

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of M.J.'s QUALITY)	
CONCRETE, INC.)	
)	Docket No. MSBCA 1241
Under MTA Contract No.)	
MTA-90-7-5)	

July 12, 1985

Responsiveness - Bid Security - A bid containing a bid bond in the amount specified was responsive.

Bid Security - The IFB and COMAR 21.06.07.02 required a bid bond in this construction contract solicitation for bids exceeding \$25,000. However, this requirement was not operative since Art. 21, Md. Ann. Code, §3-502, prohibiting bid bonds for bids less than \$50,000, and §3-504 (a) and (c), requiring bid bonds only for construction contract bids exceeding \$50,000, supercede conflicting requirements issued by State agencies.

Bid Security - A bid bond was not required in a construction contract procurement where the actual bid, as distinguished from the contract price estimated by the procurement officer, did not exceed \$50,000.

APPEARANCE FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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OPINION BY MR. KETCHEN¹

This timely appeal is taken from a Maryland Mass Transit Administration (MTA) procurement officer's decision denying Appellant's protest of the proposed award of the captioned contract to the low bidder, Springdale

¹The Board's decision was issued orally on June 19, 1985 following the hearing on the merits of the appeal. This decision reflects the Board's decision stated on the record and is issued pursuant to the notice requirements of the Maryland Administrative Procedure Act, Md. Ann. Code, State Government Article §10-214. See generally: *Nuger v. State Ins. Comm'r*, 231 Md. 543, 191 A.2d 222 (1963).

Constructon Co., Inc. (Springdale). Appellant maintains that Springdale's bid was nonresponsive since it did not contain the required bid bond. On May 29, 1985, MTA filed a Motion for Summary Disposition on the ground that a bid bond is not required where the bid price is less than \$50,000.

Findings of Fact

1. On March 15, 1985, MTA issued an Invitation for Bids (IFB) for Contract No. MTA-90-7-5 for the construction of curbs and sidewalks along Wabash Avenue to Northern Parkway.

2. The IFB's General Provisions provided, in part, as follows:

GP-2.07 Proposal Guarantee

- A. No bid will be considered for any contract in excess of \$25,000 unless accompanied by a guarantee in an amount not less than 5% of the amount bid, and made payable to the State of Maryland.
- B. Acceptable security for bid guaranty shall be as stated in COMAR 21.06.07.01 B. (Underscoring added).

3. MTA issued Addendum No. 1 to the IFB on April 3, 1985 stating, in pertinent part, as follows:

2. Bid Bond Forms will be transmitted by Addendum No. 1. A bond in the amount of 10% of bid total must accompany bid submitted.

4. Addendum No. 1 to the IFB contained an enclosure dated April 9, 1985 stating as follows:

I. BID SUBMITTAL FORMS BOOKLET

<u>Addendum Item</u>	<u>Pages</u>	<u>Modifications</u>
1	BB 1 of 3 BB 2 of 3 BB 3 of 3	Add three page Bid Bond to booklet in back of Procurement Affirmation

* * *

III. INDEX OF ATTACHMENTS

A. BID SUBMITTAL FORM BOOKLET PAGES

1. BB1 of 3, BB2 of 3, BB3. Insert (3) pages in back of Booklet and complete Bid Bond prior to submitting bid. Bid Bond was mistakenly omitted. (Underscoring added).

5. The Code of Maryland Regulations (COMAR) regarding bid bonds provides as follows:

.02 Bid Security

A. General. Solicitations on all State construction contracts in excess of \$25,000 shall require the submission of bid security in an amount equal to at least 5 percent of the amount of the bid or price proposal except that, for bids stating a rate but not a total cost, the bid bond shall be in an amount as determined by the procurement officer. Bid security or evidence of the posting of bid security shall be submitted with the bid or proposal. Bid bonds may be required for any other procurement over \$25,000, as determined by the procurement officer. If a contractor fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive as provided by §B.

B. Failure to Comply. If a bid does not comply with the security requirements of this regulation, the bid shall be rejected as nonresponsive, . . . " (Underscoring added).

COMAR 21.06.07.02.

6. Prior to the opening of the sealed bids, upon a telephone call from Appellant, the procurement officer informed Appellant that it might not be necessary to include a bid bond because they are needed only when the bid is \$50,000 or more.

