

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

August 25, 1983

Appeal of AMERICAN BUILDING )  
CONTRACTORS, INC. )

Under DGS Project No. )  
UB-592-791-020 )

Docket No. MSBCA 1125

August 25, 1983

Jurisdiction — Although Appellant recognized a mistake in bid prior to the execution of the contract, Appellant is not precluded from raising this matter as a contract dispute and having said dispute resolved by this Board. Appellant's precontract recognition of its mistake in bid and its subsequent execution of the contract are factors which may be raised by the State as a defense to the contract action.

**APPEARANCE FOR APPELLANT:**

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**APPEARANCES FOR RESPONDENT:**

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**MEMORANDUM OPINION AND ORDER BY MR. LEVY**  
**ON RESPONDENT'S MOTION TO DISMISS**

This is an appeal from a Department of General Services (DGS) procurement officer's final decision denying both Appellant's claim for the monetary difference between prevailing wage rates and what it otherwise would have been able to pay its laborers, and, in the alternative, its request to terminate the contract. DGS has filed a Motion To Dismiss For Lack of Jurisdiction alleging that Appellant did not file a timely protest. Both parties have requested that the Motion be resolved prior to the hearing and have presented the Board with the following facts:

1. On or about July 23, 1982 DGS solicited sealed bids for project No. UB-592-791, Conversion, School of Law Library for the University of Maryland at Baltimore.
2. The project specification book contains the General Conditions of the Contract Between Owner and Contractor. Section 9.06 of these General Conditions is entitled Prevailing Wage Rates, and provides that:
  - A. All contracts in the base-bid amount of \$500,000 or more shall be

subject to the provisions of Art. 21, Section 8-501, et seq.,<sup>1</sup> Annotated Code of Maryland. Where an original contract is in an amount less than \$500,000 the terms of Article 21 Section 8-501 shall not apply, even where subsequent change orders shall increase the total Contract in excess of \$500,000. Wage rates applicable to projects of \$500,000 or more are attached to the specification. (Underscoring Added)

3. The Standard Form of Proposal that bids were to be submitted on provides for a base bid and four add alternates. Appellant submitted the following proposal:

BASE BID Four Hundred Thirty Seven Thousand Seven Hundred Thirty \$437,734.00  
(Written)  
Four 00/100  
(Dollars)

ADD ALTERNATE #1 - Teak Paneling, Cabinet Work, Door,

Shelving in Lounge #220

Add Thirty Three Thousand and 00/100 Dollars (\$33000.00)

ADD ALTERNATE #2 - Wood Shelving and Wardrobes

Add Twenty Nine Thousand and 00/100 Dollars (\$29000.00)

ADD ALTERNATE #3 - Judicial Bench

Add Thirty Three Hundred and 00/100 Dollars (\$3300.00)

ADD ALTERNATE #4 - Work Stations/Chairs

Add Eighty Three Thousand and 00/100 Dollars (\$83000.00)

4. Appellant was not sure if it was required to use prevailing wages in its bid preparation, as provided in Article 21, §8-501, et seq., since its base bid was going to be under \$500,000. It did not know what would be required in the event DGS made an award for the base bid plus alternates bringing the contract value in excess of \$500,000. Appellant's President, Mr. Albert Schweizer (Schweizer), telephoned certain unidentified employees of DGS who were unable to resolve the problem. He then contacted the project architect who advised him that this bid did not have to be priced with prevailing wages. He accordingly used market wage rates in preparing Appellant's bid.<sup>2</sup>

<sup>1</sup>Article 21, §8-501, et seq., Annotated Code of Maryland, generally provides for contractors on State public works projects to pay wages at the prevailing wage rate where the amount of the contract is \$500,000 or more. Prevailing wage rates are determined by the Commissioner of the Maryland Department of Labor and Industry all classes and types of workmen and apprentices required for a project. The schedule of prevailing wage rates which is established for a particular project is incorporated into the specification as they were done for the subject project.

<sup>2</sup>See Agency Appeal File, item 10; November 12, 1982 letter from Baker to Millstone and McCord.

