

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CORUN & GATCH, INC. )  
Under SHA Contract ) Docket No. MSBCA 1490  
No. H 908-501-477 )

February 27, 1990

Responsiveness - Omission of the penal sum in a bid bond required by the invitation for bids is a material defect rendering the bid nonresponsive.

APPEARANCE FOR APPELLANT: Donald A. Tobin, Esquire  
Dempsey, Bastianelli, Brown  
& Touhey, Chartered  
Washington, D.C.

APPEARANCE FOR RESPONDENT: Edward S. Harris  
Assistant Attorney General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY:  
T.C. Simons, Inc. Curtis C. Coon, Esquire  
Cohan & Francomano  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the determination by the State Highway Administration (SHA) that its bid was rendered non-responsive by the absence of a penal sum in its bid bond.

Findings of Fact

1. On December 5, 1989, SHA opened bids for the instant construction contract. Five bids were received. Appellant submitted the apparent low bid, in the amount of \$1,632,927.50. The second lowest bid, in the amount of \$1,802,006.65, was submitted by T.C. Simons, Inc. (Simons). The engineers estimate for this contract was \$2,230,472.00 and exceeded all bids received.

2. The Invitation for Bid provided that bid security totalling 5% of the amount bid would be required.

3. At the bid opening, Appellant's bid was announced as irregular due to the fact that the enclosed bid bond did not indicate a penal sum either by dollar amount or by a percentage figure. The absence of a penal sum was the only apparent irregularity in the bid bond.

4. By letter dated December 8, 1989, Simons filed a protest with SHA challenging the responsiveness of Appellant's bid based upon the absence of a penal sum in its bid bond.

5. On December 13, 1989, Appellant wrote to SHA regarding the Simons protest and asserted that the absence of a penal sum in Appellant's bid bond did not render the bid non-responsive; and alternatively that SHA should cancel all bids and resolicit.

6. In the process of preparing its bid, Appellant contacted Johnson & Sons, of Reisterstown, MD concerning the required bid bond, as well as performance and payment bonds. Johnson & Sons is an agent for Seaboard Surety Company (Seaboard). Seaboard, acting through Johnson & Sons, agreed to issue the required bid bond in an amount to cover a bid by Appellant up to 2.3 million dollars. Seaboard's attorney-in-fact, Ms. Margaret A. Jones, filled out and executed the bid bond. The bid bond specifically referenced the project for which Appellant submitted its bid. Ms. Jones, however, left the penal sum blank. The bid bond was then forwarded to Appellant who received it on or about November 20, 1989.

7. As noted, on December 5, 1989, Appellant submitted its bid in the amount of \$1,632,927.50 to SHA, along with the bid bond as

provided to it by Seaboard/Johnson & Sons. Appellant's bid package also contained the SHA standard form proposal guaranty indicating that bid security totalling 5% of the amount bid was required. This form contained blank spaces for a bidder to indicate the amount of its bid security. The blank spaces were filled in by Appellant in words and figures indicating that the 5% bid security in the amount of \$81,646.37 was attached. However, as noted, the attached bid bond failed to include any penal sum.

8. One day after the bid opening, on December 6, 1989, Seaboard/Johnson & Sons provided SHA with a corrected bid bond, showing a penal sum of "5% of amount bid". In the letter accompanying the corrected bond, Seaboard "acknowledges its obligation under the original bid bond submitted by Corun & Gatch on the above captioned project in the penal sum of \$81,646.37 being 5% of the amount bid."

9. On January 2, 1990, the SHA procurement officer issued his final decision on the Simons protest in which he rejected Appellant's bid as non-responsive because of the absence of a penal sum in its bid bond and concluded that the lowest responsive bid was received from Simons. From this determination, Appellant appealed.

#### Decision

This appeal raises the issue of whether Appellant's bid was properly rejected as non-responsive due to the absence of a penal sum in its bid bond.

The statutory provisions regarding bid security under Maryland's procurement law are set forth in §§ 13-207 and 13-208 of the State Finance and Procurement Article of the Annotated Code of Maryland. With regard to construction contracts, § 13-207(b) provides in relevant part:

(b) Construction contracts. - (1) 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 \$50,000;...

(2) the amount of bid security required for a procurement contract for construction shall be;

(i) at least 5% of the bid or price proposal;....

