

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF BOWEN)
AND KRON ENTERPRISES, INC.)
) Docket No. MSBCA 2263
Under Morgan State University)
Project ID No. DCM99017A)

February 5, 2002

Late Bid - The Respondent correctly considered a late bid under COMAR 21.05.02.10B where the record reflected that the bid would have been timely but for the action or inaction of an employee of State personnel directing the procurement activity and that such State action or inaction was the sole or paramount cause of the late receipt.

APPEARANCE FOR APPELLANT: H. Barnes Mowell, Esq.
Monkton, MD

APPEARANCE FOR RESPONDENT: Mark J. Davis
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY William E. Slade, Esq.
(Cleveland Wrecking Company) Edward S. Wisneski, Esq.
Patton Boggs, LLP
Washington, D.C.

OPINION BY BOARD MEMBER HARRISON

The issue to be determined in this timely appeal from the denial of Appellant's bid protest is whether Morgan State University (University) properly considered the bid submitted by the Interested Party Cleveland Wrecking Company, Inc. (Cleveland) under the exception in COMAR 21.05.02.10B for late bids that "would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees."¹

Findings of Fact

1. The Contract at issue is for Pentridge Apartments Site and Building Demolition for the University. The work consists of the complete demolition of the four apartment buildings and two garage structures on the University's Pentridge Apartments site, and associated work.

¹Two other issues raised in the protest have not been pursued on appeal and will not be discussed.

2. The IFB set bid opening for 11:00 a.m. EST on November 20, 2001. The IFB required that all bids were to be placed in a sealed envelope, marked and addressed as follows:

Attn: Juanita Singletary, Procurement Department
Morgan State University
Washington Service Center Room 107
1700 E. Cold Spring Lane
Baltimore, MD 21251

Bid For:
Pentridge Apartment Site and Building Demolition
For
Morgan State University

Project ID # DCM99017 A
Bid Due Date: November 20, 2001 @ 11:00 a.m. Est

3. The IFB further provides that: "Bidders are solely responsible for the timely receipt of their Bids. Late Bids will not be accepted."
4. Cleveland's bid was in an envelope inside a Federal Express envelope. The Federal Express envelope was marked and addressed with Ms. Singletary's name and address and a large hand written notation:

Sealed Bid Enc²
Pentridge Apts.
Project No. DCM99017A

The bid due date and time³ are not included on the Federal Express envelope nor are the words "Procurement Department" included next to Ms. Singletary's name on the Federal Express envelope. We do not consider these omissions to be material to our decision herein. The Federal Express envelope was clearly designated as containing a bid for the Pentridge Apartments project herein and addressed to Ms. Singletary at Room 107 at the Washington Service Center.⁴

5. The Federal Express envelope containing the Cleveland bid was delivered by Federal Express and received by Mr. Gerriod Thomas at the Washington Service Center at 9:04 a.m. on November 20, 2001. Mr. Thomas works in Room 100 at the Washington Service Center, a caged mail and package receiving area which is the first room encountered upon entering

²The rest of the word is covered over by a sticker with bar codes that was placed on the Federal Express envelope prior to delivery of the Federal Express envelope to the Washington Service Center.

³The sticker with bar codes that was placed on the Federal Express envelope has a deliver date on it. The date is 20 November.

⁴The envelope containing the bid that was inside the Federal Express envelope was marked and addressed as required by the IFB.

the Service Center. Room 107 is approximately 15 feet away on the other side of the hall from the caged area. Mr. Thomas signed for the bid and another package delivered by Federal Express at the same time. Because Mr. Thomas was busy sorting packages when the Federal Express person arrived he signed for the bid and package and then put them aside on the pallet where they remained until the bid was pointed out to Mr. Thomas by a student assistant. Cleveland's bid was delivered to Room 107 by the student assistant minutes after the 11:00 a.m. bid due time. The Cleveland bid was opened and read and was the lowest of the ten bids received.