5. Bids were publicly opened on August 26, 1982. On September 21, 1982 the Board of Public Works approved an award of the contract to Appellant in the amount \$586,034 which was the total of its base bid and four add alternates. The contract documents were mailed to Appellant on September 22, 1982 for signature.

6. After receipt of the contract for signature, Appellant had its attorney notify the procurement officer, Mr. Marshal McCord (McCord), Director of the Office of Engineering and Construction at DGS, that a mistake had been made in preparing the bid. McCord referred Appellant's counsel to an assistant attorney general to whom the following three alternatives were proposed: (1) allow Appellant to rescind its bid; (2) issue Appellant a contract change order in the amount of its losses resulting from the ambiguity of general conditions section 9.06A; or (3) perform the required work under two contracts; one in the amount of the base bid only and the second in the amount of the sum of the four add alternates.

7. McCord ultimately responded to the alternatives proposed by Appellant's counsel by letter dated October 27, 1982. McCord stated that the prevailing wage rates that were included in the bidding documents were applicable to the contract. McCord further advised that the contract should be returned signed and that "[t]his must be accomplished within 10 days of your receipt of this letter, otherwise it will be necessary for the State to invoke your bid bond and made [sic] an award to the second bidder."

8. On November 1, 1982 Appellant's counsel wrote to the DGS General Counsel acknowledging receipt of a copy of McCord's letter. He again asserted that his client had made a mistake, requested consideration of the three alternative solutions previously proposed, and alleged that it would be impermissible to invoke Appellant's bid bond under such circumstances.

9. While the record does not reflect a written response to the foregoing letter dated November 1, 1982, subsequent events indicate that DGS did not accept the alternatives proposed. On November 10, 1982 Appellant's President returned the executed contract along with required bonds and insurance certificates to DGS. In a subsequent letter to DGS<sup>3</sup> and in pleadings filed with this Board, Appellant asserted that it signed the contract under protest.

10. On November 12, 1982, Appellant formally filed a claim with the DGS procurement officer. It requested either recognition of a bid mistake and the termination of the contract, or the issuance of a change order in the amount of the increased cost required to pay prevailing wage rates.

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<sup>3</sup>By letter dated November 12, 1982, Appellant's counsel stated as follows:

Accordingly, American agreed to execute the contract "under protest." Mr. Schweizer advised me that he was going to hand deliver the contract to Bill Lee on November 10, 1982. The claim letter is the explication of that "protest" that is made commensurate with the execution of the contract. (Agency Appeal File, item 10).

## OPINION

DGS' Motion To Dismiss raises the narrow issue of whether the Board has jurisdiction to hear the appeal of Appellant's contract claim. DGS argues that although the grounds for the claim were known prior to execution of the contract, Appellant failed to notify it or otherwise complain of an ambiguity in the specification. DGS further states that Appellant thus waived its right to complain when it did not file a protest before the opening date for bids or within 7 days of being made aware of the ambiguity after bids were opened. See COMAR 21.10.02.03A&B. In this regard DGS refers to several opinions of this Board which have required strict compliance to this regulation. See Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at p. 5; International Business Machines, MSBCA 1071 (August 18, 1982) at p. 5; Pyramid Cleaning, Maintenance and Supply, Inc., MSBCA 1099 (March 7, 1983) at p. 4; Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982) at p. 14.

The regulation cited by DGS concerns when a party may file a bid protest. A protest, however, relates solely to a dispute "...relating to the solicitation, selection, or award of a State contract. COMAR 21.10.02.01B. Here, however, we are not faced with such a dispute. Appellant instead seeks an equitable adjustment to its contract or otherwise asks that said contract be terminated. Such a claim is governed by COMAR 21.10.04 and the remedy granting clauses contained in the contract. Appellant properly has brought its appeal under these provisions.

The concerns raised by DGS, in actuality, go to the defense of Appellant's contract claim. For example, was there a patent or latent ambiguity in the contract specification? Was Appellant required to seek clarification of this ambiguity? Did it in fact receive clarification from the project architect? Is Appellant now held to its own interpretation of the specification? Did Appellant sign the contract under duress and did it properly preserve its rights? The resolution of these questions and other matters necessary to the disposition of this claim are dependent upon facts which still are in dispute. Accordingly, the Motion to Dismiss must be, and is, denied.