SF § 13-208 compels the rejection of a bid which is not accompanied by a proper bid security unless certain limited exceptions are present. SF § 13-208 provides:

(a) In general. - Except as provided under subsection (b) of this section, if a procurement officer requires bid security, the procurement officer shall reject a bid or proposal that is not accompanied by proper security.

(b) Exceptions for deficiencies. A procurement officer may accept a bid or proposal that is accompanied by bid security in less than the amount required if:

(1) the procurement officer determines that:

(i) the deficiency in the amount is insubstantial;  
and

(ii) acceptance of the bid or proposal would be in the best interests of the State;  
and

(2) the procurement officer further determines that:

(i) the bid or proposal was the only one submitted and there is no time for rebidding;

(ii) the bid security became inadequate as a result of the correction of a mistake in the bid or proposal or as a result of a modification in the bid or proposal in accordance with applicable regulations, and the bidder or offeror increased the

- amount of bid security to required limits within 48 hours after the correction or modification; or
- (iii) after consideration of the risks involved and the difference between the lowest bid and the next lowest bid, it would be fiscally advantageous to the State to accept the lowest bid or proposal.

The issue of rejection of a bid where the penal sum is omitted from the bid bond was previously considered by the Board in H.A. Harris, Inc., MSBCA 1109, 1 MICPEL ¶38 (1983). In H.A. Harris, the Board held that the omission of the penal sum in the bid bond required by the Invitation For Bid is a material defect rendering the bid non-responsive. Like Appellant's bid, H.A. Harris's bid contained a standard form indicating that bid security totalling 5% of the amount bid was required, with blanks, filled in by the bidder, in words and figures indicating that the 5% bid security was attached. Also like Appellant's bid, the H.A. Harris's bid bond failed to include any penal sum.

In concluding that Harris's bid was not responsive due to the absence of a penal sum on the bid bond, the Board stated:

The bid bond furnished by Appellant and executed by its surety did not contain a penal sum. While the surety, by issuing a signed, blank bid bond, may have intended to be liable for the [5% of bid] amount which Appellant wrote on its bid form but omitted from the bond, the absence of a penal sum on the bond raised a question as to the legal liability of the surety. This ambiguity was not resolvable by looking to the bid form. Although the bid form specified that a bid guarantee of [5% of the amount bid] was being provided, that form was not executed by a person having power of attorney to bind the surety.

The only means available to verify the validity of Appellant's bid bond was to contact the surety after bid opening. This would have placed the surety in the enviable position of being able to assess its potential

liability after having had access to the competitive bids. Such a procedure would have given the low bidder "two bites at the apple" and, concomitantly, an advantage over its competitors. See The Tower Building Corporation, supra; Total Carpentry Ltd., Comp. Gen. B-205198.2, March 25, 1982, 82-1 CPD ¶384. For this reason, the SHA procurement officer reasonably rejected Appellant's bid as non-responsive.

In its letter to SHA regarding the Simons protest and in argument at the hearing of the appeal, Appellant attempts to distinguish the present case from the circumstances confronting this Board in H.A. Harris, and asserts that appellant's bid is responsive despite the absence of a penal sum in the bid bond. Appellant suggests that H.A. Harris is not controlling because in that case the surety intentionally issued and executed the bid bond without a penal sum inserted and left it to the bidder to insert the penal sum.

In the present case it appears that the surety did not intend to delegate to Appellant the authority to fill in the penal sum but inadvertently left it blank. Nevertheless, the circumstances surrounding the execution of the bid bond in this case, as in H.A. Harris, are not apparent on the face of the bid, and as noted in H.A. Harris the Board's decision was premised on its conclusion that responsiveness must be determined from the face of the bid documents. See also Calvert General Contractors Corp., MSBCA 1314, 2 MICPEL ¶140 (1986) and cases cited therein at p.9.

Since H.A. Harris may not be distinguished as to the issue before us, Appellant next argues that H.A. Harris was wrongly decided.

