their bid prices, this time until September 30, 2008. (Appellant's Exhibit No. 2.)
11. By correspondence dated September 18, 2008, again from Mr. Krimm, bidders were requested yet again to extend their bid prices, this time until October 31, 2008. (Appellant's Exhibit No. 3.)
12. Unlike the first two letters (dated July 28 and August 20, 2008) requesting that bidders extend their price offers until the end of the following month, SHA's third request for extension until the end of the month (dated September 18, 2008) included for the first time a new concluding clause as follows: "if SHA does not receive a response your bid will be removed from consideration."
13. Appellant Rustler responded in timely fashion to SHA's first two (2) requests for bid extensions, both times by having a representative of Rustler execute the approval section at the bottom of SHA's one-page correspondence and then transmitting that approval by facsimile (fax) to telephone number 1-410-787-0985, the correct fax number for Mr. Krimm, and thereafter by first class mail, postage prepaid, to SHA, as the result of which Mr. Krimm, upon receipt of each fax, noted the procurement file that Rustler had extended its bid as requested and therefore remained eligible for potential

award of the contract.

14. With respect to SHA's third request for bid extension, Rustler claims to have faxed a copy of its executed approval at 2:25 p.m. on the due date of September 30, 2008 and a copy of a fax transmission record of Rustler's communications with SHA on this contract evidences that a fax was indeed sent by Rustler to the correct fax telephone number for Mr. Krimm at SHA at that time. (Appellant's Exhibit No. 4.)
15. SHA records fail to reflect that SHA actually received Rustler's alleged September 30, 2008 fax communication, and as indicated by the State's receipt date-stamp of the original of the executed correspondence documenting Rustler's third bid extension sent to SHA by Rustler by postal delivery, SHA did not receive the original of that document in the mail until the following day, October 1, 2008, even though the approval was expressly due "by September 30, 2008."
16. Because SHA never received Rustler's September 30, 2008 fax and did not receive the mailed original of that bid extension approval until the day after it was due, SHA discontinued further consideration of any prospective award of this contract to Rustler, though it did not notify appellant of that decision and Rustler continued to believe that it remained a viable candidate for contract award.
17. SHA did not request that Rustler extend its price beyond the extension it requested by correspondence dated September 18, 2008, because SHA did not receive Rustler's approval of SHA's requested extension through October 31, 2008 until October 1, 2008, the day after it was due.
18. SHA requested from remaining bidders a fourth and final bid extension through the end of November but that request was not directed to Rustler and is not pertinent to the instant

appeal because it came after Rustler was disqualified due to its allegedly untimely submission of its bid extension for the prior month of October.

19. On November 10, 2008, Rustler learned that SHA determined to award the contract to Civil, and on November 12, 2008 filed a protest of that award with the designated Procurement Officer, Mr. Mark Flack, who has been an SHA employee for over 25 years and served at all times relevant to this appeal as Director of SHA's Office of Construction.
20. By fax dated December 11, 2008 and sent at 4:32 p.m. on that date to telephone number 1-301-306-6731, which is the correct fax number for appellant Rustler, SHA directed a copy of its correspondence to Rustler by which Mr. Flack denied Rustler's bid protest, the original of that correspondence being sent also to Rustler by certified mail on the same date.
21. Rustler did not receive the faxed copy of the December 11, 2008 SHA denial of its protest until a week later, on December 18, 2008, when SHA faxed the protest denial letter to all six (6) bidders on the subject project, including Rustler.
22. One (1) day prior to the aforementioned round of faxes, namely on December 17, 2008, Rustler received by certified mail from SHA actual notice of SHA's denial of Rustler's bid protest. (Testimony of Ms. Karen Salehi at page 29 of the trial transcript.)
23. SHA's fax transmission documentation indicates that the copy of the December 11, 2008 letter denying the Rustler bid protest which SHA attempted to fax to all six (6) of the original bidders on December 18, 2008 was not actually transmitted to Luis because Luis' fax number was busy, and similarly, that SHA's attempt to fax a copy of that letter to another bidder, Ardent Company ("Ardent"), was also at

least partially ineffective in that SHA attempted to send six (6) pages by fax to Ardent, but only three (3) pages were actually transmitted. (State's Exhibit No. 3.)

