

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EAGLE	)	
INTERNATIONAL, INC.	)	
	)	Docket No. MSBCA 1121
Under State Aviation	)	
Administration Purchase	)	
Order No. 3-0340 Intercity	)	
Coaches for BWI Airport	)	

March 2, 1983

Bid Protest - By waiting approximately one month to raise issues of favoritism, collusion and fraud and by raising those issues with the Board in the first instance, Appellant waived its right to protest since COMAR 21.10.02.03B requires a bidder to file a protest with the procurement officer within seven days after the basis for protest is known or should have been known.

Bid Bonds - Although COMAR 21.06.07.01B describes acceptable forms of security for bid, performance and payment bonds, the regulation is not construed to limit or restrict the discretionary authority given to procurement officers under Article 21, § 3-504 (a) to approve other forms of security.

Pre-Bid Oral Explanation and Clarifications - A procurement officer's pre-bid oral clarification provided to a single prospective bidder over the telephone was found to be binding upon the State Aviation Administration since the RFQ encouraged telephone inquiry and did not mandate the issuance of written addendum to provide any clarifications or answers to all bidders.

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## OPINION BY MR. LEVY

This appeal is from a State Aviation Administration (SAA) procurement officer's final determination declaring Appellant's bid non-responsive because it included bid security in an unacceptable form. Appellant concedes that it submitted an uncertified corporate check as its bid security but contends that the SAA procurement officer approved the form of security prior to bid. Appellant further maintains that the procedures followed by SAA were collusive and discriminatory and that SAA behaved fraudulently in its dealings with the bidders. SAA denies these allegations and submits that Maryland law does not authorize the use of an uncertified corporate check as adequate bid security.

### Findings of Fact

1. On August 20, 1982, SAA published in the Maryland Register a Request for Quotations (RFQ) for 6 intercity coaches to be used to carry passengers to and from Baltimore-Washington International Airport (BWI). Bids were to be submitted by September 22, 1982.
2. The RFQ included both performance and technical (design) specifications<sup>1</sup> and established the following on page 2 with regard to contract award:

#### C. Evaluation Procedure

Award shall be made on the basis of lowest evaluated bid price. Criteria to be used<sup>2</sup> in determination of award are set forth below:

1. The SAA is interested in obtaining intercity coaches which most closely meet or exceed both the performance and technical specifications indicated at the lowest possible cost. While cost is a major consideration, award will not be based solely on cost.
2. The equipment offered clearly must meet all applicable Federal Department of Transportation specifications and requirements for intercity coaches, all applicable safety standards for commercial buses of the Maryland Motor Vehicle Administration, as well as the needs of the SAA as set forth in Paragraph I.A. above and as set forth in both the performance and technical specifications.
3. The procurement officer of SAA may accept a limited number of nonsubstantive variations to the technical specifications if it is in the best interests of the SAA to do so.

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<sup>1</sup>Attachment 3C, Agency Report

4. The procurement officer shall be entitled to determine whether or not a bidder is responsible and responsive. A numerical rating system may be used at the option of the procurement officer.
5. The procurement officer reserves the right to reject any and all bids and/or waive minor irregularities or technical defects, if, in his judgement (sic), it is in the best interest of the SAA to do so. (Underscoring added.)

Also, on page 1, SAA stated that "... in its evaluation process leading to final bid award ... [it] will consider delivery of vehicles as an important factor."<sup>2</sup>

3. The RFQ Instruction to Bidders<sup>3</sup> provided the following with regard to bid bonds:

15. Bid Bond

In the event that the proposal exceeds \$25,000 bidders must submit, on a form provided by the State, a bid bond in an amount equal to, or greater than, 5% of the total bid price. Bid bonds must be issued by a surety licensed to do business in the State of Maryland, although the bidder may submit cash, a certified check, or other security set forth in COMAR 21.06.07.01 in lieu of the bond. Failure to return the contract acceptance form properly executed within the prescribed period will be cause for the State to forfeit bid security. (Underscoring added.)

4. The SAA procurement officer for this acquisition was Mr. Charles Plantholt, Director of Finance and Administration. However, the RFQ designated Mr. John Stempel, SAA Chief of Purchasing and Supply as the buyer and gave his phone number. Bidders were expected to direct their questions concerning the RFQ to Mr. Stempel who was authorized to answer them. [Tr. 42]

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<sup>2</sup>An invitation for bids or request for quotations is used to initiate a competitive sealed bid procurement. COMAR 21.05.02.01A., 21.01.02.58. Under a competitive sealed bid procurement, award is made to the responsive and responsible bidder who submits the lowest bid price or lowest evaluated bid price. COMAR 21.05.02.13A, Hanover Uniform Co., MSBCA 1059, (April 13, 1982). Only objectively measurable criteria which are set forth in the invitation for bids or request for quotations shall be applied in determining the lowest bidder. COMAR 21.05.02.13B. Here SAA was indicating in a competitive sealed bid procedure that it would consider factors other than those which could be objectively utilized to evaluate price. While this is impermissible, the evaluation criteria here had no effect on the ultimate award and were not protested.