7. Ten bids were received and opened on April 18, 1985. The two lowest bids received were as follows:

Springdale	\$42,583.75
Appellant	49,915.00

The MTA engineer's estimate for the work was \$63,710.00.

8. On April 19, 1985, Appellant's President visited the office of the procurement officer and examined Springdale's bid. The examination was witnessed by Appellant's foreman and the procurement officer. At that time, they did not see a bid bond.

9. The procurement officer agreed that he saw no bid bond with Springdale's bid but indicated that one was not necessary as the bid was less than \$50,000. Later that same day the MTA procurement officer made a more thorough examination of Springdale's bid and determined that it did contain an appropriate bid bond.

10. Appellant filed a protest on April 24, 1985 contending that Springdale's bid was nonresponsive since its bid did not include a bid bond.

11. On May 1, 1985, the procurement officer informed Appellant that Springdale's bid did include a bid bond, and the reason they had not seen it earlier was that it was out of place in the bid and on a different color paper than normally used.

12. Appellant examined Springdale's bid again on May 2, 1985 and acknowledged that it did contain a bid bond.

13. Springdale's office manager testified that its bid did contain a bid bond when it was submitted on April 18, 1985. (Tr. 47).

14. The MTA procurement officer denied Appellant's protest in a final decision issued on May 10, 1985 finding that Springdale's bid contained a bid bond in the amount of 10% of its bid, although it had been placed in the middle pages of Springdale's bid immediately following page BF (Bid Form) 5 of 7 (the signature page) rather than as the last document in the bid. He also found it immaterial that the bid bond furnished by Springdale was not executed on the bid form furnished by MTA with the IFB. This was because Springdale's bid bond had the same wording as that contained on the MTA's IFB Bid Bond Form and in COMAR 21.06.07.03, Exhibit E.

15. Appellant filed a timely notice of appeal with this Board on May 23, 1985.

16. On May 29, 1985, MTA filed a Motion for Summary Disposition of the appeal on the ground that a bid bond was not required under the provisions of Art. 21, Md. Ann. Code §3-502 as the contract price was less than \$50,000.

Decision

Appellant contends that Springdale's low bid was nonresponsive since it did not contain a bid bond. A bid that should contain a bid bond, but does not, must be rejected as nonresponsive. It is true that neither Appellant nor the procurement officer saw a bid bond during their initial examination of Springdale's bid. However, when the procurement officer personally examined Springdale's bid on April 19, 1985, after Appellant had completed its unsuccessful search and left his office, he was able to locate Springdale's bid bond. The MTA procurement officer explained his earlier difficulty in finding the bid bond by noting that it was out of order and on the wrong color paper. (Finding of Fact No. 11). Appellant was notified on May 1, 1985 that Springdale's bid did contain an appropriate bid bond, and on May 2, 1985, Appellant re-examined Springdale's bid himself and acknowledged that it contained a bid bond. In addition, Springdale's office manager affirmed that its bid did contain a bid bond when it was submitted on April 18, 1985. (Finding of Fact No. 13). Based on these considerations, we find that a bid bond was included in Springdale's bid, and as the bid bond submitted by Springdale is acceptable, Springdale did submit a responsive bid.

Although not necessary for our decision, we have considered MTA's argument that Springdale was not required to submit a bid bond since its bid was below \$50,000. Appellant maintains that both COMAR and the IFB required Springdale to submit a bid bond since its bid exceeded \$25,000. (See Findings of Fact Nos. 2 and 5). Thus, it is said, Springdale's bid is non-responsive since Art. 21, Md. Code Annotated, §3-504(c) requires rejection of a bid if the IFB requires that a bid bond be provided. Assuming, arguendo, that Springdale's bid did not include an appropriate bid bond, this omission would not have rendered its bid nonresponsive.

The Annotated Code of Maryland regarding bid bonds provides, in pertinent part, as follows:

§3-502. Bid, performance and payment bonds for contracts under \$50,000.

No procurement agency of the State may require bid, performance, and payment bonds to be posted if the contract price is less than \$50,000, unless such bonds are required by federal law or regulation or as a condition to federal assistance. (1978, ch. 872; 1980, ch. 775, §6; 1984, ch. 479).

* * *

§3-504 Bid bonds.

