

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of ABACUS CORPORATION	)	
	)	Docket No.
	)	MSBCA 1614
Under Maryland State Department Of Education Proposal No. RFP-220006	)	
	)	

January 21, 1992

Decision Summary:

Board of Contract Appeals - Jurisdiction - Where an RFP for property management services provides that a performance bond is not due until ten days after award of the contract, failure to timely provide the bond and other alleged deficiencies in the bond involve matters of contract performance which are not cognizable by the Board of Contract Appeals in a bid protest appeal.

APPEARANCE FOR APPELLANT:

John E. Baum, Esquire  
Shapiro and Olander  
A Professional Association  
Baltimore, MD

APPEARANCES FOR RESPONDENT:

Valerie V. Cloutier  
Caroline E. Emerson  
Assistant Attorneys General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:

John R. Francomano, Esquire  
Cohen & Francomano  
A Professional Corporation  
Baltimore, MD

MEMORANDUM DECISION BY CHAIRMAN HARRISON  
ON RESPONDENT'S MOTION TO DISMISS

Appellant timely appeals from a Procurement Officer's final decision which denied its bid protest regarding the above-referenced solicitation for comprehensive property management services at the Maryland State Education Building. Appellant contends that the proposal of the successful offeror, Premier Management Group, Inc. (Premier), should have been rejected because it did not provide a conforming performance bond within ten days of

award of the contract.

### Findings of Fact

1. On May 3, 1991, the Department of Education ("Department") issued Request for Proposal No. 220006 for a contract to provide comprehensive property management services for the Maryland State Education Building at 200 West Baltimore Street in Baltimore.
2. The Request for Proposal (RFP) required the successful offeror to furnish performance and payment security, each in the amount of 10% of the contract price, and bid security in the amount of 5% of the price proposal.
3. As a result of the pre-proposal conference and on-site inspection held at the Maryland State Education Building on May 14, 1991, the Procurement Officer issued an addendum revising the bond requirements through revisions to the price proposal form. In relevant part, the following assurance regarding a performance bond was added to the price proposal form: "If I am awarded the contract, I agree to submit a performance bond in the amount of 10% of the total Bid price for the 5 year duration within ten calendar days of notification. If a contractor fails to deliver the required Performance Bond, the contractor's bid shall be rejected."
4. The proposals were opened on May 31, 1991. The Department received three proposals in response to its RFP. The lowest price proposal was submitted by Appellant (\$3,330,227) and the second lowest price proposal was submitted by Premier (\$3,999,297).
5. However, Premier's proposal earned the highest cumulative score based on both the technical and price evaluations. The

Procurement Officer notified Premier's President that that company was the highest scoring offeror and obtained the President's signature on the contract on June 18, 1991. The Procurement Officer sent all offerors notification of the scoring and of the selection of Premier by letter dated July 9, 1991.

6. The contract was approved by the Board of Public Works on July 24, 1991. The Procurement Officer signed the contract with Premier on that date and work under the contract commenced.

7. In response to a request from Appellant's President the Procurement Officer provided Appellant with a copy of the Premier performance bond on September 26, 1991. Premier's performance bond was in the sum of \$450,000 and covered an annual contract period from 7/1/91 to 6/30/92. The performance bond was executed by the surety on September 24, 1991.

8. On September 30, 1991, Appellant protested the award to Premier on the grounds that Premier's performance bond was not submitted to the Department within ten days of award of the contract, was for a one-year contract period rather than the entire five year duration of the contract, and was not executed by an officer of Premier. Appellant argued that Premier's proposal was nonresponsive and nonconforming to the RFP and contract requirements and, therefore, should be rejected. Appellant requested that the contract be awarded to it or, in the alternative, that the procurement be reoffered.

9. After receiving the bid protest, the Procurement Officer notified Premier of the protest. On October 2, 1991, the President

of Premier provided the Procurement Officer with a letter indicating that Premier's performance bond underwriter was aware that the contract was for a five-year period and that the bond would be renewed annually. Premier's President also executed the performance bond some time after September 26, 1991.

10. By letter dated November 1, 1991, the Procurement Officer issued a final decision denying Appellant's protest. The procurement officer concluded that the issue Appellant was protesting was not subject to the State bid protest procedure because the performance bond was required subsequent to award and the formation of the contract. The Procurement Officer also found, with respect to the absence of signature by a Premier officer, that there were sufficient assurances in the bond to bind the surety.

