BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Grady & Grady Inc.	)	
	)	Docket No. MSBCA 1721
Under DGS Project No.	)	
DH-000-920-001	)	
	)	

May 27, 1993

Amendments - Acknowledgement

Amendments to IFB's (Addendum) are required to be acknowledged by bidders. Such failure may be waived under certain circumstances. However, failure to acknowledge an Addendum which materially changes or affects an IFB may not be waived and bidders are entitled to assume that an agency will not waive failure to acknowledge a material amendment.

APPEARANCE FOR APPELLANT:	William R. Grady Grady & Grady Inc. Baltimore, MD
APPEARANCE FOR RESPONDENT:	John H. Thornton Assistant Attorney General Baltimore, MD
APPEARANCE FOR INTERESTED PARTY;	Joseph Fick, Jr., President The Fick Brothers Roofing Co. Baltimore, MD

OPINION BY MR. MALONE

Appellant timely appeals denial of its protest from the final decision by the DGS Procurement Officer that the protest was untimely and that the successful bidders failure to acknowledge Addendum No. 1 could be waived. No hearing was requested and the parties submitted the case upon the record.[1]

Findings of Fact

1. On April 8, 1993 DGS received sealed bids (IFB) for roof replacement at the Maryland Youth Residence Center in Baltimore City Project No. DH-000-920-001.
2. Earlier on March 26, 1993 DGS had issued Addendum No. 1 to the specifications making material changes in the contract requirements affecting the Scope of Work.
3. Seven (7) bids were opened and the tabulation form indicated

[1]The Agency Report largely consists of facts and argument in support of a motion to dismiss on grounds the protest was not timely filed and is sparse in providing details on the merits of the appeal.

the lowest base bid was made by the Fick Brothers Roofing Co. (Fick) and the next lowest base bid by Appellant. The tabulation form stated that Fick did not acknowledge Addendum No. 1. No statement was made a bid opening that DGS would waive the failure by Fick to acknowledge Addendum No. 1 and accept its bid as responsive. Addendum No. 1 stated bidders were to acknowledge receipt of the Addendum by inserting its number and date on the Construction Bid Form. One copy of the bid documents offered by Fick did contain the Construction Bid Form but made no reference to Addendum No. 1 and the space for listing Addendum information was left blank by Fick. No indication is made on Fick's bid documents that they acknowledge the material requirements of Addendum No. 1. The Construction Bid Form does refer to... "all other work"... but this refers only to Item No. 3 not Addendum No. 1.

4. Appellant correctly believed that their bid was the lowest responsive bid since the bid of Fick had failed to acknowledge Addendum No. 1. and no statement or other indication was made as to waiver of this failure by DGS.
5. On April 16, 1993 Appellant was first made aware of DGS's action to accept the bid of Fick despite its failure to acknowledge Addendum No. 1. Appellant then timely protested this action of DGS by fax on April 16, 1993 and later repeated the protest to DGS by letter on April 20, 1993.
6. The Procurement Officer denied the protest as untimely and denied the merits of the protest.

Decision

COMAR 21.10.02.03B requires a protestor to file a protest to the Procurement Officer no later than seven (7) days after the basis of protest is known or should have been known. At bid opening a reasonable bidder aware of Fick's failure to acknowledge the Addendum No. 1 would have known that the Addendum materially changed the contract requirements and that the Fick bid was, on its face, non-responsive. Since DGS did not tell any bidders they were going to accept Fick's materially defective

bid, a reasonable bidder would conclude Fick's bid would not be considered responsive. The record does not recite when DGS made its decision to waive the materially defective Fick bid. However, on April 16, 1993 Appellant first reasonably would have been aware of DGS's decision and immediately filed a protest. Nothing in the record would have given notice to the Appellant of its basis of protest prior to its inquiry on April 16, 1993. Bidders must be able to assume DGS will obey its own regulations in determining if they in fact have a basis to protest.

The Procurement Officer found that one copy of Fick's bid made clear from its face that Addendum No. 1 work was acknowledged by Fick. We disagree. DGS's analysis of the language on the Construction Bid Form is misplaced. The language clearly does not acknowledge any addenda work since the space to provide the information is blank. The addenda was a material change and its acknowledgement mandatory to make Fick's bid responsive. Fick's failure under these facts to acknowledge Addendum No. 1 could not be waived by the Procurement Officer. (See *Oaklawn Development Corporation, MSBCA 1306, 2 MICPEL 138 (1986).*

Amendments to IFB's (Addendum) are required to be acknowledged by the bidders. *(COMAR 21.05.02.08 A.)* Bidders are required to know the regulations controlling bids. However, while technicalities or minor irregularities may be waived by the Procurement Officer under certain circumstances, *(COMAR 21.05.02.12 A.)*,[2] it is unreasonable to expect Appellant to know that DGS would improperly waive a material defect if no affirmative statement is made by DGS. The protest was timely made on April 16, 1993 the same day Appellant knew or should have known its basis of protest.

