

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Southern Improvement Company,)
Inc.)
) Docket No. MSBCA 2904
)
Under MTA Contract)
No. T-1402)

APPEARANCE FOR APPELLANT: Thomas A. Baker
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OPINION BY BOARD MEMBER DEMBROW

The sole issue in this bid protest is whether the defect in the Bid Bond alleged by appellant constitutes a "minor irregularity" which may be waived, or in the alternative, rises to such a level of deficiency as to render the bid non-responsive to the solicitation. Under the circumstances present here, for which the State fairly concluded that the Bid Bond appears to be valid and enforceable, the procurement officer did not abuse lawful discretion in deeming the subject bid responsive.

Findings of Fact

1. On or about February 21, 2014, the Maryland Transit Administration (MTA) issued an Invitation for Bids (IFB)

known as MTA Contract No. T-1402 for certain repair, rehabilitation, maintenance, and construction work for MTA's MARC train services. (Contract Specification Book.)

2. The subject IFB is somewhat unusual in that MTA does not seek to contract with a single provider for performance of a predetermined task, but instead, wishes to identify three (3) prospective contract awardees to be determined to be eligible to receive future work orders. MTA evaluated the bids received in response to this IFB by determining the three (3) bidders offering the lowest bid prices in response to a certain sample task specified in the solicitation.
3. Specifically, the IFB provides as follows:

10. AWARD(S)

The Maryland Transit Administration (MTA) intends to award multiple contracts (**up to three (3) contracts**) from this solicitation to the responsible Bidders with the lowest responsive bid based on the cost of a sample task provided in this solicitation. The contractor submitting the lowest bid will be awarded that task. The lowest bid amount for the sample tasks does not represent the actual amount for which the contract will be awarded. The prospective responsible low bidder will be advised of the actual "not to exceed" contract amount prior to contract execution and will be awarded that contract amount. Based on the current program, the MTA has budgeted approximately **[Not To Exceed value of \$10,000,000** [sic] for this solicitation and anticipates multiple awards from this IFB. The MTA does not imply or guarantee that the Contractor will receive either the "Grand Total", price bid, or the "Amount Budgeted" during the life of this Contract. The Contractor will only be compensated for the actual work, satisfactorily completed and accepted, on a Task-by-Task and Item by Item basis, as required by the MTA and in accordance with the Standard Provisions and Technical Provisions of this Contract.

(Contract Specification Book, page 3 of 8.)

4. Consistent with the requirements set forth in the State Finance and Procurement (SF&P) Article of the Maryland Annotated Code §13-207 and the Code of Maryland Regulations (COMAR) 21.06.07.09, both sections governing contracts in excess of \$100,000, the IFB mandated as follows:

8. BID BOND

Each bid exceeding \$100,000 must be accompanied by a Bid Bond on a form furnished by the Administration in the amount of five percent (5%) of the Bid Price. Performance and Payment Bonds in the amount of the Contract Price will also be required. Bid, payment, and performance security may be in the form of: (1) a bond executed by a surety company authorized to do business in the State; (2) a bond executed by an individual surety that meets certain criteria; (3) cash; (4) another form of security required by State or federal law; or (5) another form of security satisfactory to the unit awarding the contract. Sections 13-207, 13-216, 17-104 of the State Finance and Procurement Article, Annotated Code of Maryland.

(Contract Specification Book, pg. 2 of 8.)

5. A total of six (6) bids were submitted on or before the April 10, 2014 bid submission deadline, with two (2) bids of less than \$100,000 for MTA's sample task and four (4) bids in excess of that sum, specifically as follows:

Company	Bid
JNL Construction Services	\$99,995.00
Southern Improvement Co.	\$97,566.48
M. Stancliff Construction Co.	\$229,071.77
Amtrac Contractors of MD, Inc.	\$223,430.00
Hawkeye Construction Co.	\$148,871.00
Denver-Elek	\$230,143.00

(Administrative Record, Tab 17.)

