

the same date and time. At that time, the eight bids removed from the bid box by Ms. Carter were the only bids contained in the box. At 12:00 noon, Ms. Carter again examined the SHA bid box and found no bids.

3. All bids for major SHA construction projects are received and opened at SHA's offices on 211 East Madison Street. The bid box is contained within a locked guard room just inside the Madison Street entrance to the building. The bid box is a wooden box mounted on wheels two inches off the floor and is 20" wide, 20" deep, and 34" tall. The box has a 14" by 10" opening in the back for receiving bids dropped into the box from a chute in the lobby area outside of the guard room. The top of the box is secured with a lock which, when unlocked, allows the box to open on hinges on the top rear of the box. The box, at the time of the present bid opening, was mounted to the wall with a latch hook on the left side. The chute in the lobby area is metal with a 16" by 6 1/2" opening. The chute can be opened by hand and closes automatically when released.¹ At the time of the subject bid opening, bids were removed from the bid box and carried into the training center across the lobby area where the bid openings are conducted. It was in this training center that the bids for this contract were opened just after 12:00 noon on February 20, 1992.
4. After bids were opened, Ms. Carter, consistent with SHA's standard practice, returned to the bid box to determine if any bids were placed in the box after the time required for submission of bids. This examination occurred at approximately 12:10 p.m. Upon examination of the box, Ms. Carter saw

¹ After the bid protest in this appeal was filed with SHA, a lock was mounted on the chute so the opening could be locked while bid openings are in progress. A latch hook with a lock was also placed on the right side of the bid box after the instant bid opening.

and retrieved a bid for the contract at issue from Appellant.² This bid was not opened by SHA and, very shortly after it was retrieved, the bid was placed in an overnight mail envelope and returned to Appellant. The bid was returned to Appellant based upon SHA's conclusion that it was submitted late.

During the afternoon of February 20, 1992 Appellant was advised by SHA in a telephone conversation, initiated by Appellant, that its bid was received late and that the bid was being returned to Appellant, unopened. However, Appellant refused delivery of its returned bid and the bid was sent back to SHA, unopened. Since its return to SHA, the bid has been stored in a secure location pending resolution of this bid protest appeal.

5. On February 21, 1992, Appellant submitted a protest to SHA. In its protest, Appellant asserts that William A. Wilson, an employee of Appellant, submitted that firm's bid to SHA on February 20, 1992 at approximately 10:30 a.m. - 10:35 a.m.

6. Mr. Wilson testified that he is the employee responsible for delivering bids and picking up bid packages. When he arrived to submit the bid for the subject contract between approximately 10:30 a.m. and 10:35 a.m. on February 20, 1992 he parked his car, got out of the car leaving his door open, walked a few steps, and then went back to shut the car door. According to his testimony he then entered the 211 East Madison Street building with the bid in his hand and deposited it in the chute to the bid box in the lobby area. Mr. Wilson was wearing a tan jacket at this time.

After leaving SHA, Mr. Wilson testified that he proceeded to the Baltimore City Department of Engineering on an unrelated

² Appellant's bid was contained in a standard 15 1/2 inch by 12 inch bright orange bid envelope provided by SHA for bids on SHA projects. This envelope has a space on the outside for a bidder to place its name and the contract number.

matter. While at that office, he telephoned Appellant's office. During that telephone conversation, he spoke with Ms. Betty Harper of Appellant, and later with Mr. Tom Fitzpatrick, Appellant's Sales Manager. This conversation took place at approximately 11:05 a.m. Mr. Wilson testified that during this conversation he advised Mr. Fitzpatrick that he had already submitted the bid at issue by placing it in the bid box as required.