<sup>3</sup>Attachment 3b, Agency Report

5. On September 3, 1982, Mr. R.S. Matthews, Vice President-Controller of Motor Coach Industries (MCI), sent a letter<sup>4</sup> to Mr. Theodore E. Mathison, Director of Airports for the SAA, requesting approval of 63 proposed equals to the RFQ technical specification. Mr. Mathison replied by letters dated September 15, 1982<sup>5</sup> and September 17, 1982<sup>6</sup> that SAA would accept the proposed equals. These three letters were submitted as a part of MCI's bid package on September 20, 1982.

6. On September 8, 1982, Mr. Vernon Tull, Manager of Operations for Appellant, phoned Mr. Stempel and inquired if a corporate check was permissible as bid security in lieu of the bid bond. Mr. Stempel replied that it was permissible. Both Mr. Tull and Mr. Stempel testified that neither one used the phrase "certified corporate check" during this conversation. [Tr. 23, 46]

7. When bids were opened on September 22, 1982, Appellant was identified as the apparent low bidder. Accompanying Appellant's bid was a four page document entitled Request For Approved Equals and Clarifications. The first paragraph of this document read as follows:

Eagle International, Inc.'s Quotation is accompanied with a corporate check in an amount equal to 5% of the total bid price. This corporate check is equal to the bid bond requested and has been given prior approval. Therefore, the Section L Bid Bond Form on Page L-01 and L-02 is not executed.

Appellant's uncertified corporation check was in the amount of \$44,664.00.

8. All bids were referred to an evaluation committee which later issued its report to T. James Truby, SAA Administrator, on October 6, 1982. The committee recommended that Appellant's bid be rejected as non-responsive because the corporate check it submitted as bid security was not certified.<sup>7</sup> The committee further recommended that the award be made to MCI, the second low bidder.

9. On October 8, 1982, the procurement officer issued a Notice of Award to MCI and advised Appellant by letter that it had not been selected for award because it had not complied with the requirements of COMAR 21.06.07.01B concerning bid security.

10. Appellant's Mr. Tull testified that he sent a letter to SAA's Mr. Stempel on October 8, 1982 requesting copies of the other bids received. Mr. Tull received the requested materials within a week. [Tr. 76]

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<sup>4</sup>Attachment 2(4), Agency Report

<sup>5</sup>Attachment 2(5), Agency Report

<sup>6</sup>Attachment 2(7), Agency Report

<sup>7</sup>The report also concluded that Appellant did not acknowledge receipt of an amendment and the bid was therefore non-responsive under COMAR 21.06.02.02B.

11. On October 14, 1982, Appellant sent a telegram to SAA acknowledging receipt of the procurement officer's October 8, 1982 letter and advising SAA of the September 8, 1982 phone conversation between Vernon Tull and John Stempel. On this basis, Appellant requested that its bid security be deemed acceptable and that it be awarded the contract.

12. The procurement officer denied Appellant's protest in a final decision issued October 26, 1982. A timely appeal was filed with this Board on November 9, 1982.

13. The Board of Public Works approved the award of this contract at its meeting on November 10, 1982 and a purchase order and notice to proceed was issued to MCI on November 18, 1982.

14. Appellant filed a Supplement To Notice Of Appeal with this Board on November 15, 1982. In addition to re-asserting its position with regard to its bid security, Appellant alleged that "the procedures followed by the purchasing office were collusive and discriminatory in that the successful bidder was accorded more favorable treatment." Appellant also asserted "that the purchasing office has behaved fraudulently in its dealings with the bidders in this case." A hearing was conducted by the Board on January 4, 1983.

### Decision

We initially must determine what grounds for protest are properly before this Board for resolution. The only ground for protest raised with the SAA procurement officer and addressed in his final determination was the adequacy of Appellant's bid security. Appellant did not allege fraud or collusive and discriminatory procedures until well after the Board appeal had been docketed. SAA contends that these latter contentions thus are untimely and should be dismissed.

On October 8, 1982, Appellant requested a copy of the MCI bid documents. This was provided to Appellant by the SAA's Mr. Stempel within a week. As testified to by Appellant's Mr. Tull, it was after a review of MCI's bid that Appellant recognized that favorable treatment had been accorded to MCI. Nevertheless, Appellant waited until November 15, 1982, approximately one month after receiving MCI's bid, to raise the issues of fraud, collusion and favoritism as grounds for protest.