6. On April 18, 2014 an oral bid review meeting was conducted with representatives of appellant Southern Improvement Company, Inc. (Southern) in attendance along with a representative of MTA, after which Southern notified MTA of its contention of certain irregularities in the bid submitted by the third lowest bidder, Interested Party Hawkeye Construction Co. (Hawkeye). (Administrative Record, Tab 4.)
7. On May 27, 2014, MTA provided to Southern a copy of the bid documents submitted by Hawkeye. (Agency Report, pg. 2.)
8. The Bid Bond provided by Hawkeye along with its bid used the form provided by MTA and was completed correctly without error as to identification of the bidder, obligee, surety, amount of bond, and applicable contract. That Bid Bond was executed by the President of Hawkeye, which signature was attested to by the corporate Secretary and thereafter imprinted with Hawkeye's unique corporate stamp and raised seal. It was also executed by Debra L. Nash, who is identified as the Attorney-in-fact for the surety, Capitol Indemnity Corporation, which signature was also attested to by another individual and thereafter imprinted with the unique corporate stamp and raised seal for the said surety. Although appellant asserts that only a copy of Hawkeye's Bid Bond was initially provided to MTA, the procurement officer testified at hearing that the original Bid Bond bearing the raised seal of the surety was furnished to MTA prior to the bid due date along with the other documents constituting Hawkeye's bid. Because this testimony is without contradiction by credible evidence, it appears that the original of Hawkeye's Bid Bond was indeed provided to MTA at the same time it submitted the rest of its bid. (Tr. pgs. 28, 51, 61; Administrative Record, Tab 12.)

9. The specific basis of Southern's allegation of a defect in Hawkeye's Bid Bond is that the Power of Attorney bearing the date April 10, 2014 provided by Capitol Indemnity Corporation on behalf of Hawkeye as evidence of authority for the valid execution of the Bid Bond by a duly authorized agent of the surety is a copy rather than the original of that document. Although not visible on the original, the form entitled "Capitol Indemnity Power of Attorney" bears a watermark stamp of the word "VOID" that appears on photocopies of the original, thus distinguishing copies from the original of that document. On copies, that word appears a total of thirty times across the single-page pre-printed form constituting the surety's Power of Attorney. The watermark "VOID" indicia can be made faint and difficult to decipher or bold and prominent on copies depending on the lighter or darker setting of the image quality setting for photocopies made from the original document.
10. The copy of the Power of Attorney submitted by Hawkeye with its bid bears in the top right corner serial no. 60098806 printed in black ink, and at the bottom of that pre-printed form the following language appears: "THIS DOCUMENT IS NOT VALID UNLESS PRINTED ON GRAY SHADED BACKGROUND WITH A RED SERIAL NUMBER IN THE UPPER RIGHT HAND CORNER. IF YOU HAVE ANY QUESTIONS CONCERNING THE AUTHENTICITY OF THIS DOCUMENT CALL, 800-475-4450." (Tab 12, Administrative Record.)
11. The copy of the Power of Attorney that was originally provided to MTA documenting the authority of Debra L. Nash as attorney-in-fact to obligate Capitol Indemnity Corporation as the surety for Hawkeye's Bid Bond was not printed on paper with a gray shaded background nor did the serial number appear in red, but instead was merely an ordinary black and white photocopy of the original.

12. The original of the Power of Attorney is a pre-printed form with a gray background and the serial number printed in red, but does not bear original signatures, only a copy thereof. Similarly, the surety's corporate stamp and seal is printed, but the seal is not raised by imprint. Instead, the original Power of Attorney was completed simply by adding the date, April 10, 2014, after typing the names of the five (5) individuals empowered by the document to execute a bid bond for Capitol Indemnity Corporation, among them Debra L. Nash, as well as a limitation on the authority of the Power of Attorney to surety not in excess of twenty million dollars.
13. MTA's procurement officer, Joseph Johnson, examined both the Bid Bond and the Power of Attorney submitted along with the Hawkeye bid and, and when he discovered on the first Monday following bid opening that the Power of Attorney was a copy rather than the original of that document, contacted Hawkeye and requested delivery of the original, in response to which the original of the Power of Attorney was hand-delivered to MTA the following day. (Tr. pg. 54.)
14. On June 2, 2014, Southern filed a bid protest with MTA objecting to the eligibility of Hawkeye to be awarded a contract, asserting that Hawkeye's bid was non-responsive because it "failed to provide a valid bid bond." (Administrative Record, Tab 14.)
15. By final action dated September 9, 2014, MTA denied Southern's bid protest, advising appellant that the initial provision of a copy of the Power of Attorney rather than the original constituted a defect that was waived by MTA as a "minor irregularity." (Administrative Record, Tabs 3, 13.)
16. The procurement officer's denial letter dated September 9, 2014 fails to distinguish between the Bid Bond and the Power of Attorney supporting the Bid Bond, referring collectively

to "a copy of the bid bond versus an original bid bond." (Tab 13, Administrative Record.) In fact, the uncontested affirmation of the procurement officer is that the original of the Bid Bond had been provided to MTA as a part of Hawkeye's bid; only the second document, namely, the accompanying Power of Attorney, was submitted as a copy of the original unsigned document rather than the original itself printed on a gray background and bearing the serial number in red ink. (Tr. 28, 51, 61.)

