

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEALS OF KINSLEY
CONSTRUCTION, INC.

Under Maryland Port
Administration IFB for
Contract No. 503209

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) Docket Nos. MSBCA 2384 & 2399
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March 15, 2004

Bid Protests - Bid Bond – In order to pursue a bid protest remedy where the solicitation requires a bid bond, a protestor must secure its surety’s consent to extension or a new bond to cover the entire period of the protest and appeal.

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(Atlantic Builders Group, Inc.)

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OPINION ON MOTION TO DISMISS BY CHAIRMAN HARRISON

These timely appeals arise out of Maryland Port Administration (MPA) Invitation for Bids (IFB) for Contract No. 503209 for a New 300,000 Square Foot Cargo Shed (and related site work) to be constructed at South Locust Point Marine Terminal. Appellant was the low bidder with a bid price of \$14,654,301 for Alternate B, the only alternate under consideration. Atlantic Builders Group, Inc. (Atlantic) was next in line with a bid price of \$14,692,265. However, Atlantic was permitted to correct its bid price downward from \$14,692,265 to \$14,627,487, thereby displacing Appellant as the low bidder.

Appellant protested on the grounds that: 1) Atlantic should not be permitted to revise its price downward because the purported correction was not “apparent from the face of Atlantic’s bid ...;” and 2) Atlantic does not have “the capability to meet the Solicitation requirement ... that 30% of the contract work be performed with the offeror’s own forces.”

Thereafter (over a period of more than two months), Atlantic submitted a series of proposed plans in an effort to demonstrate that it could meet the 30% requirement. As Appellant was notified about each of these plans, it protested alleging the plans were inadequate to meet the requirements of the solicitation.

Four months after the initial protest had been asserted, MPA issued a final decision by letter dated December 11, 2003, which denied each of Appellant's protests. Several subsequent protests were filed thereafter.

Appellant's appeal from the December 11, 2003 agency final decision was filed with the Board on December 19, 2003. MPA issued final decisions as to Appellant's remaining post-December 11, 2003 protests, save one¹, on February 20, 2004, and Appellant appealed to the Board on February 23, 2004. The matter was heard on February 24, 2004, and, with agreement of counsel, the appeals were consolidated. However, the Board never reached the merits of the protests due to its conclusion that Appellant lacked standing to pursue its appeals. We explain.

On or about January 20, 2004, Atlantic filed a Motion to Dismiss alleging that Appellant does not have standing because it had not agreed to extend the time for acceptance of its bid price. On or about February 6, 2004, in its Reply to Response to Motion to Dismiss, Atlantic added an additional ground, arguing that Appellant does not have standing because Appellant had not extended its Bid Bond. MPA has not joined in Atlantic's motion on either ground. Appellant and Atlantic argued their respective positions regarding standing preliminarily at the hearing on February 24, 2004.

Maryland's General Procurement Law provides a multi-step administrative process for the adjudication of bid protests. First, the aggrieved party must file a protest with the procurement officer. Then, the agency must render a final decision on the protest. If the aggrieved party is still not satisfied, it may take an appeal of the agency's final decision to the Board.

COMAR 21.10.02.02.A provides that "[a]n interested party may protest to the appropriate procurement officer against the award or proposed award of a contract" COMAR 21.10.02.01.B(1) defines "interested party" as "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest."

In this case, Appellant's protest was that the contract should have been awarded to it as the low bidder and that the contract cannot be awarded to Atlantic (both because its bid should not have been corrected and because it allegedly is not a responsible bidder under the requirements of the solicitation). As such, it is difficult to imagine a more straightforward scenario under which a bidder may have been "aggrieved" and Appellant had standing to protest.²

¹This protest involves the issue dealt with in this opinion and is rendered moot thereby.

²We make no findings on the merits of Appellant's protests.

In response to Appellant's initial protests, MPA rendered a final decision which denied these initial protests. As such, Appellant had a statutory right to appeal. *See, e.g.*, State Finance and Procurement Article, §15-220(a) (2001 Repl. Vol.), Annotated Code of Maryland, which explicitly provides that the protester "may appeal the final action of a unit to the Appeals Board." The only limitation is that the appeal must be filed "within 10 days of receipt of notice of a final action ...," which Appellant did do.

Appellant was an aggrieved party with standing to protest. The agency first issued a final decision denying Appellant's initial protests from which Appellant took a timely appeal. Hence, the Board initially had jurisdiction to hear the appeal, and Appellant had standing to pursue its appeal.

Atlantic relies upon COMAR 21.05.02.19 regarding Appellant's alleged failure to extend its bid price.

