

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of  
KENNEDY TEMPORARIES

Under Comptroller of the Treasury  
Contract OCP-1

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Docket No. MSBCA 1061

July 20, 1982

Bid Protest Procedure -- While a procurement officer may insist upon strict compliance with procedural administrative regulations, they can be waived, in the absence of prejudice, where the ends of justice require it. Thus, the procedural written notice requirement of COMAR 21.10.02.02B may be waived, but the timeliness requirements of COMAR 21.10.02.03, which are substantive in nature, cannot.

Bid Bonds -- COMAR 21.06.07.02B(2), which allows for the acceptance of a bid bond in an amount less than 5% of the amount bid when the amount of the submitted bond is equal to or greater than the difference in price stated in the next higher acceptable bid, was determined to be inconsistent with the mandatory language of Md. Ann. Code, Art. 21, §3-504 and therefore void.

APPEARANCE FOR THE APPELLANT:

Stephen Kennedy  
Baltimore, Maryland

APPEARANCE FOR THE RESPONDENT:

Gerald I. Langbaum  
Assistant Attorney General  
Baltimore, Maryland

OPINION BY MR. LEVY

This is an appeal from a procurement officer's final decision confirming the propriety of an award of the captioned contract to Bay Services, Inc. (Bay Services). Appellant maintains that Bay Services should not have received this contract award because it failed to provide a bid bond in the full amount required by law. The State contends, however, that this omission was "non-substantial" under Maryland's procurement regulations and that the Bay Services' bid was therefore responsive. The State further argues that Appellant's appeal may not even be considered on these substantive grounds since the original protest was untimely.

FINDINGS OF FACT

1. An Invitation for Bids (IFB) was issued by the Comptroller of the Treasury on October 1, 1981 for the procurement of temporary personnel services to assist in the handling of 1981 Maryland State income tax returns. These services were to be required for the period from January 1, 1982 to June 30, 1982.

2. Section I P. of the IFB provided as follows:

Bid Bond Provision

Bids exceeding \$25,000 in anticipated price must contain a Bid Bond in an amount equal to at least five percent (5%) of the total amount bid. The preferred bid security is a bond in form satisfactory to the State underwritten by a company licensed to issue bonds in Maryland. The bond shall be in substantially the form contained in Appendix (F). State procurement regulations permit other forms of bid securities. Contact the issuing office to discuss any other form of bid security.

Failure to provide an acceptable bid security with the bid when required shall result in the bid being rejected.

3. Bids were opened on November 17, 1981 and Bay Services was identified as the apparent low bidder with a bid of \$608,159. Appellant was the second low bidder at \$621,502. Bay Services' bid was accompanied by a bid bond in the amount of \$30,000, which was approximately \$408 less than the required 5% amount.

4. Appellant first was allowed to review the bid documents on November 23, 1981. During this review, Appellant told Mrs. Mary Ann Porter, Personnel Manager of the State Comptroller's office, that the Bay Services' bid bond was not in the full amount required by the IFB.

5. On November 24, 1981, Appellant's President, Mr. Stephen Kennedy, was informed by the designated State procurement officer that Bay Services would be given until December 1, 1981 to furnish the additional bid security.

6. By letter dated November 25, 1981, the State procurement officer advised Bay Services that its failure to provide the full 5% bid bond would be treated as a minor irregularity pursuant to COMAR 21.05.02.12 provided that it furnished an additional bond in the amount of \$500 by December 1, 1981. A copy of this letter was mailed to Appellant.

7. By letter dated November 27, 1981, the procurement officer informed Appellant that an award of the contract to Bay Services would be recommended to the Board of Public Works. Appellant further was told that the deficiency in the Bay Services' bid bond was considered "non-substantial" pursuant to COMAR 21.06.07.02B(2) and did not warrant rejection of the low bid.

8. At the meeting of the Board of Public Works on December 2, 1981, Appellant's President voiced an objection to the Bay Services' award during the Board's consideration of this action.

9. On December 7, 1981, Appellant requested a procurement officer's final decision concerning the responsiveness of the Bay Services' bid. The next day the procurement officer advised Appellant that he was not going to issue such a letter since he had never received a formal written protest.

10. The procurement officer notified Bay Services by letter dated December 9, 1981, with a copy to Appellant, that the Board of Public Works had voted to award the contract to Bay Services at its December 2nd meeting.

11. Appellant again requested a procurement officer's decision in a letter dated December 21, 1981. This was not received by the procurement officer until December 30, 1981.

12. The procurement officer responded to Appellant by letter dated December 30, 1981 and advised Appellant that his decision to recommend Bay Services for the award was final. The procurement officer further asserted that Appellant's letter of December 21, 1981 was not in accordance with the requirements of COMAR 21.10.02.03B and that Respondent was reserving the right to raise the issue of timeliness in the event of appeal. Appellant received this final decision on January 5, 1982 and filed this timely appeal on January 20, 1982.