17. On another bid bond form included as a part of the IFB package is a three (3) page document with spaces for bidders to indicate whether they are a corporation, partnership, individual, or joint venture, and at the bottom of that form the following statement appears: "In the event that a Corporate Officer (President or Vice President) does not sign the Bid Form, a Power of Execution or Power of Attorney, must be submitted with the Bid Forms." (Contract Specification Book, pg. 8 of 8.)
18. It is undisputed that the President of Hawkeye signed the Bid Form, but appellant, using the same reasoning as set forth above, argues by implication or analogy that, by the aforementioned qualifying language set forth in another part of the IFB, the signature of the attorney-in-fact for the surety is also invalid unless supported by a valid power of attorney memorializing the authority of the attorney-in-fact to sign on behalf of the corporate surety for which the attorney-in-fact is not a corporate officer.
19. On September 25, 2014 Southern noted an appeal of MTA's September 9, 2014 protest denial letter to the Maryland State Board of Contract Appeals (Board).
20. On November 19, 2014, the Agency Report was filed with the Board, followed by appellant's Comments to the Agency Report received on December 1, 2014.

21. This matter was originally scheduled for hearing on the merits on December 18, 2014, but on December 16, 2014 the Board discovered that Interested Party Hawkeye had previously not been made aware of the filing of the instant appeal with notice required by COMAR 21.10.07.03A, as a result of which the hearing was continued *sua sponte* to January 6, 2015 in order to afford any interested party a fair opportunity to retain counsel to enter an appearance and participate in the trial proceeding.
22. Hawkeye did retain counsel, who entered an appearance in this proceeding on December 19, 2014.
23. Hearing was conducted on January 6, 2015.
24. On January 8, 2015, MTA filed a supplemental Affidavit clarifying that when Hawkeye submitted its bid to MTA, it provided an original and two copies.
25. The transcript of the hearing was made available January 19, 2015.

Decision

Bid bonds are vital to state procurement. Without an enforceable bid bond in place, bidders would be free to make speculative price offers and thereafter withdraw their offers without consequence. A person offering to perform work for the State may not change their mind after the State has determined to accept their offer. The entire competitive bidding process could fall into disarray unless those who propose to enter into government contracts are obliged to follow through on their offer after the state's acceptance by selection for contract award. This is the reason that bids on large state contracts are required to include a bid bond.

In particular, SF&P 13-207(b) provides, "a procurement officer shall require a bidder or offeror to provide bid security on a procurement contract for construction if: (i) the price is

expected to exceed \$100,000" and SF&P 13-207(c) states, "a procurement officer may require a bidder or offeror to provide bid security on a procurement contract for services, supplies, or construction related services if the price of the procurement contract is expected to exceed \$50,000." Similarly, COMAR 21.05.08.02A provides "Solicitations for construction contracts reasonably expected by the procurement officer to exceed \$100,000 shall contain notice of bid security requirements" and COMAR 21.05.08.02B states, "solicitations for all other contracts reasonably expected by the procurement officer to exceed \$50,000 and for which the procurement officer wishes to require bid security shall contain notice of the bid security requirements."

COMAR 21.06.07.09D prescribes the preferred form for bid bonds required in state contract procurement. At the end of the form set forth in that section of COMAR are signature lines for the president of a corporate bidder and attorney-in-fact for the surety, with additional signature lines for third persons to attest to the signatures of the same. SF&P 17-104 establishes certain requirements of surety bonds but there appears to be no reference in state statute or COMAR to the necessity of an accompanying power of attorney to evidence the authority of the surety's attorney-in-fact, though it is customary that a power of attorney be submitted along with a bid bond.

By slight contrast, federal procurement regulations are quite similar to Maryland's with respect to the requirements of bonds, but, unlike Maryland regulation, Federal Acquisition Regulation (FAR) 28.001 defines "Power of Attorney" and FAR 28.106-1(k) requires the use of Standard Form (SF) 1414, which states as the precursor to the part of the form for the signatures and seals evidencing the consent of the surety:

The Principal or authorized representative shall execute this consent of surety with the modification to which it pertains. If the representative (e.g., attorney-in-fact) that signs the consent is

not a member of the partnership, or joint venture, or an officer of the corporation involved, a Power-of-Attorney or a Certificate of Corporate Principal must accompany the consent.

