

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF K & K PAINTING)
& CONSTRUCTION CO.)
) Docket No. MSBCA 2260
Under Maryland Transportation Authority)
Contract No. Ft-990-000-002)

February 12, 2002

Late Bid - The Respondent should not have considered a late bid under COMAR 21.05.02.10B where the record reflected that the action or inaction of employees of State personnel directing the procurement activity was not the sole or paramount cause of late receipt of the bid.

APPEARANCE FOR APPELLANT: Jerald J. Oppel, Esq.
David L. Cole, Jr., Esq.
Ober, Kaler, Grimes & Shriver
Baltimore, MD

APPEARANCE FOR RESPONDENT: Sandra E. Clifford
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTIES: Stephen J. Annino, Esq.
(New Construction, Inc.) Kasimer & Annino, P.C.
Falls Church, VA

(Spensieri Painting Co., Inc.) None

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from a final agency action that denied Appellant's bid protest regarding the Maryland Transportation Authority's (Authority) solicitation to Refinish Ceiling Panels and Hand Rails within the Fort McHenry Tunnel maintenance contract.

Findings of Fact

1. The Contract in question is Contract No. FT-990-000-002 to Refinish Ceiling Panels and Hand Rails in the Fort McHenry Tunnel (Contract). The Contract has not yet been awarded.
2. The Contract was advertised on May 29, 2001.
3. Three (3) addenda were issued that modified the bid documents.
4. A pre-bid meeting was held on June 12, 2001.
5. According to Addendum No. 3 issued on October 31, 2001, bids for the Contract were due

- on November 16, 2001 at 12:00 p.m. The bids were to be received by 12:00 noon in the “bid box of the Maryland Transportation Authority Administration Building, 2nd Floor, located at the Francis Scott Key Bridge, Baltimore, Md. . . .” (FSK Main Building).
6. At 12:00 noon on November 16, 2001, Umesh Murthy, the Deputy Director of Engineering at the Authority and Keith Duerling, the Director of Engineering and the Procurement Officer for the Contract, unlocked the bid box at the FSK Main Building and carried over the six (6) bid packages to the Engineering Conference Room on the second floor of the Engineering/Finance Building of the Authority.
 7. At that time the six (6) bids received were publicly opened and read aloud for everyone present at that time to hear. The apparent low bidder, at that time, was announced to be New Construction, Inc., and the apparent second low bidder was announced to be Appellant.
 8. At the end of the bid opening, Mr. Lou Mavericks, a representative of Avalotis Corporation (Avalotis) mentioned that his company had sent in its bid via Federal Express and that he had verified with Federal Express that it had been delivered to the Authority’s location at approximately 10:30 a.m. Mr. Mavericks was concerned that his bid had not been read aloud.
 9. The Procurement Officer notified Mr. Mavericks that his bid package had not been found in the bid box and that he would look into the matter.
 10. The Procurement Officer’s office then received a telephone call from Ms. Donna Dean, an administrative assistant whose office is located at the FSK Main Building. Ms. Dean indicated that she had two (2) packages, which she believed belonged in the bid box.
 11. The Procurement Officer then visited Ms. Dean at the FSK Main Building. Ms. Dean had two (2) Federal Express envelopes, one from Spensieri Painting Company, Inc. (Spensieri) and one from Avalotis. As discussed in Findings of Fact 11 - 14, Ms. Dean indicated that the following sequence of events had occurred: the Federal Express delivery person dropped off four (4) envelopes at her cubicle at the FSK Main Building. Ms. Dean asked the Federal Express employee who delivered the packages who they were addressed to and the Federal Express employee said: “Steve Hurtt (the Authority’s Real Estate Manager), Umesh Murthy (the Authority’s Deputy Director of Engineering), the Bid Box and Engineering”.
 12. Ms. Dean then delivered Mr. Hurtt’s package to him, placed the package entitled “Bid Box” in the bid box¹ and placed the other two (2) packages in her out box, as she was very busy on that morning and did not examine the packages other than to verify their name and location. This sequence of events occurred before 12:00 noon.
 13. Sometime after 12:30 p.m., a gentleman came into the FSK Main Building and told Ms. Dean he had been tracking his Federal Express package and that it had never made it into the bid box. The gentleman told Ms. Dean that he had been at the bid opening for the Contract at the Engineering/Finance Building and his bid had not been in the bid box at that time.
 14. Ms. Dean then reviewed the two (2) Federal Express packages in her out box and realized that one of the packages (Avalotis) might have been a bid, as it did have a contract number on it and a “deliver by” time on it as well. The second (Spensieri) package had only the name of an individual, the company and the company address on it and was addressed as follows:

¹The record does not reflect the proximity of the bid box to Ms. Dean’s cubicle. The Board will assume that Ms. Dean’s cubicle was in the vicinity of the bid box and that her duties included receiving packages as well as bids and that this was known by Federal Express personnel who deliver packages and bids to the FSK Main Building.

Engineering
Maryland Transportation Authority
Francis Scott Key Bridge
303 Authority Drive
Baltimore, MD 21222-2200

15. It was later revealed that an Engineering Department employee had orally advised an employee of Spensieri before the bid to write "Engineering" on his bid package and assured him that this would sufficiently identify it for timely delivery into the bid box.
16. Pursuant to COMAR 21.05.02.10(B) and the General Provisions of the State Highway Administration's General Provisions for Construction Contracts §GP-2.12(b), the Procurement Officer issued a determination that the bids of Avalotis and Spensieri were timely received and did not make it into the bid box only as a result of the inaction of State personnel, and that a public bid opening of the two bids should be conducted.
17. On November 27, 2001 at 10:30 a.m., the two bids were opened and publicly read aloud. The apparent low bidder for the combined base bid and option bid at this time was identified as still being New Construction at \$5,184,202, and the combined base bid and option bid of Spensieri at \$6,607,938 was identified as being lower than Appellant's combined bid at \$6,931,000 making Spensieri the apparent second lowest bidder.
18. At the second bid opening, Appellant filed a bid protest letter dated November 26, 2001 stating in part, as grounds for its protest, that the two bids should not be opened as: "(1) Bid submitted subsequent to bid opening date and time Y(3) Bid opening occurred ten (10) days after original Bid Opening Date."
19. On November 30, 2001, the Procurement Officer issued the Authority's final agency decision. In that decision, the Authority rejected Appellant's bid protest and determined that:
 - (a) The two bids which had been received by Authority staff on November 16, 2001 from Avalotis and Spensieri were to be considered timely received, as they had not been in the bid box only due to the inaction of the Authority's staff, and that the bids would also be considered responsive.

Thereafter, Appellant on December 11, 2001 filed its appeal with this Board. In its appeal, Appellant contends that the Authority should reverse its action in denying Appellant's bid protest and should reject the bids of Spensieri and Avalotis in evaluating the lowest bid price. The record reflects that Appellant is also protesting the qualifications and responsibility of the apparent low bidder, New Construction. The Authority is still evaluating that protest and has not yet issued an Agency final decision concerning that protest.

20. Appellant withdrew its request for hearing and the appeal is decided on the written record.

Decision

Appellant recognizes the limited exception provided in COMAR 21.05.02.10(B) for bids that “would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees” and cited this exception in its Appeal to the Board. It is Appellants’s contention, however, that bids received by the Authority from Spensieri and Avalotis do not fall within this exception because the actions of Spensieri and Avalotis, not Authority personnel, were the primary causes of the late submission of the respective bids. The Board agrees concerning the bid of Spensieri.²

The Authority does not identify the Engineering Department employee who allegedly advised Spensieri to address its bid to Engineering or when the conversation took place. For that reason, the Authority has not shown, and the Board cannot determine, that this anonymous person is indeed “State personnel directing the procurement activity or their employees” for purposes of the late bid exception.

We also note that it was neither proper for Spensieri to call the Authority to make a verbal inquiry about the solicitation nor reasonable for Spensieri to rely upon pre-bid oral statements made by the Authority employees, regardless of the identify or status of the employee. Section GP-2.09 of the Maryland Department of Transportation’s “General Provisions for Construction Contracts” (incorporated by reference in the IFB) states:

Any information regarding the requirements or the interpretation of any provision of the General Provisions, Special General Provisions, Specifications or **any part of the bidding documents** shall be requested, in writing, from the procurement officer, and delivered no later than 10 days prior to the scheduled date of bid opening. Responses to questions or inquiries having any material effect on the bids shall be made by written addenda, or by written notice sent to all parties’ prospective bidders. **DO NOT MAKE VERBAL INQUIRIES.** (Emphasis in original.)