It is this 27th day of May, 1993 ORDERED that the appeal of Appellant is sustained and remanded to DGS for action consistent with this Decision.

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[2]The Procurement Officer does not specifically state he is waiving the failure to acknowledge addenda as a minor irregularity but the Board infers this from the record as a whole.

Dated: May 27, 1993

Neal E. Malone
Board Member

I concur:

Robert B. Harrison III
Chairman

Sheldon H. Press
Board Member

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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1721, appeal of Grady & Grady, Inc. under DGS Project No. DH-000-920-001.

Dated: May 27, 1993

Mary F. Priscilla
Recorder

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APPEARANCE FOR APPELLANT:	Thomas Kohn, Esq. Goldman, Kohn & Bembert, PA Baltimore, MD
APPEARANCE FOR RESPONDENT:	John H. Thornton Assistant Attorney General Baltimore, MD
APPEARANCE FOR INTERESTED PARTY:	Jeffrey Abarbanel, Esq. Fedder and Garten, PA Baltimore, MD
APPEARANCE FOR AMICI	William A. Kahn Assistant Attorney General Baltimore, MD

MEMORANDUM DECISION ON RESPONDENT'S MOTION FOR RECONSIDERATION

The Board having read and considered the Motion for Reconsideration of the Board's decision and Order of May 27, 1993 and as no additional evidence was offered during the hearing on the Motion, it is this 21st day of June, 1993 ORDERED that the Motion for Reconsideration is denied and remanded to DGS for action consistent with this decision.

The Board's decision of May 27, 1993 is based on facts appearing from the record before the Board. The Board's decision does not as asserted by the State in its Motion for Reconsideration adopt a rule or standard that is contrary to the standard set forth in the Board's previous decisions concerning application of the 7 day rule as a comparison of the facts in all previous Board decisions cited by Respondent in its Motion with the facts of the instant appeal makes clear.

The Board's application of COMAR as to when a bidder knows or should have known its basis of protest remains unchanged. Prior to the instant case the Board found facts in each appeal which defined when a reasonable bidder acting diligently actually knew or should have known its grounds for protest. It is this finding of fact which begins the seven days to toll for filling a protest.

The timeliness rule when analyzed in the context of an IFB is expectedly different from an analysis of a RFP. In an IFB all parties have the date of bid opening at which time most grounds of protest should be discoverable to a reasonably diligent bidder. The bidders await the decision of award from the State unit and the completed bid materials are generally available for review. The expectation that the State and bidders will review these materials is clear and present to all. However, there is no absolute requirement found in any Board case that protests must be filed within 7 days of bid opening. The cases speak for themselves and while the Board has found in many cases the period began on bid opening other cases were found as a matter of fact to have begun to toll at times after or before bid opening. It is the factual determination on a case by case basis of what the reasonable bidder knew or should have known at a given time in the bidding process which begins the tolling of the 7 day period which is not always tied to bid opening. A reasonably diligent bidder must have available facts sufficient to it to actually or constructively know its basis of protest. The defect in the bidding process may or may not result from improper State action, bid defect, or specification defect to list only a few basis of protest. However, despite who or what causes the defect in the bidding process it is the finding of fact by this Board in appeals before it as to what the bidder knew or should have known which initiates the tolling of the filing period as that finding of fact relates to the Appellant's basis of protest. At bid opening, for example, there is no requirement for State units to announce their reaction to the bids. The State can wait and decide after bid opening matters concerning responsiveness and responsibility of the bids. If the basis of protest is

factually based upon an alleged error in the decision of the State unit as to award after bid opening; the period runs from the time a reasonably diligent bidder knew or should have known of the defect in the process as it does in this appeal.

The regulation is clear and unambiguous in using "should" (i.e. probable) have known and not "could" (i.e. possible) have known. The level of proof necessary to find that a fact is probable is vastly different from a finding that a fact is possible. The State desires, in effect, to have what a bidder possibly could have known as the standard opposed to the standard expressed in the regulation. A "possibly" could have known standard necessarily results in bid protest by speculation. The Board does not have the authority to change the clear meaning of the COMAR regulation.

This reasoning is consistent with the Board's decisions as to timeliness in RFP appeals which expectedly revolve in general around the debriefing. However, whether at bid opening or debriefing the Board's decisions as to timeliness still require a finding of fact as to when a reasonably diligent bidder (probably) should have known its basis of protest. This is the rule and application in the Board's cases which runs consistently throughout the decisions when the facts of the appeal led to a finding of constructive knowledge of the basis for the protest.