Thus, a power of attorney is required in federal procurement if the signatory to a bond is an attorney-in-fact for the surety.

While it is axiomatic that for a bond to have any significance, it must be valid and enforceable, Maryland statute provides expressly that "the procurement officer shall reject a bid or proposal that is not accompanied by proper security." SF&P §13-208(a). It has been said that "the only requirement for a proper (and thus enforceable) bid bond...is that it evidences that the surety is obligated to pay the appropriate penal sum if a bidder fails to perform on the bid." Appeal of American Paving Corp., ____ MSBCA ____, MSBCA No. 2498 (2005). See also Appeal of Pinnacle Electronic Systems, 5 MSBCA §404, MSBCA 1967 (1996). Naturally, a bid bond that cannot be enforced is not a "proper" bid bond as required by statute and renders the bid materially defective and therefore non-responsive.

Recognizing that a bid bond is invalid if it is not enforceable in accordance with the specific requirements of the bond as enumerated by the terms of the solicitation, the question before the Board in the instant contest becomes whether the Bid Bond obtained by Hawkeye and provided to MTA as security for its bid is enforceable by the State in order to assure perfection of the contract award by serving as collateral for damages the State may otherwise incur in the unusual event of a bid offer being withdrawn.

As a question of responsiveness, the determination of bid bond adequacy must be made by the procurement officer on the basis of the constituent documents initially submitted by a proposer as its bid. That is to say that the determination of whether a bid is responsive must be made solely on the basis of

"the four corners of the document" rather than reference to extraneous material not included as a part of the bid. Appeal of Inner Harbor Paper supply Co., 1 MSBCA ¶24, MSBCA No. 1064, (1982); Appeal of Excelsior Truck Leasing Co., Inc., 1 MSBCA ¶50, MSBCA No. 1102 (1983); Appeal of Long Fence Co., Inc., 2 MSBCA ¶123, MSBCA No. 1259 (1986); Appeal of Calvert General Contractors Corp., 2 MSBCA ¶140, MSBCA No. 1314 (1986); Appeal of Long Fence Co., Inc., 3 MSBCA ¶286, MSBCA No. 1607 (1991); Appeal of Weis Markets, Inc., 4 MSBCA ¶305, MSBCA No. 1652 (1992); Appeal of Aepco, Inc., 5 MSBCA ¶415 (1997); Appeal of Substation Test Co., 5 MSBCA ¶429, MSBCA Nos. 2016 & 2023 (1997); Appeal of Cop Shop, Inc., et al., 5 MSBCA ¶447, MSBCA Nos. 2081 & 2082, (1998); Appeal of Fortran Telephone Communications Systems, Inc., 5 MSBCA ¶460 (1999). "Responsiveness" of a bid is unlike "responsibility" of a bidder with respect to whether the procurement officer may undertake an independent investigation to make a determination of bid sufficiency, such outside research being permitted to evaluate responsibility, but not allowed to determine responsiveness. Appeal of National Elevator Co., 2 MSBCA ¶114, MSBCA No. 1252 (1985); Appeal of National Elevator Co., 2 MSBCA ¶115, MSBCA No. 1251 (1985); Appeal of National Elevator Co., 2 MSBCA ¶160, MSBCA No. 1329 (1987); Appeal of Cam Construction Co. of MD, Inc., 2 MSBCA ¶195, MSBCA No. 1393 (1988); Appeal of McGregor Printing Corp., 4 MSBCA ¶318, MSBCA No. 1697 (1992); Appeal of Covington Machine & Welding Co., 5 MSBCA ¶436, MSBCA No. 2051 (1998).

Counsel for appellant principally posits three (3) federal procurement case precedents to support Southern's proposition that submitting a copy of a power of attorney evidencing the authority of a signatory to bind the surety in a bid bond is deficient as a matter of law, rendering the bid non-responsive. They are decisions of the Comptroller General of the United States known as In the Matter of The King, Co., Inc., No. B-

228489, 87-2 CPD ¶423 (1987); In the Matter of Global Engineering, No. B-250558, 93-1 CPD ¶31 (1993); and In the Matter of Regional Development Corp., et al., Nos. B-151299.2 & 251431.2, 93-1 CPD ¶238 (1993). These procurement protests are remarkably similar to the factual circumstances present in the instant dispute. In King Co., Inc., the Comptroller General states flatly, "the photocopied signature of the Attorney-in-fact of the surety and the photocopied General Power of Attorney render the bid non-responsive." King Co., Inc., *op cit.*, pg. 1.

