



Queen Anne's County, Maryland.

2. SHA received five bids in response to the IFB. The firm submitting the lowest bid was David A. Bramble, Inc./McLean Contracting Company Joint Venture (McLean/Bramble) in the amount of \$15,441,947.40. The second lowest bid was received from Appellant in the amount of \$16,497,681.75.

3. Based on its review of the bids on April 26, 1990, Appellant on May 1, 1990 protested the award of the subject contract to McLean/Bramble. The letter of protest asserted that the McLean/Bramble bid "is materially unbalanced and fails to result in the lowest price to the SHA. As such the McLean/Bramble bid cannot be accepted and award should be made to Julian, the second low bidder." The letter of protest identified five estimated quantity unit price items contained in the IFB which were claimed to have been "significantly below cost" in the McLean/Bramble bid.

4. On May 1, 1990, during the course of a discussion between Appellant's counsel and counsel for SHA, Appellant's counsel identified the McLean/Bramble bid of \$600,000 for Bid Item No. 1002 for the removal and disposal of a boat house within the project limits as a lump sum bid item that was significantly overpriced.<sup>1</sup>

5. On May 4, 1990, Appellant supplemented its May 1, 1990 protest and asserted that the overpricing of Bid Item No. 1002 resulted in McLean/Bramble's bid being materially unbalanced and that its acceptance would thus be improper, citing in support of this

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<sup>1</sup>In the course of the hearing, testimony was presented by Mr. Thomas Hutt, Appellant's chief estimator and Mr. Steven Foster, section chief with the SHA Design Division, concerning whether Bid Item No. 1002 involved the removal and disposal of one building or two buildings. The Board finds that the Bid Item No. 1002 involves the removal of one building, that is, a boar house on Winchester Street within the project limits.

assertion 31 USC 3324 which prohibits advance payments in federal procurements and a decision of the Comptroller General of the United States, F&E Erection Company, B 234927, 89-1 CPD ¶573 (1989).

As an additional basis of protest, Appellant's letter of May 4, 1990 also asserted that the overpricing of Bid Item No. 1002 would adversely affect the enforceability of McLean/Bramble's performance bond.<sup>2</sup>

6. On May 8, 1990, the procurement officer issued a final decision denying Appellant's protest. The procurement officer rejected that aspect of Appellant's protest relating to underpricing of estimated quantity unit price items because Appellant had presented no evidence that the estimated quantities would vary from those contained in the IFB and, therefore, there was no basis to conclude that McLean/Bramble's bid would not result in the lowest cost to the State.

The procurement officer rejected that portion of Appellant's protest relating to the overpricing of Bid Item No. 1002 because he found that (1) the State of Maryland had no statutory provision similar to 31 USC 3324 prohibiting advance payments; (2) McLean/Bramble's bid for Bid Item 1002 would not result in its total bid being anything but the lowest cost to the State; and (3) nothing in McLean/Bramble's bid affected the enforceability of the performance bond (which had not then been delivered to the State).

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<sup>2</sup>At the time Appellant's May 4, 1990 letter supplementing the protest was received by the procurement officer, McLean/Bramble's performance bond had not yet been received by SHA. The bond had been received by SHA at the time of the hearing of the instant appeal on June 5, 1990.

7. On May 21, 1990, Appellant noted a timely appeal to this Board.

8. At the time of the hearing of the appeal on June 5, 1990 the only issue left for determination (Appellant having conceded an inability to prevail on the other various issues of its protest) was Appellant's contention that the \$600,000 lump sum bid for Bid Item No. 1002 for the removal and disposal of a boat house within the project limits constituted an improper advance payment.

9. Respecting the advance payment issue, the other bids for Bid Item No. 1002 were as follows: Appellant, \$3,300; Cherry Hill, \$650; Shirley, \$3,000; I.A., \$12,600. In this regard, the parties agree that \$5,000 constitutes a representative bid of the other four bidders for the removal of the boat house.

#### Decision

##### (A) Timeliness

SHA and McLean/Bramble assert that Appellant should have determined the advance payment issues arising out of McLean/Bramble's \$600,000 bid for Bid Item No. 1002 when Appellant first examined the McLean/Bramble bid on April 26, 1990 two days after bid opening on April 24, 1990. Thus its supplemental protest specifically articulating such grounds of protest filed on May 4, 1990 was late; i.e., was not filed within seven days of the date Appellant knew or should have known of such ground. The Board finds, however, that the advance payment issues specifically articulated in the May 4, 1990 letter flow directly and are properly discernible from the general allegations of an unbalanced

bid set forth in the original protest timely filed on May 1, 1990. Thus, we find Appellant's protest on the advance payment issues to be timely.