### DECISION

This appeal initially concerns whether Appellant properly raised its protest at the procurement officer's level pursuant to agency regulations. In this regard COMAR 21.10.02.02 addresses the filing of a protest with a procuring agency as follows:

- A. An interested party may protest to the respective procurement officer representing the State agency against the award or the proposed award of a contract for supplies, services, maintenance, or construction.
- B. The protest shall be in writing and addressed to the respective procurement officer representing the State agency.  
(Underscoring added.)

Of further import is COMAR 21.10.02.03 which requires that:

- A. Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.
- B. In cases other than those covered in §A, bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.
- C. The term "filed" as used in this regulation means receipt in the procurement agency. Protestors are cautioned that protests should be transmitted or delivered in the manner which shall assure earliest receipt. Any protest received in the procurement agency after the time limits prescribed in this regulation shall not be considered. (Underscoring added.)

Here it is undisputed that Appellant failed to file a written protest with the procurement officer within the time period specified in the preceding regulations. The

question remaining, therefore, is whether these facts are sufficient to warrant our dismissal of the appeal.

"It is well established that rules and regulations promulgated by an administrative agency cannot be waived, suspended or disregarded in a particular case as long as such rules and regulations remain in force." Hopkins v. Md. Inmate Grievance Comm'n, 40 Md. App. 329, 335 (1978). The principal exception to the doctrine, however, is that it "does not apply to an agency's departure from procedural rules adopted for the orderly transaction of agency business." Hopkins, supra, at p. 336. Thus, an agency's procedural regulations may be waived, in the absence of prejudice, where the ends of justice require it. Lake Placid Club, Inc. v. Abrams, 179 N.Y. S.2d 487, 491, 6 A.D.2d 469 (1958); American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539; 90 S. Ct. 1288, 256 L.Ed. 547 (1970).

The filing requirements set forth in the preceding Maryland regulations are in part both substantive and procedural. With regard to the requirement that a protest be filed within a certain time period, this typically has been viewed as substantive. As stated by the Comptroller General of the United States:

"...To raise a legal objection to the award of a Government contract is a serious matter. At stake are not only the rights and interests of the protester, but those of the contracting agency and other interested parties..."

See Comp. Gen. Dec. B-180913, August 12, 1974, 74-2 CPD, ¶91 at p. 22. For the foregoing reason, timeliness requirements typically are construed strictly.<sup>1</sup>

With regard to the requirement that a protest be filed in writing, however, this clearly is procedural. The purpose of such a regulation is to assure orderliness since where a protest is made in writing, there can be no doubt that a protest was intended and that it was communicated to the authorized procurement officer within the time specified in the regulations. However, if a protest were orally communicated to the authorized procurement officer within the time specified in the regulations, neither the rights of the State or any interested party ordinarily would be prejudiced. Accordingly,

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<sup>1</sup>In this regard, where a protest involves a defect in the solicitation and it is not raised prior to bid opening, the consideration of that protest clearly would affect the interest of the competitors whose bids were made public. Further, where grounds for protest are first apparent after bid opening, an untimely protest would unfairly expose the Government to increased liability and delay the procurement of needed goods and supplies. Accordingly, prejudice normally would be experienced if an untimely protest were heard.

we conclude that the State can relax the requirements of COMAR 21.10.02.02B, in the absence of prejudice, where it has received timely oral notice.<sup>2</sup>

In the instant appeal, Appellant first learned of the alleged defect in the bid bond submitted by Bay Services on November 23, 1981. This was the first opportunity which Appellant had to inspect the Bay Services' bid and learn of the alleged defect. Appellant's President immediately voiced his concern and, on the next day, discussed his grounds for protest with the State procurement officer. The State procurement officer thus had knowledge of Appellant's ground for protest well within the seven day period specified by COMAR 21.10.02.03B. Further, the record indicates that the procurement officer clearly understood the basis for protest as established by his letters dated November 25 and 27, 1981 advising Appellant that the deficiency in the Bay Services' bid bond would not render the low bid non-responsive under Maryland's procurement regulations.

Notwithstanding the preceding series of conversations and correspondence, the State procurement officer contends that Appellant's complaint was never understood to be a bid protest. We disagree. The evidence establishes that the procurement officer, after learning of Appellant's grounds for protest immediately acted to resolve the dispute in the same manner as if he had received a written protest. Further, in considering the substantive grounds for Appellant's protest, the procurement officer specifically kept Appellant apprised of his investigation and ultimate conclusion. Under the circumstances, we find that the actions of the procurement officer were inconsistent with his belated claim that notice of the bid protest was inadequate. Although we agree that a procurement officer may insist upon strict compliance with the requirements for filing a bid protest, we conclude that the procurement officer, by his actions in this case, effectively waived the formal requirements of COMAR 21.10.02.02B and considered the substantive grounds of Appellant's protest. Accordingly, this Board, as well, may consider Appellant's substantive grounds for protest on appeal.