Also very much akin to the case at bar, in Global Engineering, the Comptroller General observed a power of attorney bearing a serial number printed in black on a form which indicated that it was valid only if numbered in red, just as Capitol Indemnity's form Power of Attorney states in support of Hawkeye's Bid Bond, concluding, "This fact would appear to make the power of attorney submitted prior to bid opening invalid on its face...the facsimile copy of the document is invalid. The attorney-in-fact named in the power of attorney who signed the bid bond, insofar as the contracting officer could determine from the bid, did not have the authority to bind that surety." Global Engineering, *op cit.*, pgs. 3-4.

Addressing the validity of a copy of the bid bond, as contrasted to the power of attorney supporting the bid bond, the Comptroller General has also ruled bids unresponsive for failure to provide the original rather than a copy, stating,

In these circumstances, the bond deficiency is not a correctable minor informality, as the protesters suggest, and it may not be cured by submitting the original bond documents after bid opening because this would essentially provide the bidder with the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system...Photocopies and facsimile copies of bid bonds generally do not satisfy the requirement for a bid

guarantee because there is no way for the contracting agency to be certain from examining the copies, other than by referring to the originals after bid opening, that there had not been alterations to which the surety had not consented, and that the surety's liability to the government, therefore, is secure.

Regional Development Corp., *Op cit.*, pgs. 2-3. So it would seem clear from the foregoing decisions of the Comptroller General, whose decisions are used and relied upon by the Board, that submitting only a copy of a bid bond or power of attorney renders the bid non-responsive because the bond may be unenforceable lacking evidence of the contracting authority of the person signing the bid bond.

Though this case precedent offered by counsel for appellant appears at first blush to be determinative of the case at hand and fatal to the State's case, upon closer inspection the Board notes that the federal authority cited above is based upon regulatory requirements different from that applicable to this state procurement. Furthermore, federal regulations have changed since the dates of the foregoing opinions now more than twenty (20) years old. Neither statute nor regulation in Maryland requires a power of attorney at all. By comparison, by reference to SF-1414, FAR 28.106-1(k) mandates that a bid bond be accompanied by a power of attorney in federal procurement to affirm the authority of the purported agent of the surety to bind the surety to its obligation under the terms of the bond. In addition, FAR 28.101-3(a) states, "Any person signing a bid bond as an attorney-in-fact shall include with the bid bond evidence of authority to bind the surety."

Maryland has no such provision. Specifically on point to the question raised in this appeal, and contrary to the outdated precedents cited by appellant, modern federal regulations in force at the time of this IFB provide expressly that, "An

original, or a photocopy or facsimile of an original, power of attorney is sufficient evidence of such authority." FAR 28.101-3(d) provides even further particularized guidance, dictating that failure to provide a signed and dated power of attorney at the time of bid opening is treated as a matter of responsiveness which must be determined at the time of bid opening; while "questions regarding the authenticity and enforceability of the power of attorney at the time of bid opening as a matter of responsibility. These questions are handled after bid opening." Consequently, it is clear that the basis of the 1993 cases relied upon by appellant was reversed by revisions to FAR subsequent to that time. The case authority relied upon by appellant is inapposite at the present time to state or federal procurement.

The current language set forth in FAR 28-101-3 became effective September 30, 2005. 70 Federal Register (FR) 57461. The background of the change to this FAR is explained as follows:

This final rule amends the Federal Acquisition Regulation to revise the policy relating to acceptance of copies of powers of attorney accompanying bid bonds. There has been a significant level of controversy surrounding contracting officers' decisions regarding the evaluation of bid bonds and accompanying powers of attorney.

Since 1999, a series of GAO decisions has rejected telefaxed as well as photocopied powers of attorney. The latest decision from GAO (All Seasons Construction, Inc., B-291166.2, Dec. 6, 2002) has been interpreted by industry and procuring agencies to require a contracting officer to inspect the power of attorney at bid opening to ascertain that the signatures are original and applied after generation of the documents. This case law has created a costly and unworkable requirement for the surety industry and left contracting officers with an almost impossible standard to enforce. More recently, on January 9, 2004, the U.S. Court of Federal Claims, in *Hawaiian Dredging Construction, Co. v. U.S.*, 59 Fed. Cl. 205 (2004), issued a ruling highlighting that the

FAR does not require an original signature on the document serving as evidence of authority to bind the surety. The court was critical of GAO's reasoning in the All Seasons case. In response to the split between the two bid protest fora and the quandary shared by industry and government in implementing a workable standard to be applied at bid opening, the Councils agreed to a revision to FAR part 28 that would remove the matter of authenticity and enforceability of powers of attorney from a contracting officer's responsiveness determination, which is based solely on documents available at the time of bid opening. Instead, the rule instructs contracting officers to address these issues after bid opening as a matter of responsibility.