In this appeal the Appellant possibly could have believed the Procurement Officer would not reject Fick's non-responsive bid, however, under the expressed standard of what the bidder reasonably should have known the appeal is timely.

Dated: June 21, 1993

Neal E. Malone
Board Member

Sheldon H. Press
Board Member

I concur in the result. The State contends in its Motion for Reconsideration that the Board is overruling its previous decisions

on the seven day rule. Given the same facts as were present in the Board's previous decisions concerning the seven day rule, I would continue to find that the protests in those appeals were not timely filed and the appeal in such a case would be dismissed.

However, I believe the facts of this appeal as actually or by necessary inference set forth in the State's Agency Report are different from those in the Board's previous decisions on the seven day issue and as analyzed in Kennedy Temporaries v. Comptroller, 57 Md App. 22 (1984)[1] in one or two respects and as a result the seven day substantive limitations period set forth in COMAR 21.10.02.03B did not begin to run until April 16, 1993 when the Appellant was advised that award would be made to Fick Bros. Roofing Company (Fick). In all other previous cases there existed at least an argument that the alleged irregularity in the apparent low bid may have, in fact, properly been found by the procurement officer either not to exist or properly waived as a minor irregularity if it did exist. In some of the previous cases the irregularity was announced at bid opening. In other cases, however, the alleged defect may not have been or would not have been apparent and therefore the procurement officer could not or might not have discovered it absent a protest. Accordingly, in those cases the sometimes unique knowledge of the protestor of the alleged defect and the always present uncertainty of how the matter would be resolved once brought to the attention of the Procurement Officer required in my opinion commencing the seven day limitations period for filing a protest from the time the protestor knew or with reasonable diligence should have known of the defect rather than when the bidder knew or should have known an award was to be made to its competitor and thus the alleged defect in the competitor's bid had

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[1] In Kennedy Temporaries v. Comptroller, the Board found that Kennedy had filed an oral protest within the required seven days of acquiring knowledge of the alleged defect in its competitors bid and that the State under the facts had waived the requirement for a written protest. The Court of Special Appeals held, among other things, that a written protest was required.

been rejected, waived or gone undetected by the Procurement Officer.

As stated above I believe the facts herein are different and a different result is required in application of the seven day rule. Herein, the agency, as in some of the Board's previous decisions on the seven day issue, publicly announced the irregularity (failure to acknowledge Addendum No. 1) at bid opening and recorded the same on the Tabulation of Bids. Therefore, the Procurement Officer would know that he had a publicly announced irregularity to consider as would all bidders who attended bid opening or thereafter looked at the Tabulation of Bids. Unlike the situation in the Board's previous cases, however, the irregularity herein, in my opinion, could not upon examination by the Procurement Officer arguably be said not to exist or waived if it did exist. In my opinion Addendum No. 1 was not acknowledged by Fick. The fact that one of the two originals of the Fick bid had one page of Addendum No. 1 attached does not in my opinion constitute acknowledgment. The State correctly states in its Agency Report that Addendum No. 1 made material changes in the contract requirements. Addenda are required to be acknowledged by COMAR 21.05.02.08 A and the Addendum herein stated "Acknowledge receipt of the Addendum by inserting its number and date on the Construction Bid Form." This was not done. Failure to acknowledge an addendum that makes material changes may not be waived by a Procurement Officer and results in the bid being nonresponsive. A nonresponsive bid may not be accepted. Section 13-103(e), Division II, State Finance and Procurement Article; COMAR 21.05.02.13A. See Oaklawn Development Corporation, MSBCA 1306, 2 MSBCA ¶ 138 (1986).

Therefore, I believe that under the facts of this appeal a bidder who was present at bid opening would reasonably understand that the Procurement Officer would have to reject the Fick bid as nonresponsive because the irregularity in the Fick bid (1) existed and (2) could not lawfully be waived. Under this limited set of circumstances where the agency does not reject the nonresponsive

bid, I believe, assuming that, as herein, the bidder acts within a reasonable time to ascertain the status of award, the known or should have known test runs from the date the bidder is made aware that the award will be made in violation of law rather than from the date of bid opening when the bidder became aware that the bid was nonresponsive. The facts in this appeal, I believe, will very seldom be present. Where such facts are presented, I believe, the above set forth result should prevail. The seven day rule, however, remains the same.

Dated: June 21, 1993

Robert B. Harrison III
Chairman

Certification

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* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Memorandum Decision on Respondent's Motion for Reconsideration in MSBCA 1721, appeal of Grady & Grady, Inc. under DGS Project No. DH-000-920-001.

Dated:

Mary F. Priscilla
Recorder