COMAR 21.10.02.03B requires a disappointed bidder to file a protest with the appropriate procurement officer within 7 days after the basis for protest is known or should have been known. By waiting approximately one month, Appellant waived its right to protest on these grounds. See The CTC Machine and Supply Corporation, MSBCA 1049, Mot. for Rec. Den., (April 20, 1982).

We now consider the adequacy of Appellant's bid security. In this regard, Art. 21 § 3-504(a), Md. Ann. Code provides that:

(a) Each bidder or offeror for a construction contract shall give a bid bond if the bid or offer exceeds \$25,000. Bid bonds may be required for any other procurement over \$25,000, as determined by the procurement officer. The bid bond shall be provided by a surety company authorized to do

business in this State, or the equivalent in cash, or in a form satisfactory to the procurement officer. (Underscoring added.)

The regulations promulgated to implement this statute appear at COMAR 21.06.07. Of particular significance is COMAR 21.06.07.01B as follows:

B. Acceptable security for bid, performance, and payment bonds shall be limited to:

(1) A bond in a form satisfactory to the State underwritten by a company licensed to issue bonds in this State;

(2) A bank certified check, bank cashier's check, bank Treasurer's check, cash, or trust account; or

(3) Pledge of securities backed by the full faith and credit of the United States government or bonds issued by the State of Maryland.

In contrast to the statute, therefore, the foregoing regulation does not afford the procurement officer any discretion to determine whether other forms of bid security may be acceptable.

We previously have recognized in Kennedy Temporaries, MSBCA 1061 (July 20, 1982) that a power granted to an administrative agency to make rules and regulations extends no further than the authority given by the relevant statutory delegation. In that opinion we further cited the Maryland Court of Appeals decision in Mayor and City Council of Baltimore v. William E. Koons, Inc., 270 Md. 231, 236 (1973) for the following principle:

A legislatively delegated power to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, or impairs, limits, or restricts the act being administered. (Underscoring added.)

In accordance with these decisions, we thus conclude that COMAR 21.06.07.01B cannot be construed to limit and restrict the discretionary authority given to the State's procurement officers under Article 21, § 3-504(a). Accordingly, we find that the acceptable forms of security listed in COMAR 21.06.07.01B are simply illustrations and were not intended to preclude a State procurement officer from accepting security in other forms.

Since an uncertified corporate check is not expressly authorized for use as bid security by law or regulation, we next must determine whether the procurement officer, or his authorized representative,<sup>8</sup> approved the use of

<sup>8</sup>COMAR 21.01.02.50 defines the term procurement officer to mean "...any person

Appellant's check prior to the instant bid. In this regard, the record indicates that Appellant's Mr. Tull was instructed by the SAA's Mr. Stempel, prior to bid, that a corporate check would be acceptable for submission as bid security. During this conversation, no mention was made of the further requirement that the corporate check be certified.

The SAA contends that all Mr. Stempel approved was the use of a certified corporate check. However, the RFQ Instructions to Bidders, paragraph 15, expressly provided that certified checks would be accepted as bid security. Accordingly, there was no reason for Mr. Tull to make inquiry unless Appellant intended to submit an uncertified corporate check. For this reason, we believe that Appellant was justified in concluding both that Mr. Stempel understood its inquiry and that an uncertified corporate check was acceptable to the SAA as bid security.

Finally, we address the authority of Mr. Stempel to act on behalf of the procurement officer. Here Mr. Stempel was identified in the RFQ as the buyer for the SAA. His phone number also was included in the RFQ presumably to permit those with questions to contact him. There was nothing in the RFQ to alert bidders that Mr. Stempel's oral clarifications or answers in response to telephone questions would not be binding on the SAA. Further, the RFQ did not mandate the issuance of written addendum to provide any clarifications or answers to all bidders. For these reasons, we conclude that Mr. Stempel was authorized by the procurement officer to administer the bidding process and prescribe the forms of bid security acceptable to the SAA. See Department of General Services v. Cherry Hill Sand & Gravel Company, Inc., Ct. of Special Appeals of Md., No. 593, Sept. term, 1981 (filed April 7, 1982).<sup>9</sup>

For the foregoing reasons, we conclude that the SAA procurement officer improperly rejected Appellant's low bid as non-responsive. The contract awarded to MCI thus should be terminated for the convenience of the State and awarded to Appellant.

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authorized by a State agency in accordance with law or regulations to formulate, enter into, or administer contracts or make written determinations with respect to them. The term also includes an authorized representative acting within the limits of authority." (Underscoring added.)

<sup>9</sup>Compare Cherry Hill Sand & Gravel to our earlier decision in Granite Construction Company, MDOT 1011 (July 29, 1981) where that contract expressly stated that oral explanations or clarifications would not be binding. In view of that statement and the requirement that only written addendum were to be relied upon, the Board concluded in Granite that the person identified in the IFB to field telephone questions had no authority to provide oral responses.