Thus, notwithstanding the old case precedent relied upon by appellant, under current federal regulations a contracting officer is expressly allowed to contact the bidder or surety to validate the power of attorney. This is precisely what the procurement officer did in the case at bar. We turn therefore to a discussion of whether the state procurement officer handling the Hawkeye bid in Maryland abused his discretion in waiving as a minor irregularity appellant's initial submission of a copy rather than the original of the Power of Attorney accompanying its Bid Bond.

The requirement of a bid bond is not necessarily satisfied simply because a bid bond is included with the bid. On previous occasions, the Board has invalidated bids due to deficiencies in the associated bid bond required as a condition of responding to a solicitation. Not surprisingly for example, the Board has held that a bid bond which fails accurately to reflect the State of Maryland as the obligee makes the bond ineffective and thereby renders the bid non-responsive. See Appeal of Madigan Construction Co., Inc., 2 MSBCA ¶162, MSBCA No. 1350 (1987). In Madigan, Id., the State would not have been able to take legal recourse against the surety, which named an incorrect obligee.

A bid bond which names the State but references an incorrect contract number is also invalid unless "there are clear indicia on the face of the bond that identify it with the correct solicitation." Appeal of FMC Technologies, Inc., ____ MSBCA ____, MSBCA No. 2312 (2003), quoting Grafton McClintock, Inc., 91-1 CPD §381, B-241581.2 (1991), citing Kirila Contractors, Inc., 67 Comp. Gen. 455 (1988). See also Joseph B. Fay Co., 91-1, CPD §234, B-241769.2 (1991).

In addition, bid bonds which are enforceable, but not to the full extent mandated by a solicitation, also result in disqualification of a bid as non-responsive. A bid bond which fails to include the penal sum, for instance, renders the underlying bid non-responsive when the State has demanded a penal assessment as a component of the bond. See Appeal of H. A. Harris, Inc., 1 MSBCA ¶38, MSBCA No. 1109 (1983) and Appeal of Corun & Gatch, 3 MSBCA ¶240, MSBCA No. 1490 (1990). Similarly, the Board has also held that failure of a bid bond to include a provision for automatic extension of the surety's obligation for a period of time without the consent of the surety renders such a bid bond materially defective where the State has required such an extension as a condition of the bond assuring the validity of a bid. See Appeal of Keller Bros., Inc., 4 MSBCA ¶395, MSBCA No. 1946 (1996); Appeal of V&S Contractors, Inc., 5 MSBCA ¶469, MSBCA No. 2134 (1999); Appeal of Micklos Paiting Contractors, 5 MSBCA ¶509, MSBCA No. 2256 (2002).

On the other hand, a bid which is submitted with a proper bid bond in the amount specified may be deemed responsive. Appeal of M.J.'s Quality Concrete, Inc., 1 MSBCA ¶107, MSBCA No. 1241 (1985); Appeal of American Paving, *op cit.*; Appeal of FMC Technologies, Inc., *op cit.* If a bid bond is defective to the degree that it is unlikely to be enforceable, such a defect constitutes more than a minor irregularity. On the other hand, if an alleged defect has no impact on the validity of the bond,

it may be presumed to be a minor irregularity. Thus, in the instant controversy, the Board is charged to determine whether the Bid Bond provided by Hawkeye is likely to be enforceable, or more accurately, whether the procurement officer erred as a matter of law in determining that Hawkeye's Bid Bond was adequate based upon the documents that appellant provided to MTA as its bid.

The Bid Bond actually submitted by appellant is the very same bid bond form that was attached as a part of the IFB, which is a verbatim version of the form prescribed in COMAR, except for a reference to specific Maryland statute. The form correctly identifies the procurement. It has the correct penal sum and is otherwise in compliance with all requirements of a valid and proper bid bond. MTA's form was completed by Hawkeye in full and bears the signatures of four (4) separate individuals, including Andrew Todtz as President of Hawkeye, whose signature is attested to by another person, and Debra L. Nash as the Attorney-in-fact for the surety, Capitol Indemnity Corporation, for whom another person, namely, Stacey L. Nash, attests to the authenticity of the signature of Debra L. Nash. The Bid Bond form further identifies its bonding agent located in Maryland and bears the imprinted corporate seal of Hawkeye, though the corporate seal is not a mandatory element of verification of a corporate bid bond. Appeal of Crouse Construction Co., Inc., 2 MSBCA ¶150, MSBCA No. 1322 (1987). Appellant makes no objection to the content or manner of execution of Hawkeye's Bid Bond. It is properly completed in its entirety and bears the original signatures and corporate seals on the form prescribed by MTA in accordance with COMAR.