7. Mr. Warren E. Beachy, an employee of Keystone Lime Company, Inc. (Keystone), Springs Pennsylvania, submitted a bid for Contract No. G538-501-677 (an unrelated project) on February 20, 1992. Mr. Beachy testified that he and his wife arrived at the 211 East Madison Street building at approximately 10:30 a.m. to submit Keystone's bid. Mr. Beachy entered the building at approximately 10:30 a.m. The security guard on duty advised him to check the bulletin board to make sure that the project on which he was submitting a bid was not canceled. While Mr. Beachy was checking the board, Mr. Beachy heard behind him the sound of the chute to the bid box open and close. He later turned and saw a side view of a man he identified at the hearing as Mr. Wilson wearing a tan jacket exiting the building. After depositing his bid Mr. Beachy then returned to his car to await bid opening. Mr. Beachy did not see Mr. Wilson place a bid in the chute.

8. Ms. Carter specifically described the events surrounding the removal of bids from the bid box. At 11:50 a.m. the latch holding the bid box to the wall was unlocked, the bid box was rolled out from the wall and the lock on the top of the bid box was unlocked. All bids then contained in the box were removed and handed, by Ms. Carter, to an SHA employee also involved in the bid opening process and the top was re-locked. However, the latch holding the bid box to the wall was not re-fastened. Ms. Carter then positioned herself near the chute to look for additional bids being deposited. At 12:00 noon, Ms. Carter unlocked the top of the box and examined the inside

but no additional bids were contained in the box. The top was again locked and Ms. Carter went to the training center for the bid opening.

9. On March 24, 1992, Appellant's counsel wrote to SHA and provided a description of Mr. Wilson's activities on the day of the bid opening as well as information regarding other individuals submitting bids to SHA on February 20, 1992. Subsequent to receipt of this letter, SHA again investigated the circumstances surrounding the opening of bids. This investigation revealed no evidence of mishandling of the bid by SHA employees.
10. The Board finds that Appellant's bid was not in the bid box at the time set for bid opening. Thus Appellant's bid was late.
11. On May 8, 1992, SHA's Procurement Officer issued a procurement officer's final decision denying Appellant's protest. In denying the protest, the Procurement Officer determined that Appellant had not met its burden of demonstrating, with reasonable certainty, that the lateness of the bid was caused by State employees directing the procurement activity. He concluded that, in the absence of documented and independent evidence that Appellant's bid was received late due to mishandling by State employees directing the procurement activity, the protest must be denied.
12. Appellant timely appealed to this Board on May 21, 1992.

Decision

The Board must first determine whether Appellant's bid was late, i.e., was it or was it not received before 12:00 p.m. on February 20, 1992, the time and date set in the solicitation for receipt of bids.³

³ Assuming a bid was late, was the lateness excused under Maryland's procurement law is a question the Board has been called on to determine in previous appeals. COMAR 21.05.02.10 concerns late bids and provides, in pertinent part:

Appellant has the burden of demonstrating, with reasonable certainty, that its bid was submitted on time. Appellant has not met this burden.

A late delivery of a bid requires its rejection. COMAR 21.05.02.10B. It is the bidder's responsibility to deliver its bid to the proper place and at the proper time. Pioneer Oil Company,

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- A. Policy. Any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late. Any request for withdrawal or request for modification received at the place designated in the solicitation after the time and date set for receipt of bids is late.
- B. Treatment. A late bid, late request for modification, or late request for withdrawal may not be considered. Upon written approval of the Office of the Attorney General, exceptions may be made when a late bid, withdrawal, or modification is received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees....

A late bid must be rejected. The only exception permitted under Maryland's late bid rule is when the bid's untimely receipt was due to the action or inaction of State procurement personnel directing the procurement activity or their employees. Patco Distributors, Inc., MSBCA 1270, 2 MSBCA ¶128 (1986); Pioneer Oil Company, Inc., MSBCA 1060, 1 MSBCA ¶16 (1982).