COMAR 21.05.02.19.A provides: "[u]nless otherwise provided in the invitation for bids, bid prices are irrevocable for a period of 90 days following bid opening." Significantly, however, Section A does not provide that bids are deemed to be withdrawn if they are not accepted within the 90 day period. It simply says that they are "irrevocable" during that time. In other words, the irrevocability provision gives protection to the State during the 90 day period, and in this case the IFB did not provide otherwise.

Although we are of the opinion that offers can be revoked at the expiration of the designated period, Appellant did not ever do so here. Hence, Appellant's offer was on the table 91 days after bid opening. *Cf.*, Marc Industries, B-243517, 91-1; CPD ¶ 542 (bidder refused agency's request to extend thereby withdrawing its bid from consideration).

COMAR 21.05.02.19.B provides: "[a]fter opening bids, the procurement officer may request bidders to extend the time during which the State may accept their bids, provided that, with regard to bids, no other change is permitted."

It is clear from the record, however, that MPA did not formally ask Appellant or any other bidder to extend. It is also clear that Appellant filed and pursued a bid protest beyond the initial 90 days counted from bid opening, asking that the contract be awarded to it. As such, Appellant had sufficiently evidenced its intent to extend and properly qualifies as an interested party. *See, e.g.*, Washington-Structural Venture, B-235270, 89-1 CPD ¶ 130 (pursuit of award through a bid protest is indicative of an intent to extend; hence, a party challenging award to another bidder is an interested party even if it had not formally extended its bid).

COMAR 21.05.02.19.B does not provide that bids are deemed to be withdrawn if the agency fails to request an extension. It simply says that the procurement officer "may" make such a request. Although the State potentially leaves itself at risk when it fails to do so, the risk is merely academic here since Appellant did not withdraw its bid.

We further observe that Section B does not appear to impose any time deadline by which the State must make the request for extension. Hence, MPA could have invoked Section B at any

time during the 90 day window from bid opening. However, the real problem regarding Appellant's standing is not presented by COMAR 21.05.02.19; the real problem is presented by the lapse of the required bid security.

State Finance and Procurement Article, §13-207(b), Annotated Code of Maryland provides in pertinent part that "[a] procurement officer shall require a bidder ... to provide security on a procurement contract for construction if ... the price is expected to exceed \$100,000" The New Cargo Shed project was a solicitation for a construction contract as to which the price was expected to be \$15 million. Hence, the solicitation expressly provided that "[w]hen the bid is in excess of \$100,000, each bid must be accompanied by a Bid Bond"

COMAR 21.06.07.02 provides in pertinent part that "the bid bond shall be in an amount as determined by the procurement officer," 21.06.07.02.A, and sets forth a "preferred form of a bid bond," 21.06.07.02.D. Hence, the solicitation for the New Cargo Shed project provided that the amount of the Bid Bond shall be "not less than five percent (5%) of the bid price" IFB at p.1. It also set forth in an appendix (along with various other required forms) a form for the bid bond. That form was essentially the same as the preferred bid bond form set forth in COMAR 21.06.07.02.D.

All seven bidders, including Atlantic and Appellant, used the prescribed form. As is relevant to Atlantic's motion, the bid bonds each provided:

NOW, THEREFORE, if the Principal, upon acceptance by the State of its bid identified above, within the period specified herein for acceptance (ninety (90) days, if no period is specified), shall execute such further contractual documents, if any, and give such bond(s) as may be required by the terms of the bid as accepted within the time specified (ten(10) days if no period is specified) after receipt of the forms, or in the event of failure so to execute such further contractual documents and give such bonds, if the Principal shall pay the State for any cost of procuring the work which exceeds the amount of its bid, then the above obligation shall be void and of no effect.

The Surety executing this instrument hereby agrees that its obligation shall not be impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the State, notice of which extension(s) to the Surety being hereby waived; provided that such waiver of notice shall apply only with respect to extensions aggregating not more than ninety (90) calendar days in addition to the period originally allowed for acceptance of the bid.

Thus the bid bonds were effective for a period of 180 days. In this case, the 180 day period expired on January 27, 2004. Prior to January 27, 2004, Appellant did not extend its bid bond beyond the 180 day period ending on January 27, 2004. Thus by the terms of the bid bond, the Appellant's Surety had a defense that there was no longer an enforceable commitment. Such

extension occurred on or about February 6, 2004 when Appellant sent MPA an extension of its bid bond through March 27, 2004, dated February 5, 2004.

Maryland's General Procurement Law provides that under certain circumstances bidders are to provide proper bid security with their bids. In this case, the solicitation asked for, and Appellant submitted, what was required by law and what was asked for in the solicitation. Hence, its bid was responsive.³ However, its bid bond lapsed by its own terms on January 27, 2004 after Appellant's first appeal to the Board. Was this lapse fatal to Appellant's standing regarding the protests encompassed in its first appeal and those encompassed in its second appeal?