Very significantly, the original Bid Bond initially submitted by Hawkeye as a part of its bid is also imprinted with the raised seal of the surety, Capitol Indemnity Corporation, over top of the signature of its agent. It is true that the

Power of Attorney initially provided to MTA to verify the surety agent's authority was not the original of that document, only a copy, but the presence of the surety's raised seal on the Bid Bond itself certainly serves as evidence of the lawful authority of the surety's identified attorney-in-fact. How else would Debra L. Nash be able to imprint over her signature the raised seal of Capitol Indemnity Corporation?

There is no contention that the named agent did not have actual authority on behalf of the surety, just the contention that sufficient evidence of that authority was lacking by virtue of providing only a copy of the Power of Attorney and not the original with the initial bid submission. The Board disagrees. Even without a power of attorney at all, the Bid Bond alone documents the enforceable obligation of the surety to the State. Because the Bid Bond appears to be enforceable with or without the original of the Power of Attorney, the bid is responsive.

This is not to suggest to the contracting community that a bidder need not provide to the State along with the rest of its bid an original bid bond *and* power of attorney verifying the authority of the surety's attorney-in-fact. Of course this is the better practice. The procurement officer should be able to determine conclusively from inspection of the initially submitted documents that the person signing the bid bond has authority to bind the surety. That is to say that if the signatory on behalf of the surety is not a corporate officer, the bid bond should be accompanied by a power of attorney to evidence the agency authority of the surety's signatory. But under the circumstances present here, the authority of the surety's agent is evident not only from the copy of the Power of Attorney but also directly from the Bid Bond by virtue of the impression of the surety's raised seal upon the signature of its attorney-in-fact.

As stated above, besides the original of the Bid Bond itself, Hawkeye also provided to MTA a Power of Attorney for

Capitol Indemnity Corporation documenting that Debra L. Nash and four other individuals, including Stacey L. Nash, are its "true and lawful Attorney(s)-in-fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, any and all bonds, undertakings and contracts of suretyship..." By that instrument, it is clear that Debra L. Nash was effectively authorized and empowered by Capitol Indemnity Corporation as its lawful agent to execute Hawkeye's Bid Bond. Appellant's sole objection in the instant dispute is its contention that the surety's Power of Attorney to Debra L. Nash is invalid because Hawkeye submitted to MTA only a copy of the Power of Attorney and not the original, granting further that the copy is stamped "VOID" and contains express language, "THIS DOCUMENT IS NOT VALID..." under the circumstances that accurately describe the Power of Attorney copy. Only the original of the Power of Attorney is in the form of a formal certificate bearing a red serial number and printed on gray paper that is watermark embedded with the word "VOID" that appears in a transparent fashion every inch or two only upon copies made from the original but not the original itself. The particular copy of the Power of Attorney provided to MTA here contains that evenly spaced watermark thirty (30) times on the single page certificate.

Notwithstanding the above, it is clear to the Board that the Power of Attorney provided to MTA in this procurement is valid and not void. The markings on copies of the original of the Power of Attorney are intended to distinguish the original of the document from xerographic copies made of the original. The fact that upon copies made from an original of a document a watermark stamp of the word "VOID" becomes visible, does not invalidate the actual underlying Power of Attorney as evidenced by the original of that document; it appears merely to indicate to the reader that the copy is not the original.

Neither party to this bid protest contends that the IFB expressly requires bidders to provide an original of a power of attorney to evidence the surety agent's authority. It does not. Appellant must argue that that is implied, and furthermore, that providing a copy instead of an original is more than a minor irregularity. The ultimate question for the Board to determine therefore is whether such an irregularity is minor as defined by COMAR 21.06.02.04, which provides as follows:

- 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.

In past decisions, the Board has on several occasions addressed the question, what is a "minor irregularity?"