This Board has consistently held that the bidder bears the burden "to demonstrate with reasonable certainty that the [lateness] was caused by State personnel directing the procurement activities or their employees at the time it physically attempted delivery." Patco Distributors, Inc., supra at 6. See also Pioneer Oil Company, Inc., supra; Delmarva Drilling Company, MSBCA 1096, 1 MSBCA ¶36 (1983); American Air Filter Co., MSBCA 1199, 1 MSBCA ¶89 (1984). R.R. Donnelley & Sons Company MSBCA 1463, 3 MSBCA ¶213 (1989); Giant Food Stores, Inc. (Trading as Martin's Food Markets), MSBCA 1603, 3 MSBCA ¶284 (1991). However, Appellant does not contend that the exception should be applied. Appellant's position is that Appellant's bid was placed in the bid box prior to bid opening and thus was not late. The Board finds the bid was late. The Board has reviewed the record to determine whether evidence permitting the exception to be applied exists and finds that there is no evidence in the record of action or inaction of State personnel directing the procurement activities or their employees that caused the bid to be late.

supra; Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10. (1982) at p.18 quoting Comp. Gen. Dec., B-137550 (Dec. 18, 1958). R.R. Donnelley & Sons Company, MSBCA 1463, 3 MSBCA ¶213 (1989).

The purpose of this requirement is to give all bidders an equal opportunity to compete and to preserve the integrity of the competitive bid system. This requirement may operate harshly in certain instances. However, any relaxation of the rule would create confusion as to its applicability and perhaps lead to inconsistent results to the detriment of public confidence in the State's General Procurement Law.

In this appeal, Appellant and SHA disagree as to whether the bid was late. It is the bidder's burden, however, of affirmatively proving its case that the bid was timely delivered.

Appellant's asserts that its bid was placed in SHA's bid box approximately an hour and one-half before the bid opening by Mr. Wilson.

Despite Mr. Wilson's testimony that he placed the Appellant's bid in the chute at approximately 10:30 a.m. to 10:35 a.m., there is no basis to discredit the testimony of Ms. Bonnie Carter, the SHA employee responsible for removing bids from the bid box. Ms. Carter examined the bid box on two occasions; at 11:50 a.m. and then at 12:00 noon. At 11:50, Ms. Carter removed all bids then contained in the bid box and Appellant's bid was not among those removed from the box. At 12:00 noon, Ms. Carter again examined the bid box and saw no bids contained in the box. While the testimony of Mr. Beachy corroborates that Mr. Wilson was in the lobby in the 10:30 a.m. time frame, and that he heard the chute to the bid box open and close, Mr. Beachy did not see Mr. Wilson deposit a bid in the chute.⁴ Upon its review of the record the Board finds that

⁴ The parties and the Board agree that depositing of a bid in the chute to the bid box constitutes placement of the bid in the bid box. Appellant suggests as a possible explanation of why Appellant's bid was not in the bid box that the bid may have fallen on the floor of the guard room because the bid box may not have been against the inside wall of the guard room when Mr. Wilson allegedly deposited the bid in the chute. The record does not

Appellant has not met its burden to show that the bid was placed in the bid box prior to bid opening.

The parties have directed the Board's attention to a number of decisions of the Comptroller General. SHA emphasized the Comptroller General's decision in Free State Builders Inc., B-184155,76-1 CPD ¶133. In Free State it was held that a bid discovered in a General Services Administration (GSA) bid box after bid opening could not be considered even though the bidder stated that the bid was deposited in the bid box prior to the bid opening. The bid opening was set for 1:30 p.m. The president of Free State stated he placed his bid in the bid box at 12:26 p.m. The bid box was set in a wall in the GSA building bid room and when bids were dropped through the slot into the box, a buzzer was activated to alert procurement personnel in the bid room that a bid has been dropped.

Notwithstanding Free State's allegations of a timely bid, their bid was not discovered in the box until 1:48 p.m. (18 minutes after the bid opening). At 1:15, the GSA procurement officer entered the bid room. At 1:30, he was handed three bids for opening, none of which were from Free State. At 1:48, the buzzer sounded and two bids were discovered in the bid box - Free State's bid and a bid for a 2:00 p.m. bid opening. The bidder for the 2:00 opening was questioned and stated that he did not submit two bids. However, an employee of GSA stated that the Free State president was in the GSA building at approximately 12:05.