The substantive issue presented by Appellant concerns whether the failure of Bay Services to supply a bid bond in the full amount required by law rendered its bid non-responsive. In concluding that the deficiency in the Bay Services' bid bond was not

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<sup>2</sup>Historically, notice requirements have fallen into two broad categories. The first category involves the required transmittal of information and the second category involves a form of statutory or formal notice. Where notice is intended solely to furnish information, the common law holds that the notice requirement may be obviated where the noticee has actual knowledge. See 1 Merrill on Notice 480; State of Maryland v. Barnes, 273 Md. 195, 328 A.2d 737 (1974); McLay et al. v. Maryland Assemblies, Inc., 269 Md. 465 (1973), Clark et al. v. Wolman et al., 243 Md. 597, 221 A.2d 687 (1966). Where notification is needed for some formal or statutory purpose, personal knowledge by the noticee traditionally has not been permitted to replace the written requirements of notification. This has been referred to as the "rules of the game" theory whereby the notification is a procedural requirement which must be observed for the sake of keeping the ritual. See 1 Merrill on Notice 489. The modern trend, however, is to permit personal knowledge of the noticee to obviate the need for formal written notice. This has been evidenced particularly in the judicial interpretation of notice requirements of federal remedy-granting clauses. These clauses, prescribed by regulation, make notice a prerequisite to recovery. Compare Hoel-Steffen Construction Company v. United States, 197 Ct. Cl. 561, 456 F.2d 760 (1972).

substantial enough to render its bid non-responsive, the procurement officer relied upon the following regulatory language contained in COMAR 21.06.07.02:

**B. Failure to Comply**

If a bid does not comply with the security requirements of this regulation, the bid shall be rejected as non-responsive, unless the failure to comply is determined by the procurement officer to be non-substantial when:

- (1) Only one bid is received, and there is not sufficient time to rebid the contract;
- (2) The amount of the bid security submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference in price stated in the next higher acceptable bid; or
- (3) The bid guarantee becomes inadequate as a result of the correction of a mistake in the bid or bid modification in accordance with COMAR 21.05.02.12, and the bidder increases the amount of guarantee to required limits 48 hours after the correction.  
(Underscoring added.)

Here since the \$30,000 bid bond submitted by Bay Services exceeded the \$13,343 difference between its bid and the second low bid, the procurement officer concluded that the defect in the bid bond was non-substantial.

The preceding regulation was properly interpreted and applied by the State's procurement officer. Further the regulation is itself well reasoned. Where a bid bond is sufficient to protect the State against a failure by the low bidder to accept a contract award, the low bid should be considered responsive and the State permitted to benefit from the low price offered. The issue for our consideration, however, concerns whether such a regulation was within the rule-making authority of the procuring agencies.

It is a basic rule of administrative law that power granted to an administrative agency to make rules and regulations extends no further than the authority given by the relevant statutory delegation. As further stated by the Maryland Court of Appeals in Mayor and City Council of Baltimore v. William E. Koons, Inc., 270 Md. 231, 236 (1973):

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.

Here, therefore, the promulgating authorities were required to adopt regulations consistent with Maryland's procurement law. See Md. Ann. Code, Art. 21, § 2-101 (1981

Repl. Vol., 1981 Supp.). To the extent they exceeded this authority, the regulation, or severable portion thereof, must be deemed void.

Md. Ann. Code, Art. 21, § 3-504 (1981 Repl. Vol., 1981 Supp.), provides that:

- (a) Each bidder or offeror shall give a bid bond if the contract price is estimated by the procurement officer to exceed \$25,000. 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.
- (b) The bid bond shall be in an amount equal to at least 5 percent of the amount of the bid or price proposal.
- (c) If 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.
- (d) Once opened, the bids or price proposals are irrevocable for the period specified in the invitation for bids or the request for proposal except as provided in § 3-202(h) of this article. However, if a bidder or offeror is permitted to withdraw his bid or proposal before award because of a mistake in the bid proposal, no action shall be taken against his bid bond.

(Underscoring added.)

With this language, the Legislature clearly intended, for procurements exceeding \$25,000, that the failure of a bidder to provide a bid bond in the required amount be fatal to the further consideration of that bid. "If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement." *Hammond v. Love*, 187 Md. 138 (1946). Accordingly, we find the language of COMAR 21.06.07.02B(2) to be inconsistent with the mandatory language of Maryland's procurement statute and therefore void. The Bay Services' low bid in the instant procurement thus should have been rejected as non-responsive under Maryland law and COMAR 21.06.07.02A.<sup>3</sup>

For the foregoing reasons the appeal is sustained. However, because of the nature of this procurement the desired services were required to be performed, in full, concurrent with these administrative proceedings. Accordingly, no effective administrative remedy is feasible.

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<sup>3</sup>COMAR 21.06.07.02A provides that:

...Solicitations on all State contracts in excess of \$25,000 shall require the submission of bid security in an amount equal to at least 5 percent of the total amount bid, at the time the bid is submitted. If a contractor fails to accompany its bid with the required bid security, the bid shall be deemed non-responsive, as provided by § B.

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