Not surprisingly, in Appeal of Computer Services of America, 3 MSBCA ¶221, MSBCA No. 1465 (1989) it was held that a bid was non-responsive when the base price was not ascertainable. On the other hand, in numerous other prior cases before the Board, bids were held to be responsive because defects were waived as matters of minor irregularity. In Appeal of Civic Center Cleaning Co., Inc., 2 MSBCA ¶169, MSBCA No. 1357 (1988) the failure to submit

the bid package in the specified preprinted colored envelope was forgiven as a minor irregularity. In Appeal of Wolfe Bros., Inc., 1 MSBCA ¶53, MSBCA No. 1141 (1983), the Board ruled that a bidder's failure to initial a bid alteration was a minor irregularity. In Appeal of MD Supercrete Co., 1 MSBCA ¶27, MSBCA No. 1079 (1982), the Board concluded that failure of a notary to verify an anti-bribery affidavit was a minor irregularity. Another of the early cases handled by the Board shortly after its creation was Appeal of Apollo Paving Co., Inc., 1 MSBCA ¶29, MSBCA No. 1092 (1982), in which even a lack of a signature on the bid form was deemed to be a defect that could be waived as a minor irregularity, given that the identity of the bidder was otherwise known. In Appeal of Joseph Averza & Sons, Inc., 3 MSBCA ¶254, MSBCA No. 1544 (1990), it was held that failure to write the amount of the bid in the proper space on the bid form was a minor irregularity. In Appeal of Orfanos Contractors, Inc., 2 MSBCA ¶188, MSBCA No. 1391 (1988), the Board held that the lack of a missing total bid price could be waived as a minor irregularity, recognizing that the total could be determined by tallying itemized bid prices. And the reverse defect was also allowed to be waived in Appeal of Liberty Roofing Co., Inc. 1 MSBCA ¶77, MSBCA No. 1184 (1984) in which the bidder included a total price but failed to specify the unit price for one of the particular items in the bid.

Other mathematical errors have also been regarded as defects that could be waived. Listing an alternate unit item bid price of \$600 instead of \$6,000 was deemed to be a minor irregularity in a case for which the Board noted that either figure could be used and still render the price to be the low bid. Appeal of Melke Marine, Inc., 3 MSBCA ¶247, MSBCA No. 1499 (1990). Another mathematical error was considered trivial and allowed to be waived where the total impact on the \$5 million contract price was in the amount of \$12,500 to be paid at an earlier time than

correctly specified. Appeal of P. Flanigan & Sons, Inc., 3 MSBCA ¶254, MSBCA No. 1544 (1990). So the Board has a broad range of case authority to consider in determining whether appellant's provision of a copy instead of the original of a power of attorney is a matter of minor irregularity which would not disqualify a bid.

The Board concludes that Hawkeye's submission of a copy rather than the original of the Capitol Indemnity's Power of Attorney to Debra L. Nash is a matter of form and not of substance and pertains to a defect which is inconsequential, because the underlying Bid Bond appears to be enforceable in accordance with the requirements stated in the IFB. Had the Bid Bond itself been defective, the Board may have reached a contrary conclusion; but here the entire complaint raised by appellant pertains not to the Bid Bond on its face, but only to the accompanying document memorializing the authority of the individual executing the bond on behalf of the bonding company. Indeed, appellant's objection does not even pertain to the actual original Power of Attorney memorializing the surety agent's authority at all, only to the first copy of that document provided by Hawkeye to MTA which plainly appears to have been offered as a copy and not the original.

The Board might propose but is not empowered to create new statute or regulation. However, the Board can and does recognize the guidance afforded by the 2005 revisions to federal procurement regulations. Comparable to the regulations governing federal procurement, here the initial provision of a copy of the Power of Attorney permitted MTA to make further inquiry and upon receipt of the original of the same, which verified the legitimate contracting authority of the surety's identified attorney-in-fact, the procurement officer was legally within lawful discretion to deem the defect a minor irregularity. In

fact, it would have constituted reversible error for the procurement officer not to waive this defect.

Of course, this protest might have been avoided altogether had Hawkeye merely provided to MTA the original of the Power of Attorney in the first place. But there is no indication in the record that Debra L. Nash did not have authority to execute Hawkeye's Bid Bond on behalf of Capitol Indemnity Corporation. She did. And more importantly, the procurement officer could determine that based solely upon the documents first provided by appellant in response to this IFB. That determination was easily and promptly confirmed when Hawkeye provided to MTA the original Power of Attorney. Moreover, the executed Bid Bond is in proper form and content as prescribed by MTA. In short, Hawkeye's Bid Bond is valid and enforceable. As a result, its bid is responsive.

WHEREFORE, it is by the Appeals Board this ____ day of January, 2015,

ORDERED that the instant appeal be and hereby is DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
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 2904, appeal of Southern Improvement Company, Inc. Under MTA Contract No. T-1402.

Dated:

Michael L. Carnahan
Deputy Clerk