Relying upon COMAR 21.06.07.02.<sup>1</sup> Appellant contends that not only is the deficiency in the amount of its bid bond insubstantial, it asserts that there is no difference between the amount of bid security provided and the amount (5%) required under the Invitation For Bid. In support of this assertion it argues that because the bid bond was attached to a bid in the amount of \$1,632,927.50 and because the underlying statute and regulations require a 5% bid bond, Appellant's surety is bound by the amount of 5% of the bid as a matter of contract interpretation and thus the bond would be enforceable against the surety in the event Appellant defaulted despite the absence of the penal sum. In Appellant's view the fact that the surety's intention to be bound is not evidenced on the face of the bid documents is immaterial. Under Appellant's asserted construction, a penal sum would never have to appear on a bid bond because the bonding company would be presumed to have submitted what the law required and be held accountable in the event of a contractor's default.

However, this result is not consistent with H.A. Harris, supra which requires that the surety's intention to be bound must be evidenced on the face of the bid document. We will not retreat from H.A. Harris, at least on the facts of this appeal, particularly in the absence of Maryland case law construing the enforceability of a bid bond where the penal sum is omitted.

In this regard we are advised that there are no reported

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<sup>1</sup>COMAR 21.06.07.02, relied upon by Appellant, is worded substantially the same as SF §§ 13-207 and 13-208 set forth above.

Maryland decisions dealing with the enforceability of a bid bond where the penal sum is inadvertently omitted. However, there is a suggestion in Kennedy Temporaries v. Comptroller, 57 Md. App. 22 (1984) at pp. 37-39 that where a statute mandates a bid bond, questions concerning the enforceability of the bond will be strictly construed and waivers of deficiencies not favored.<sup>2</sup>

In any event the procurement officer and agency head ultimately made a determination that the bid was not responsive because intention to be bound could not be determined from the face of the bid documents.<sup>3</sup> While the risk of default and subsequent refusal of the surety to honor the bond might, based on the facts of this appeal, be minimal,<sup>4</sup> we cannot say as a matter of law that should such events transpire the surety would ultimately be held responsible (after possible lengthy litigation) to secure the State against loss (generally measured by the difference between the amount of the defaulter's bid and the amount of the next highest bid accepted by the State).

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<sup>2</sup>The Court in Kennedy Temporaries distinguished the situation in Board of Education v. Allender, 206 Md. 466 (1955) where the requirement for bid security was not statutory and acceptance of a deficient security was tested by the wide discretion accorded the agency where not constrained by statute or ordinance. Here the procurement officer's discretion is constrained by statute and regulation. We also note that under recent federal procurement decisions the Comptroller General has held that the absence of a penal sum on a bid bond renders a bid non-responsive. See M/V Constructor Co., 88-2 CPD ¶272, B-232572 (1988); F&F Pizano, 85-2 CPD ¶88, B-219594, B-219594 (1985), affirmed on reconsideration, 85-2 CPD ¶234 (1985).

<sup>3</sup>Such a situation (absence of a penal sum) may be contrasted with a situation where the obligee is omitted but from the four corners of the bid documents and the operative facts it is obvious that the obligee (i.e. procuring entity) is State X or the U.S. Government or the U.S. Postal Service or whomever. See Nationwide Roofing and Sheet Metal, Inc. 85-1 CPD ¶454, B-21684 (1985).

<sup>4</sup>Counsel for the interested party points out that in general if and when a surety learns that the bidder has defaulted by not signing a contract awarded to it, or by not providing the subsequent payment and performance bonds required under the contract awarded, the surety has two choices; it can pay-up or it can defend. Whichever choice it takes, the surety is most concerned about its relations with its principal, the bidder, and whether it is secured properly. The blank dollar figure "bond" may therefore, be fertile ground for a surety's contentions in defense, that no bond exists. These contentions may include fraud, failure of consideration and/or failure of a meeting of the minds. Thus, when the sum is left blank, the bond, on its face, is arguably unenforceable, and, any surety may argue, by collateral evidence, that it was never the intention of the surety to be bound. It is this very quicksand which is avoided by adherence to the statute.



We further do not find under the facts of this appeal that rejection of the bid for failure to include the penal sum in the bid bond was otherwise erroneous or an abuse of discretion.<sup>5</sup>

The appeal, accordingly, is denied.

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<sup>5</sup>We have considered and rejected for purposes of this appeal the argument of SHA that under SF § 13-208(b)(1) failure to include any penal sum may never be waived regardless of circumstances.