Any verbal interpretation or oral pre-bid statements made by State employees or their **representatives shall not be binding upon the State.** (Emphasis added.)

Pursuant to the foregoing, and particularly the requirements of GP-2.08 regarding the proper address for mailed bids, if Spensieri had questions regarding the bid, it should have sent those questions in writing to the Authority at least ten (10) days prior to the bid. This would allow the Authority to publish its responses to all bidders to ensure a fair solicitation. Spensieri did not do this, but spoke over the telephone to an Authority employee in the Engineering Department.

²The combined bid of Avalotis is the seventh lowest at \$10,515,900. The issue concerning receipt of the Avalotis bid is thus moot because it is too high to affect Appellant’s third low bid and will not be further discussed.

Even if it is to be assumed that such a conversation took place, and that Spensieri could bind the Authority to pre-bid oral statements, the Engineering Department employee's action does not satisfy the late bid exception. As noted in Appellant's appeal, this Board has held that the State may not consider a late bid delivered by commercial courier "unless improper State action is the sole or paramount cause of the late receipt." American Air Filter Co., MSBCA 1199, 1 MSBCA ¶89 (1984) (citing The Tower Building Corp., MSBCA 1057, 1 MSBCA ¶13 (1982)). In American Air Filter, this Board allowed a bidder to rely on information provided by a State employee via telephone, but only because the IFB did not provide adequate information for the proper delivery of bids. There, the IFB did not include a room number or even a building name.³

In the instant matter, however, the IFB is very specific as to the precise location for the submission of bids. It states in conspicuous bold font that bids "**will be received until twelve (12) Noon on the 16th of November, 2001, in the Bid Box of the Maryland Transportation Authority Administration Building, 2nd floor, located at the Francis Scott Key Bridge, Baltimore, Md. the work to be performed at Baltimore City.**"

Even if it is assumed that an Authority employee connected with the procurement (i.e. State personnel directing the procurement activity or their employees) directed Spensieri to address its bid as it did, the employee's action was not the sole and paramount cause for the bid's late receipt as Spensieri did not adequately or properly identify its bid package. An examination of the Federal Express package containing Spensieri's bid reveals that there is nothing on the package to indicate that a bid is (was) enclosed. Even if the envelope inside the package contained any such marking, given that the package was directed to Engineering, without any identification on the outside of the package indicating it was a bid, the bid's label inside would not be seen until the package was ultimately opened by the Engineering Department.

In Edison Electronics Division, Armtec Industries, Inc., Comp. Gen. Dec. B-202342, June 10, 1981, 81-1 CPD ¶478, the Comptroller General of the United States found that the fact that a package containing a bid did not have any exterior identification indicating that it contained a bid contributed to the bid's late receipt and therefore, rejection, as "there was no indication to alert the mail processing personnel that expedited handling was necessary...." Similarly, as is the case here, in regard to Spensieri an Authority employee receiving such a package would have no reason to know that a bid was enclosed or understand the urgency and immediacy of opening it.

Based on the record, the Board cannot determine whether Ms. Dean, identified by the Authority as the administrative assistant who received the bid of Spensieri, is even authorized to open mail addressed generically to Engineering. Even if she were, we would still conclude that Spensieri's failure to properly label the Federal Express package was the paramount reason that its bid was late.