B. Merits

The parties agree that the McLean/Bramble bid for Bid Item No. 1002 is significantly overpriced considering the nature of the work to be performed and thus it is unbalanced. Appellant argues that the McLean/Bramble bid for Bid Item No. 1002, since the amount bid will be paid to McLean/Bramble within the first month of the job, represents or creates an advance payment proscribed by Maryland's General Procurement Law. SHA and McLean/Bramble disagree. GP-2.17 of the general provisions of the contract entitled "Rejection of Individual Bids or Proposals" constitutes the sole reference in the contract documents to unbalanced bids. GP-2.17B(3)(b) provides:

Reasons for rejection of a bid may include but not limited to: ...(3) the bidder submitting the bid is determined to be non-responsible. A determination of non-responsibility may be made for but is not limited to any of the following reasons; ...(b) the unit prices contained in a bid are unbalanced.

Thus, under the subject IFB, the rejection of an unbalanced bid is tied to the agency's discretionary determination of responsibility. With regard to responsibility determinations, the Board has held that a State Procurement Officer has broad discretion and latitude and that the Board will not disturb such a determination unless it is found to be unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulation. Environmental Controls, Inc., MSBCA 1356, 2 MICPEL ¶168 (1987) (and cases cited therein).

Appellant asks that the Board apply federal law to the advance payment contained in the McLean/Bramble bid asserting that certain federal standards are subsumed in Maryland's General Procurement Law.<sup>3</sup>

While conceding in its comment on the Agency Report that it cannot demonstrate that the McLean/Bramble bid will not result in the lowest cost to the State, Appellant argues that under federal law any advance payment is proscribed. The Board, however, will not apply a federal standard to the subject procurement (whether it be the standard as tested by the Appellant's analysis or the standard as tested by the analysis of SHA and McLean/Bramble). We have found no Maryland statute or regulation which would support such an approach. In the absence of any Maryland statute or regulation specifically precluding advance payments in Maryland procurements, and in the face of contractual language (GP-2.17) which addresses unbalanced bids in the context of bidder responsibility and provides no notice regarding a prohibition on advance payments, we believe it would be an abuse of discretion for this Board to reject a bid under the circumstances presented here. A bidder is asked to

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<sup>3</sup>The parties have directed the Board's attention to the provisions of 31 USC 3324 which provides, in pertinent part, that "...a payment under contract to provide services or deliver an article to the United States Government may not be more than the value of the service already provided or the article already delivered" and have provided the Board with their respective legal analyses of the implications of such statute in federal procurements. SHA and McLean/Bramble assert that the Comptroller General will only condemn an advance payment where the item(s) in question result in a bid that is grossly unbalanced mathematically. Edgewater Machine and Fabricators, Inc., 85-1 CPD ¶ 364, affirmed upon reconsideration, 85-2 CPD, ¶ 108 at 3 (1985). McLean/Bramble and SHA argue that when viewed as a whole, the McLean/Bramble bid cannot be described as grossly unbalanced mathematically and direct the Board's attention to F&E Erection Company, 89-1 CPD ¶ 573 (1989), a case in which the Comptroller General found fault in award where the contractor was to receive 28 percent of the total contract price in the first month of performance, although only 2.9 percent of the required work was to be performed.

Appellant argues that properly interpreted the aforementioned decisions of the Comptroller General call into question any advance payment regardless of the amount of the advance payment as a percentage of the total bid.

bid the requirements contained in the IFB and may expect the State to make award determinations based upon those requirements and solely upon those requirements. We hold that the Appellant may only prevail if it demonstrates that the SHA procurement officer erred in determining that McLean/Bramble was a responsible bidder, i.e., that the procurement officer erred in his determination that McLean/Bramble's capability to perform was not adversely affected by the advance payment that it will receive upon removal and disposal of the boat house. Since the advance payment for the work to be performed under Bid Item No. 1002 constitutes less than two percent of the total price bid, we do not find that the procurement officer abused his discretion by determining that McLean/Bramble was a responsible bidder.

Appellant in its May 4 letter of protest alternatively argues that the McLean/Bramble bid if accepted would present the substantial possibility that in the event of a default in which the bonding company was called upon to perform, the bonding company will successfully challenge its obligations under the bond as a result of a reduction of the monies that otherwise might be available to complete the work as a result of the advance payment in dispute. The parties cite various cases involving the liability of a surety in various factual contexts. However, we find none of the cases cited to present a set of facts such as those involved in the instant dispute. We will not speculate concerning whether, assuming arguendo the surety in this contract is at some future date called upon to act, it will or will not assert as a defense

should it decline to act the fact that McLean/Bramble received an advance payment as a result of its performance of the work required by Bid Item No. 1002. Once again, we believe the matter is properly resolved by reference to GP-2.17B(3)(b). That is to say, did the procurement officer err in determining that McLean/Bramble was a responsible bidder visa vi the enforceability in the abstract of the performance bond it was required to submit to the State? We believe the procurement officer made the appropriate determination since the surety, albeit after the procurement officer issued his final decision, has executed the bond for the contract between McLean/Bramble and SHA which contract provides for the advance payment in dispute. Based on the record, we do not find that the procurement officer otherwise abused his discretion when he determined that the advance payment at issue constituting a theoretical delution of the surety's security, i.e., the contract price, of less than two percent would not adversely affect McLean/Bramble's performance or impermissibly hinder contract administration.

For the foregoing reasons, the appeal is denied.