The Comptroller General opined that "the only direct evidence" that the bid was timely was the statement of Free State's president. Id. at 2. He concluded that "[t]he most that can be said in

been against the inside wall of the guard room when Mr. Wilson allegedly deposited the bid in the chute. The record does not support this theory. The bid box at all relevant times was in its appropriate position against the inside wall of the guard room. Mr. Charles Jackson the security guard on duty in the guard room was sitting next to the bid box. Neither he nor Ms. Carter nor anyone else observed a bid on the floor of the guard room or elsewhere.

behalf of considering Free State's bid is that the bid may have been deposited in the bid box prior to opening" (emphasis in original) and denied the protest.

A few years after the Free State case the Comptroller General decided the case of All - States Railroad Contracting, Inc., B-216048.2,85-1 CPD ¶174. In All - States (relied on by Appellant herein) bid were due at 1:30 p.m. All - States operations manager testified that he deposited All - States bid sometime between 1:10 p.m. and 1:14 p.m. Procurement personnel remembered a man entering the premises at approximately 1:10 p.m but could not say whether a bid was deposited because they could not see the bid box from their location. Bids were last removed from the bid box at 1:00 p.m. and procurement personnel (the bid opening officer) forgot to check the bid box at 1:30 as scheduled. After bids were opened a subsequent check of the bid box revealed the presence of All - States bid. The Comptroller General discussed the Free State opinion and the factual differences between Free State and All - States at some length. The failure in All - States of the procurement personnel to check the bid box at 1:30 we believe to represent a significant fact in the Comptroller General's determination that the All - States' bid should be considered as timely received. In the instant appeal (unlike the facts in All - States) the bid box was checked at the time set for bid opening by procurement personnel. See also: Santa Cruz Construction, Inc., B-226773, '87-2 CPD ¶7.

Appellant finally argues that SHA's process for receiving and opening bids was fatally flawed at the time of the instant bid opening as evidenced by the changes instituted regarding locking the bid box chute during bid opening and placing a latch hook on the right side of the bid box.

COMAR 21.05.02.11, entitled Receipt, Opening and Recording of Bids provides in relevant part:

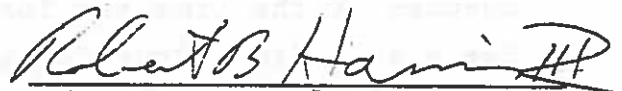
- A. Receipt. Upon its receipt, each bid and modification shall be stored in a secure place until the time and date set for the bid opening. Before bid opening the State may not disclose the identity of any bidder.

B. Opening and Recording. Bids and modifications shall be opened publicly, at the time, date and place designated in the invitation for bids. The name of each bidder, the bid price, and such other information as is deemed appropriate shall be read aloud or otherwise made available. This information also shall be recorded at the time of bid opening. The bids shall be tabulated or a bid abstract made. The opened bid shall be available for public inspection at a reasonable time after bid opening but in any case before contract award except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in this title. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices, makes, and model or catalog numbers of the items offered, deliveries, and terms of payment shall be publicly available at a reasonable time after bid opening but in any event before contract award regardless of any designation to the contrary at the time of bid opening....

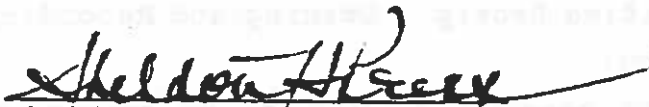
Appellant is unable to point to any regulatory requirement that was not complied with by SHA during the receipt and opening of the bids for this contract. The aforementioned changes instituted were not necessary to comply with the regulatory requirements regarding bid opening, and receipt and recording of bids nor did they have any affect on the instant procurement.

For the reasons stated above, Appellants appeal is denied.

Dated: August 7, 1992


Robert B. Harrison III
Chairman

I concur:


Sheldon H. Press
Board Member

Neal E. Malone
Neal E. Malone
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1655, appeal of American Asphalt Paving Company, Inc. under SHA Contract No. B-945-501-477.

Dated: August 7, 1992

Mary L. Priscilla
Mary L. Priscilla
Recorder

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