24. Pursuant to COMAR §21.10.02.10A, Rustler had ten (10) days from "receipt of notice of the final procurement agency action" within which to note an appeal to the Maryland State Board of Contract Appeals ("Board").
25. Rustler's appeal to this Board was filed December 23, 2008.

Decision

The first question that must be answered in the affirmative if this Board is to address the merits of the instant bid protest is whether this appeal is timely filed. Toward resolution of that determination the Board finds specific guidance in COMAR §21.03.05.02, which states in pertinent part as follows:

"A. Each solicitation and contract *shall* state whether electronic transactions are permitted or required for that procurement. If the solicitation or contract does not specify that electronic transactions are permitted or required, bidders and offerors *may not* use electronic means for any part of the procurement.

B. If the electronic means are permitted or required, a solicitation or a contract shall specifically identify:

(1) Transactions for which electronic means are authorized;

(2) Specific means of conducting each authorized electronic transaction, including:

(a) Facsimilie..." (Emphasis supplied.)

The immediately subsequent regulation set forth as COMAR §21.03.05.03 further amplifies the limitations set forth by state procedural regulation of procurement communications:

"A. 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.

B. An attempt by a bidder, offeror, or contractor to conduct a transaction by electronic means, including any acknowledgement, bid, proposal, protest, or claim, does not satisfy the requirements of this title unless the solicitation or contract specifically authorizes the use of electronic means for the specified transaction." (Emphasis supplied.)

There is no dispute concerning the applicability of the foregoing restrictions on fax communications. Facsimile is expressly referenced as a means of electronic transaction. There is equally no issue that the IFB that is the subject of the instant protest is technically defective and in violation of COMAR §21.03.05.02 in that it failed to state whether electronic transactions like fax communications were permitted. That SHA routinely violated and violates COMAR limitations on the use of fax communications, as asserted by the trial testimony in this proceeding (see page 66 of transcript of proceedings), does not empower this Board to re-write, ignore or overlook the requirements of Maryland law and regulation. Indeed, it would have been a very simple matter for SHA to have included in the IFB here at issue a clause permitting communication by fax under specified circumstances such as SHA request for response by fax, and also an additional clause that could have expressly provided that bids did not automatically expire 90 days after due date. Such contract provisions would have saved SHA considerable unnecessary work during the course of its extended bid evaluation that occurred here.

By correspondence dated December 11, 2008 SHA denied Rustler's bid protest and on that date sent its determination both by fax and by mail to the appellant. Ironically given the substantive basis of appellant's complaint, Rustler never received the SHA fax of December 11, 2008. Rustler did receive SHA's certified mail on December 17, 2008 and one day later, on December 18, 2008, also received SHA's second electronic

transmission of the fax that had earlier been sent on December 11, 2008 but not received. Under these circumstances the earliest that Rustler received actual or constructive notice of the agency's disposition of its bid protest was December 17, 2008. Because Rustler's filing of its appeal with this Board on December 23, 2008 was within ten (10) days of its December 17, 2008 notice of the final agency action, Rustler's appeal is timely filed in accordance with COMAR §21.10.02.10B.

Turning to the merits of the appeal, it appears that SHA in this procurement may have confused the requisite period of non-revocability of an offer as set forth in COMAR, with the related but somewhat distinct concept of actual revocation of a contract bid. In this procurement, although any of the six (6) bidders on this contract had the legal right to rescind their bid following the expiration of ninety (90) days after submission, there is no indication that any of them elected to do so and indeed, there is every indication that the bidders sought for their bids to remain under consideration, including appellant Rustler.