We find that such lapse is fatal to Appellant's right to pursue the remedies set forth in Subtitle 2 of Title 15 of the State Finance and Procurement Article, Annotated Code of Maryland regarding dispute resolution.

On the face of the Bid Bond herein the Surety is arguably no longer bound upon the expiration of 180 days. As noted above, the Bid Bond required to be executed and delivered by Appellant and its Surety recites:

The Surety executing this instrument hereby agrees that its obligation shall not be impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the State, notice of which extension(s) to the Surety being hereby waived; provided that such waiver of notice shall apply only with respect to extensions aggregating not more than ninety (90) calendar days in addition to the period originally allowed for the acceptance of the bid.

It is clear from the face of the Bid Bond that regardless of what Appellant might have done or not done relative to extending its bid, upon the expiration of 180 days, i.e. January 27, 2004, the Surety has a defense that the bond has expired and there is no longer an enforceable commitment. Because the Surety is not obligated for any extension, the bid of Appellant is no longer extant.

The Board has made it clear over the years that it regards the bid bond as material and meaningful, finding bids not responsive due to defects in such bonds. Micklos Painting Contractors, *Supra*; V & S Contractors, Inc., MSBCA 2134, 5 MSBCA ¶ 469 (1999); Keller Brothers, Inc./AccuBid Excavation, Inc. Joint Venture, MSBCA 1946, 5 MSBCA ¶ 395 (1996);

³State Finance and Procurement Article, §13-208(a), Annotated Code of Maryland provides: "except as provided under subsection (b) of this section, if a procurement officer requires bid security, the procurement officer shall reject a bid or proposal that is not accompanied by proper security." See COMAR 21.06.07.02.A(1) ("If a contractor fails to accompany its bid with the required bid security, the bid shall be considered non-responsive and rejected except as provided by §§ B and D of this regulation.") As set forth above, however, Appellant did in fact submit the proper bid security. See also V & S Contractor's, Inc., MSBCA 2134, 5 MSBCA ¶ 469 (1999) and Micklos Painting Contractors, MSBCA 2256, 5 MSBCA ¶ 469 (2002)

H.A. Harris, Inc., MSBCA 1109, 1 MSBCA ¶ 38 (1983). In *dicta* in Micklos Painting Contractors, the Board hinted at the result we reach here regarding lapse in bid bond coverage:

Appellant's filing of a protest and his subsequent appeal of the denial of its protest might be viewed as tolling the period in which its bid could be accepted. However, even though the bid may be deemed extended, Appellant's bid bond lapsed on October 23, 2001 since Appellant has not provided its surety's consent to extend the bond or a new bond. Appellant's surety has a defense that the bond has expired and that there no longer is an enforceable commitment by the surety.

We now hold that in order to pursue a bid protest remedy, at least where the solicitation requires a bid bond, the protester must secure its surety's consent to extension or a new bond to cover the entire period of the protest and appeal. To hold otherwise is to give a protesting competitor the proverbial two bites at the apple after prices, as here, are exposed. If the protest is upheld, the protester may then decide whether to actually enter into the contract, because if the bid bond has lapsed there no longer is an enforceable commitment by the surety. As observed in H.A. Harris, Inc., *supra*, "[a] bid bond guarantees that the successful bidder will execute the contract and obviates the necessity of a lawsuit to recover any damages resulting from the repudiation of the bid." While we recognize that the bid bond for Appellant herein was renewed after a nine day lapse, it nevertheless was allowed to expire, giving the Surety (and Appellant) nine days to assess whether to proceed with the protest and appeal after the prices of competitors had been exposed. While we also recognize the expense involved in extending a bid bond to pursue a protest, we believe that the great majority of protests (to include determination of an appeal by this Board) may be resolved and contracts awarded within the 180 day period set forth in the standard State bid bond.

We also are mindful of the provisions of Section 13-209 of the State Finance and Procurement Article of the Annotated Code of Maryland which states:

§ 13-209. Withdrawal of bids or proposals.

Whenever a bidder or offeror withdraws a bid or proposal, action may be taken against the bid security unless:

- (1) there is a mistake in the bid or proposal; and
- (2) the procurement officer allows the bidder or offeror to withdraw before the procurement contract is awarded. (SF § 11-121; 1988, ch. 48, § 2.)

This provision suggests to us that the General Assembly intends, where bid security is required, that the security be effective through award.

Accordingly, it is hereby Ordered this 15th day of March, 2004 that the appeals are denied and remanded to MPA for appropriate action.

Dated: March 15, 2004

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
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 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 2384 and 2399, appeals of Kinsley Construction, Inc. under Maryland Port Administration IFB for Contract No. 503209.

Dated: March 15, 2004

Michael L. Carnahan
Deputy Recorder