11. Appellant appealed to this Board on November 8, 1991. The Department filed a Motion to Dismiss based in part on jurisdictional grounds on December 5, 1991 and Appellant responded thereto on December 24, 1991. Oral argument on the motion was heard by the Board on January 17, 1992. For the reasons that follow the Board shall grant the Department's Motion.

#### Decision

Appellant's appeal must be dismissed because it concerns a matter of contract performance which is not cognizable by this Board in a bid protest appeal. The material facts necessary to a disposition of the matter are not in dispute.

By the terms of the RFP, the successful offeror was not

required to provide a performance bond until 10 days after notification of award of the contract.

Under Maryland procurement law, an award "means the decision by a procurement agency to execute a purchase agreement or contract after all necessary approvals have been obtained." COMAR 21.01.02.01(8). Thus, in the case of a Department of Education procurement which must be approved by the Board of Public Works, "award" of a contract occurs, at the latest, when the Board of Public Works' approval of the contract has been given and both the Department and the contractor execute the contract. The contract for RFP 220006 was, therefore, awarded to Premier by July 24, 1991 when both Board of Public Works' approval and contract execution had occurred.

The Board of Contract Appeals has jurisdiction over appeals arising from the final action of an agency on "a protest relating to the formation of a procurement contract" and "includes a complaint about: (i) the qualifications of a bidder or offeror; or (ii) the determination of the successful bidder or offeror." State Finance and Procurement Article §15-215(c) (emphasis added). Accordingly, the bid protest procedures as set forth in COMAR indicate that bid protest appeals are available only for "complaint[s] relating to the solicitation or award of a procurement contract." COMAR 21.10.02.01B(2). See also The Chesapeake and Potomac Telephone Co. of Maryland, MSBCA 1194, 1 MICPEL ¶78 (1984).

By the terms of the RFP the performance bond was not due until

after award of the contract which occurred on July 24, 1991, the date on which the Board of Public Works approved the contract and both parties had signed the contract. Therefore, the provisions of the performance bond cannot be considered a responsiveness requirement as argued by Appellant because responsiveness criteria concern an offeror's legal obligation to perform the required services in conformity with the RFP specifications and must be satisfied at the time of opening of bids or proposals. See, e.g., Cam Construction Company of Maryland, Inc., MSBCA 1393, 2 MICPEL ¶195 (1988). The performance bond herein was not required prior to formation or award of the contract and therefore is not properly the subject of a bid protest under the Maryland bid protest procedures.

By contrast, the Board's jurisdiction over contract disputes relates to claims concerning the breach, performance, modification, or termination of a procurement contract. State Finance and Procurement Article ¶¶ 15-211 (a)(2) and 15-215(b). Because the contractor's performance bond was not due until after award of the contract, it must be considered a contractual performance obligation. Since the Board's jurisdiction over complaints regarding breach or performance of a contract is limited to contract claims filed by the contractor or the procurement agency, this Board cannot accept jurisdiction over a breach of contract claim filed by an unsuccessful offeror that is not a party to the contract.

Appellant argues, however, that Premier's bid must be

rejected, ever<sup>n</sup> after award, because of the statement in the price proposal form that; "If a contractor fails to deliver the required Performance Bond, the contractor's bid shall be rejected." We determine, however, that this statement in the RFP cannot convert a contract performance requirement into one relating to responsiveness of a bid or proposal. We have held in other contexts that "a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation." Aquatel Industries, Inc., 1 MICPEL ¶82 (MSBCA 1192, Aug. 30, 1984) at p. 4. See also, e.g., Control Systems Services, Inc., MSBCA 1397, 2 MICPEL ¶189 (1988); Roofers, Inc., MSBCA 1284, 2 MICPEL ¶133 (1986). The inclusion of the language in the RFP noting that "the contractor's bid shall be rejected" does not alter the fact that Appellant's complaint concerns a post-award performance requirement and cannot mandate rejection of a proposal on the basis of which the State has already executed a contract.

We thus determine the Board may not accept jurisdiction of Appellant's appeal because the substance of its protest relates to performance of a contract condition, not a solicitation requirement, and therefore is not cognizable by this Board in a bid protest.