(a) Contracts exceeding \$50,000; surety. - Each bidder or offeror for a construction contract shall give a bid bond if the bid or offer exceeds \$50,000. Bid bonds may be required for any other procurement over \$50,000, as determined by the procurement officer. 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) Amount. - The bid bond shall be in an amount equal to at least 5% of the amount of the bid or price proposal except that, for bids stating a rate but not a total cost, the bid bond shall be in an amount as determined by the procurement officer.

(c) Rejection of noncomplying bidder. - 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) Withdrawal of bid. - Once opened, bids or price proposals are irrevocable for the period specified in the invitation for bids or the request for proposal except as specified 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 or proposal, no action shall be taken against his bid bond. (1980, ch. 775, §7; 1982, ch. 3; 1984, ch. 479).² (Underscoring added).

When the foregoing sections of the Code are read together, as they should be, there is no ambiguity. (Tr. 73). Compare Gnau v. Seidel, 25 Md. App. 16, 332 A.2d 739 (1975). It is clear that in construction contract procurements the procurement officer has no discretion regarding the necessity of bid bonds; he may not require a bid bond for a construction

²Chapter 872 (House Bill 348) of the Laws of Maryland, 1978, provides that the Act was for the purpose of prohibiting a State agency from requiring that bid, performance, and payment bonds be posted for certain contracts in certain cases and subject to certain exceptions. Chapter 479 (House Bill 1336) of the Laws of Maryland, 1984, changed the bid bond requirement limits from \$25,000 to \$50,000.

contract bid that is less than \$50,000, but he must require a bid bond for a construction contract bid that exceeds \$50,000. The only instance where the procurement officer has some discretion is when there is a non-construction contract bid or offer that exceeds \$50,000. Accordingly, Art. 21, §§3-502, 3-504(a) and (c) when read together clearly require an IFB for a construction contract to provide for a bid bond only for bids exceeding \$50,000 and require the rejection of bids that do not comply. Conversely, a provision in an IFB for a construction contract calling for a bid bond where the bid is less than \$50,000 is not operative.

We recognize that there is a conflict between the law as stated above and the provisions of the IFB and COMAR, which both have a \$25,000 minimum which triggers the requirement for a bid bond. Where such a conflict arises, it is the accepted construction that laws passed by the Legislature supercede conflicting regulations promulgated by state agencies. See: Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982) at 10, rev'd on other grounds, UMBC v. Solon Automated Services, Inc., Misc. Law No. 82-M-38, 82-M-42 (Cir. Ct. Baltimore Co.; October 13, 1982); compare Kennedy Temporaries, MSBCA 1061 (July 20, 1982) at 9, rev'd on other grounds, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984); Mayor and City Council of Baltimore v. William E. Koons, 270 Md. 231, 310 A.2d 813 (1973).

There is a second conflict between the Code and COMAR which relates to what figure it is that must be above the minimum amount in order for a bid bond to be required. Art. 21, Md. Ann. Code, §3-504(a) states that bid bonds are required only "if the bid or offer exceeds \$50,000." (Underscoring added). This language was adopted in a 1982 amendment that changed the prior language which had stated that a bid bond was necessary "if the contract price is estimated by the procurement officer to exceed \$25,000 ..."³ Art. 21, Md. Ann. Code, §3-504(a) repealed. (Underscoring added). The IFB and COMAR state that bid bonds are required on "all state construction contracts in excess of \$25,000." COMAR 21.06.07.02; G.P. 2.07 (Underscoring added). Thus, a reading of the IFB and COMAR gives rise to an uncertainty concerning the meaning of "construction contract in excess of [\$25,000]."

However, a comparison of the current and repealed sections of the Code makes it clear that the amended version of the Code was adopted in order to dispel any such conflicts; the operative figure, according to the Code, is the actual bid. As cited above, when a provision of the Code is in conflict with a regulation, the language of the Code supercedes. So for any bid under \$50,000, no bid bond is required, and, therefore, it is irrelevant whether a bid bond was included in Springdale's bid.

For the foregoing reasons, therefore, Appellant's appeal is denied.

³The 1984 amendment to Art. 21, Md. Ann. Code, §3-504(a) deleted, "if the contract price is estimated by the procurement officer to exceed . . ." and substituted, "if the bid or offer exceeds . . ."