The Authority contends that it was the inaction of Ms. Dean that caused the bid of Spensieri

³Even with the misinformation given by the State employee, the bidder could not show that this State action was the paramount cause of the late receipt of its bid rather than the actions of the commercial courier.

to not be placed in the bid box and that this failure caused the bid to be received late. This contention improperly misplaces the responsibility for the proper submission of bids. Bidders are responsible for choosing the method and manner in which they transmit their bids. American Air Filter Co., MSBCA 1199, 1 MSBCA ¶89 (1984) at p. 5. Nevertheless, the Authority asserts that Ms. Dean's failure to place Spensieri's bid in the bid box was an intervening cause of the lateness. There is no evidence to support this assertion. Even if the Board assumes, as we do, that one of Ms. Dean's duties was to receive bids and place them in the bid box such that she is a person encompassed by COMAR 21.05.02.10(B) we may not assume that Ms. Dean would have known that the Spensieri's package contained a bid because it was not labeled as such. There is no evidence suggesting that Ms. Dean may have constructively prevented Spensieri (or its private courier) from placing the bid in the bid box as a result of her having accepted the Spensieri package. When a bid is delivered by commercial carrier such as Federal Express and is late it may not be considered unless the improper State action is the sole or paramount cause of the late receipt. The Tower Building Corp., *supra*. See also R.R. Donnelley & Son Company, MSBCA 1463, 3 MSBCA ¶213 (1989).

In the Agency Report, the Authority attempts to distinguish Viron Energy Services, MSBCA 2122, 5 MSBCA ¶463 (1999), a case cited by Appellant in its Appeal. Although it is true that Viron is in some ways distinguishable from the instant situation in that the private courier in that case initially attempted to deliver the bid to a different agency within the same building, it is nevertheless illustrative of the Board's longstanding policy of strict enforcement of the timeliness requirement, even where there is no direct fault on the part of the bidder. In Viron, the bidder addressed the bid envelope correctly, but the private courier initially attempted to deliver the bid to the wrong office. The Board held the bidder accountable for the courier's error, noting that it was ultimately the bidder's responsibility to make sure the bid was delivered to the correct location on time. In the instant matter, we find Spensieri to be at fault for not designating the proper location for the submission of bids on its package. Indeed, it was this failure that caused the bid to not be in the bid box by the noon November 16, 2001 deadline.

In the Agency Report the Authority also, as noted above, asserts that the bid of Spensieri would have been placed in the bid box in a timely manner were it not for the failure of Ms. Dean to place the bids in the bid box and the improper advice given to Spensieri by an anonymous employee. Based on the record, the Board must find that these alleged "actions or inactions" have no weight. We have discussed the Authority argument or assertion based on Ms. Dean above. As to the anonymous Engineering Department employee, we find that given the specific and unambiguous directions regarding the location for receipt of bids and GP-2.09's prohibition against verbal inquiries, it was incumbent upon Spensieri to seek clarification concerning the oral advise received.

Assuming, arguendo, that these alleged "actions or inactions" may have contributed in some fashion to the late receipt of the bid of Spensieri, the late bid still should not be considered. In American Air Filter, *supra* at p. 5, the Board stated with approval the position that "a late bid is not excused if the bidder's unreasonable action or inaction is an intervening cause of the bid being delivered late, even where the lateness in part is attributable to improper State action or advice." (Citing Avantek, Inc., Comp. Gen. Dec. B-185248, February 5, 1976, 76-1 CPD ¶75 and Empire Medical Contractors, Inc., Comp. Gen. Dec. B-202141, 81-1CPD ¶471.) See also Visar Company, Inc., Comp. Gen. Dec. B-208701, January 31, 1983, 83-1 CPD ¶100. Compare Imperial

Maintenance, Comp. Gen. Dec. B-218614, 85-2 CPD ¶94.

In this case and assuming arguendo that Ms. Dean was authorized to accept bids and place them in the bid box as one of her official duties and that the anonymous Engineering Department employee was involved in the Authority's procurement process, the failure of Spensieri to address the bid to the specific bid box address, compounded by the failure of Spensieri to in any fashion label the Federal Express package to indicate that a bid was enclosed, was the paramount cause for the untimely receipt of the bid, superceding any alleged action or inaction by the Authority.

Accordingly, the appeal as to the opening of the late bid of Spensieri is sustained. Therefore, it is Ordered this 12th day of February, 2002 that the appeal is sustained.

Dated: February 12, 2002

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

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 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2260, appeal of K & K Painting and Construction Co. under Maryland Transportation Authority No. FT-990-000-002.

Dated: February 12, 2002

Mary F. Priscilla
Recorder