The sole cause of the delay in recommending this contract award was SHA's long evaluation of the apparent low bidder's request for DBE/MBE waiver. Why this request remained pending from May until November is not explained, potentially raises questions outside the jurisdiction of the Board, and is not pertinent to the questions that the Board must address to resolve this appeal. What is known is that Rustler offered a bid that, by regulation, was valid and irrevocable for ninety (90) days. Rustler thereafter sought affirmatively to extend its bid and did so in response to SHA requests, first, through August 31, 2008, and then, through September 30, 2008, both of which extensions were recognized and honored by SHA even though Rustler's communications in this regard were of a form that was prohibited by COMAR as more fully set forth above.

When Rustler issued its third assurance of bid extension on

September 30, 2008, SHA did not receive it in the mail until the following day, the day after it was due. But it is not contested that SHA had actual proper written notice by mail sent on September 30, 2008 but not received until October 1, 2008, by which Rustler extended its price through the end of that month, as SHA requested. And Rustler had previously extended its bid price through the end of the prior month of September, as SHA acknowledges. Accordingly, there was no time prior to November 1, 2008 that Rustler could have rescinded its offer. SHA never requested that Rustler extend its bid a fourth time to cover the final month of delay during SHA's internal deliberations, but Rustler's bid nonetheless remained outstanding and susceptible of acceptance at all times during SHA's entire evaluation of IFB responses.

Rustler faxed and mailed its third agreement to extend its bid on September 30, 2008. Plainly, Rustler's intent at that time was to extend its bid. Setting aside the lawfulness of the fax, Rustler's bid extension was arguably valid therefore on two bases, first, that it was issued in timely fashion by mailing on September 30, 2008, and second, the bid never lapsed at any time between midnight on September 30, 2008 and the moment after midnight when October 1, 2008 began.

Much is made over the potential change in SHA policy during the course of their evaluation of these bids, as reflected by the new language that was added to the third version of the agency's repeated requests for bid extension. Specifically, SHA's third request to bidders stated expressly, "if SHA does not receive a response your bid will be removed from consideration." Why this provision was absent in the first two letters to bidders but added to the subsequent letters is unknown. Why SHA would seek to limit competition and disqualify responsive low bidders is equally inexplicable. Of paramount importance is that SHA treat all bidders equally and also conform to the dictates of their own

statements, and it is their adherence to these vital procurement principles that presumably may have driven procurement officials to disqualify Rustler. But the new language added to the third bid extension does not state, "if SHA does not receive a response *by the due date*, your bid will be removed from consideration." This may have been what the State meant, but it is not what SHA said, and by the doctrine of *contra proferentem*, to the extent that any ambiguity may exist with respect to the new concluding language set forth in SHA's third form bid extension request, that ambiguity must be resolved in favor of Rustler. See *Anderson Adventures, LLC v. Sam & Murphy, Inc.*, 176 Md.App. 164 (2007).

Finally and most importantly, notwithstanding any of the above, Rustler never rescinded its offer. Its offer remained outstanding at all times during SHA's consideration of the IFB responses submitted by the May 22, 2008 due date. The assertion that under other circumstances Rustler may have been able lawfully to withdraw its bid at some point if it had elected to do so, does not imply that Rustler ever actually rescinded its bid. It did not. SHA could have accepted Rustler's offer at any time because it was never revoked, regardless of whether its bid was unnecessarily expressly extended in timely fashion in response to one of several unnecessary SHA requests for bid extension. When contract award is delayed, it may well be good practice for SHA to confirm from all bidders in equivalent fashion that all bids remain pending, but permitting this to be done by fax in violation of COMAR is fraught with the potential of encountering such miscommunications as those which occurred here. In this procurement, SHA should have known that Rustler did not wish or intend to revoke its offer. For SHA to contend that Rustler did not properly extend its offer is factually and legally incorrect and also to some significant degree immaterial to resolution of this dispute, because it is undisputed that

Rustler did not at any time in fact rescind its bid.

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 2638, appeal of Rustler Construction, Inc. under SHA Contract No. PG5715177.

Dated:

Michael L. Carnahan
Deputy Clerk