

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CROUSE CONSTRUCTION)
CO., INC..)
) Docket No. MSBCA 1322
Under MPA Contract No. 287215)

May 21, 1987

Responsiveness - Bid Bond - The apparent low bid was responsive where it contained the required bid bond executed by the surety's signature and seal and delivered by the surety to the bidder (principal obligor) without condition as to the bidder's execution of the bond, and the bid bond was signed although not sealed by an authorized representative of the corporate bidder.

Responsiveness - Bid Bond Seal - In Maryland, a corporation binds itself on a written undertaking, including a suretyship agreement, by the signature of an authorized corporate official without the formality of an authenticating corporate seal. Accordingly, the procurement officer without prejudice to other bidders reasonably waived as a minor irregularity the apparent low bidder's failure to provide a seal on its otherwise properly executed bid bond.

APPEARANCE FOR APPELLANT:

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APPEARANCES FOR RESPONDENT:

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OPINION BY MR. KETCHEN

This appeal is taken from a Maryland Port Administration's (MPA) procurement officer's decision denying Appellant's protest objecting to award to the apparent low bidder. Appellant maintains that the low bid was not responsive because the bid bond was defective since it did not contain the apparent low bidder's corporate seal.

Findings of Fact

1. MPA issued Request for Proposals No. 287215 (IFB)¹ in December 1986 for demolition of Building No. 9 at the South Locust Point Marine Terminal.

2. Bids were received on January 29, 1987 with the following results:

Berg Contracting, Ltd.	\$238,888.00
O'Rourke Construction Co.	\$267,000.00
Crouse Construction Co.	\$288,500.00

¹This was a solicitation for sealed bids on a competitive, advertised procurement, although the "Request for Proposal (RFP)" designation normally indicates a competitive negotiation procurement. In this regard, COMAR 21.01.02.57 provides that "'Request for proposals' means any document, whether attached or incorporated by reference, used for soliciting proposals under procurement by competitive negotiations, noncompetitive negotiations, multi-step and small procurement procedures." COMAR 21.01.02.37 provides that "'Invitation for bids' means any documents, whether attached or incorporated by reference, used for soliciting bids under procurement by competitive sealed bidding and small procurement procedures including requests for quotations."

International Crane Co.	\$398,160.00
Potts & Callahan, Inc.	\$449,085.00
The Baltimore Rigging Co.	\$778,298.00

The MPA engineer's estimate was \$686,010.00.

3. O'Rourke Construction's bid was disqualified, therefore, Appellant became the apparent second low bidder.

4. Berg Contracting's bid included the required bid bond pursuant to COMAR 21.05.08.05 on the IFB bid bond form similar to that recommended by COMAR 21.06.07.03C(1), Exhibit E. The IFB bid bond form provided the following for a corporate bidder to execute:

Corporate Principal

.....
(Name of Corporation)

Attest:

.....
Corporate Secretary

By:
PRESIDENT

AFFIX
CORPORATE
SEAL

5. Mr. David Berg, Vice President of Berg Contracting, signed the bid bond submitted with Berg Contracting's bid in the space provided on the bid bond form for the corporate principal's signature. However, a corporate seal was not affixed in the position on the bid bond that directed bidders to "AFFIX CORPORATE SEAL."

6. The surety's attorney-in-fact, Nancy L. Oring, on behalf of the surety signed and sealed the bid bond that was submitted with Berg Contracting's bid. She acted pursuant to a power-of-attorney dated January 7, 1987, executed by the surety, Atlantic Bonding Company, Inc.

7. After bid opening, when contacted by the MPA procurement officer, Berg Contracting explained that it did not have an official corporate seal but used the signature of David Berg as such. However, Berg Contracting previously had submitted financial information on an MPA form entitled "Contractor's Financial Statement," that contained a hand drawn, circular symbol with the handwritten words, "Berg Contracting, Ltd., Corporate Seal, 1984, MARYLAND." This "Contractor's Financial Statement" signed by David Berg, as Vice President of Berg Contracting, also contained a form affidavit stating that the financial information is a true statement of the financial condition of Berg Contracting and a direction to the affiant that, "[a] corporation must give full corporate name, signature of official, and affix corporate seal."

8. By letter dated February 4, 1987, Appellant filed a timely protest with the MPA procurement officer. Appellant objected that Berg Contracting's bid was nonresponsive because it had not affixed a corporate seal at the appropriate place on its bid bond.

9. The MPA procurement officer by letter dated February 19, 1987 denied Appellant's protest concluding that Berg Contracting's failure to affix a corporate seal to its bid bond did not affect the bid's responsiveness. He found that lack of a seal on Berg Contracting's bid bond was not an irregularity since corporate seals are no longer required in Maryland as evidence of whether a document executed by a corporation is its authorized act. Next, he determined that Berg Contracting's failure in this regard was an immaterial and inconsequential variation from an exact requirement of the solicitation the waiver of which would not prejudice other bidders.

10. Appellant timely appealed the MPA procurement officer's decision to this Board on February 24, 1987.

Decision²

COMAR 21.06.02.03 provides as follows:

"Minor Irregularities in Bids or Proposals.