6. Both Appellant and Cleveland wrote to the University concerning the timing and circumstances of Cleveland's bid. By letter dated November 20, 2001, Appellant filed a protest based on the fact that Cleveland's bid was late. By letter dated November 27, 2001, Cleveland argued that it followed the instructions in the specifications, addressed the delivery envelope to the address in the specifications and that the University accepted the bid by opening it and reading it aloud.
7. The University Procurement Officer initially determined that Appellant was entitled to be awarded the contract and so notified Appellant by letter dated November 28, 2001.
8. Cleveland's attorney filed a protest by letter dated December 3, 2001, arguing, in part, that "even if Cleveland Wrecking's bid were late, which it was not, its bid should have been accepted as timely because any delay in delivering the bid was the fault of MSU, and not Cleveland Wrecking."
9. On the advice of the Office of the Attorney General, the University investigated the facts relating to the timing of Cleveland's bid. As developed at the hearing the record reflects that Mr. Gerriod Thomas was a receiving clerk employed by the Purchasing and Property Control Department - the same department that conducted the procurement activity - and that his responsibilities included the prompt delivery of bids or proposals that he received. Bids and proposals were not to be signed for and the carrier was to be directed to Room 107.
10. The University determined, pursuant to COMAR 21.05.02.10B, that Cleveland's bid would have been timely but for the inaction of an employee of "State personnel directing the procurement activity." The University therefore decided to award the contract to Cleveland.
11. The University requested the Board of Public Works (BPW) pursuant to COMAR 21.10.02.11A to award the Contract to Cleveland pending resolution of the Appellant's protest of November 20, 2001. The University represented to the BPW that execution of the Contract without delay was "necessary to assure that the Pentridge Apartments are available as student housing by the fall of 2003." Furthermore, the University stated that if the contract award were stayed pending the outcome of the protest, the delay in the start of the demolition work would jeopardize the University's ability to make this student housing available by September 2003. At its meeting of December 12, 2001, the BPW concurred with the University's recommendation and awarded the Contract to Cleveland.
12. On December 17, 2001, the University's Procurement Officer issued a final decision pursuant to COMAR 21.10.02.09 denying Appellant's protest.
13. Citing COMAR 21.05.02.10B the Procurement Officer found that "Cleveland's bid of \$788,019 was the lowest bid and, but for the inaction of the receiving clerk in delivering it until several minutes after the deadline, Cleveland's bid would have been timely." Appellant noted a timely appeal of this decision to this Board.

Decision

Late bids ordinarily may not be considered. However, there is an exception. Herein the Procurement Officer correctly determined that Cleveland's bid would not have been late but for the inaction of an employee of the Procurement Department.

COMAR 21.05.02.10B provides in pertinent part that:

A late bid, late request for modification, or late request for withdrawal may not be considered. Upon the 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.

Thus, the prohibition on consideration of late bids is subject to an exception where the lateness is attributable to State personnel who either direct the procurement or are employed by those who do. Here the Procurement Officer determined that Mr. Thomas, a receiving clerk whose duties included direction of the bearer of bids or proposals to Room 107, was employed by the Purchasing and Property Control Department, the unit that directed the procurement at issue herein. The record reflects that Federal Express delivered Cleveland's bid to Mr. Thomas at 9:04 a.m. But for his inaction in not delivering Cleveland's bid until after 11:00 a.m. or his action in signing for and accepting the bid in the first place rather than directing the Federal Express bearer of the bid to Room 107, Cleveland's bid would have been timely and the lowest bid. Therefore, we shall uphold the State's determination that Mr. Thomas' inaction (or improper action) was the reason why Cleveland's bid was late. The record reflects that facts establishing an exception to the prohibition against consideration of late bids exist.

Bidders are primarily responsible for choosing the method and manner in which they transmit their bids to assure their timely arrival. American Air Filter Co., MSBCA 1199, 1 MSBCA ¶89 (1984) at p. 5. Similarly, the State may not consider a late bid delivered by a commercial carrier unless improper State action is the sole or paramount cause of the late receipt. Id. Thus, a late bid is not excused if the bidder's unreasonable action or inaction is an intervening cause of the bid being delivered late. Id.

In this appeal, however, the Board has found that it was the receiving clerk's failure to properly deliver or properly direct Cleveland's bid that was the intervening cause of the lateness. Even if it is assumed that Cleveland should have delivered its bid directly to Room 107, or should have brought it to the receiving area of the Washington Service Center more than two hours before the bid was due, the bid still would have been timely but for Mr. Thomas' delay in delivering it to Room 107 or his failure not to direct the bearer of the bid directly to Room 107. Although the Federal Express envelope was clearly marked as containing a bid and Mr. Thomas was an employee of the Purchasing and Property Control Department, one of whose responsibilities is to assure prompt delivery of bids by directing the carrier to Room 107, the bid was not received in Room 107

until after 11:00 a.m. In other words, Cleveland's delivery of the bid to the Washington Service Center less than two hours prior to bid opening could not have been the intervening cause of the lateness because it preceded Mr. Thomas' handling of it.

This case differs from Patco Distributers, Inc., MSBCA 1270, 2 MSBCA ¶128 (1986), cited by Appellant, where the Board found that the lateness exception could not apply in the absence of evidence as to how packages were handled and whether the employee at issue was either "State personnel directing the procurement activity or their employees." Here, by contrast, the record reflects that Mr. Thomas is an employee of State personnel directing the procurement and the record otherwise supports applying the exception. Accordingly the appeal is denied.

Therefore, it is Ordered this 5th day of February, 2002 that the appeal is denied.

Dated: February 5, 2002

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

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 2263, appeal of Bowen and Kron Enterprises, Inc. under Morgan State University Project ID No. DCM99017A

Dated: February 5, 2002

Mary F. Priscilla
Recorder