A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State."³

Appellant alleges that Berg Contracting's bid is nonresponsive because the bid bond signed by a Berg Contracting official does not contain a corporate seal, although the bid bond was properly executed and sealed by the surety. Appellant maintains that this is a material defect that cannot be waived.

Md. Ann. Code, State Finance and Procurement Article, §13-504(c) provides that "[i]f the invitation for bids or request for proposals require that a bid bond be provided, a bidder or offeror that does not comply shall be rejected."⁴ The issue for our determination, therefore, is whether there is a material defect on the face of the bid bond that renders the bid nonresponsive.

In the context of this appeal, the test of whether a material defect exists is whether the bid bond furnished is sufficient to obligate the surety to indemnify MPA for the maximum amount specified in the IFB if the low bidder, Berg Contracting, repudiates its bid. H.A. Harris, Inc., 1 MSBCA (MICPEL) ¶38 (February 4, 1983). In this regard, a bid bond may be unenforceable against the surety, if it signs and seals the bond on condition that the principal (obligor) also properly execute the bond prior to its delivery to the obligee, here MPA. See: Birmingham News Co. v. Moseley, 225 Ala. 45, 141 So. 689 (1932); Hanco Associates - Request for Reconsideration, Comp. Gen. Dec. B-209446.2, April 29, 1983, 83-1 CPD ¶460; Atlas Contractors, Inc., Comp. Gen. Dec. B-209446, March 24, 1983, 83-1 CPD ¶303. On the other hand, absent a condition by the surety that its agreement to indemnify the obligee is conditioned on the obligor's proper execution and delivery of the bond to the obligee, "a bond sealed and delivered to the obligee is sufficient without the signature of the obligor. 11 C.J.S., Bonds Section 16." Comptroller Gen. Dec. B-177407, February 26, 1973 (Unpublished).

In Maryland a seal serves as prima facie authentication that a sealed corporate document is the authorized act of the corporation acting through its officers. However, the absence of a corporate seal on an otherwise properly executed document has no significance as to the validity of the document as an authorized corporate act. The Maryland Court of Appeals has commented on the matter as follows:

"In the early law it was held that a corporation could not contract except under its corporate seal. This rule persisted, but was increasingly relaxed during the 19th century. Today, in the absence of charter or statute to the contrary, a corporation may bind itself by a writing not under seal to the same extent as an individual." (Underscoring added).

²The Board's decision was transmitted orally to the parties on April 9, 1987, shortly after close of the record. This is the Board's written decision issued pursuant to the notice requirements of the Maryland Administrative Procedure Act, Md. Ann. Code, State Government Article, §10-214. See generally: Nuger v. State Ins. Comm'r, 231 Md. 543, 191 A.2d 222 (1963).

³To the same effect, see IFB, G.P. (General Provision) - 2.15 entitled, "Minor Irregularities/Informalities."

⁴COMAR 21.06.07.02B provides that "[i]f a bid does not comply with the security requirements of this regulation, the bid shall be rejected as nonresponsive, . . ."

Gildenhorn v. Columbia R. E. Title, 271 Md. 387, 398 (1973). See generally: Susquehanna Bridge and Bank Co. v. The General Insurance Co., 3 Md. 305, 311-12 (1852); Federalburg v. Allied Contractors, 275 Md. 151, 155-57 (1975). Thus, in Maryland a corporation may enter a binding contractual undertaking in writing without the formality of an authenticating corporate seal.

Here there is nothing in the record before us which indicates that the surety executed the bid bond conditioned on proper execution by Berg Contracting. We thus find that there is nothing on the face of the bid bond conditioning the surety's obligation, or otherwise, that would defeat the surety's obligation to perform its obligation if Berg Contracting repudiates its bid. See: F&F Pizano, Comp. Gen. Dec. B-219591.2; B-219594.2, August 27, 1985, 64 Comp. Gen. 805, 85-2 CPD ¶234. Furthermore, Berg Contracting's failure to provide a seal on its bid bond otherwise properly executed by its Vice President is a minor irregularity insignificant as to price, quantity, quality, or delivery, since corporate seals no longer are a prerequisite to valid corporate action in Maryland. In this regard, there is no statute or regulation that would make illegal or improper the acceptance of a bid as responsive where it contains a bid bond containing the variation here involved. See: Apollo Paving Co., Inc., 1 MSBCA (MICPEL) ¶29 (October 26, 1982); Excavation Constr. Inc. v. U.S., 204 Ct.Cl. 299, 308 (1974). Cf.: Siska Construction Co., Inc. - Request for Reconsideration, Comp. Gen. Dec. B-213208.2, March 21, 1985, 85-1 CPD ¶331 (evidence of authority to sign bid documents may be furnished after bid opening).

Accordingly, Berg Contracting submitted a valid bid bond, albeit absent a corporate seal, making its bid responsive to the IFB's requirements. The surety is bound in any event to indemnify MPA if Berg Contracting repudiates its bid. Under these circumstances, the MPA procurement officer appropriately waived Berg Contracting's failure to provide a corporate seal as a minor irregularity not prejudicial to other bidders despite the direction on the IFB bid bond form to "affix corporate seal."

For the foregoing reasons, therefore, the appeal is denied.