

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF M&J'S )  
POWERWASH, INC. )  
 ) Docket No. MSBCA 2362  
 )  
Under SHA Contract No. SGR0304 )

September 18, 2003

Timeliness - Notice of Final Agency Action by Facsimile - Receipt of final agency action by facsimile constitutes receipt for purposes of the commencement of the ten calendar day period for filing a bid protest appeal.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Carolyn Moses Frank  
Assistant Attorney General  
Baltimore, Maryland

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from a final decision by the State Highway Administration (SHA) denying its protest.

Findings of Fact

1. The above captioned procurement (Contract) by competitive sealed bids involves graffiti removal for various locations and structures. It also includes the painting over of any graffiti unable to be removed. Accordingly, the bids required prices on two items. Item No. 1001 required a quote for removal of 500 square feet of graffiti by a high-pressure washer, and Item No. 1002 required a quote for removal of 100 square feet by painting it over.
2. The Contract was advertised on May 28, 2003, and the bids were due by June 20, 2003.

3. Bids were received from Appellant, Signs of the Times, and E.G. Painting Co. as set forth below:

**BID RESULTS**

**Appellant**

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1001 sq. ft. of powerwash	500 sq. ft.	.70	\$350.00

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1002 sq. ft. of paint over	100 sq. ft.	.45	\$ 45.00

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Bid Amount      \$420.00

**Signs of the Times**

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1001 sq. ft. of powerwash	500 sq. ft.	.60	\$300.00

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1002 sq. ft. of paint over	100 sq. ft.	.40	\$200.00

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Bid Amount      \$500.00

**E.G. Painting Co.**

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1001 sq. ft. of powerwash	500 sq. ft.	1.15	\$575.00

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1002 sq. ft. of paint over	100 sq. ft.	.45	\$ 45.00
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		Bid Amount	\$620.00

4. Following the bid opening, it became apparent that the bid submitted by Signs of the Times contained a mistake. It is apparent that Signs of the Times's bid for (100 square feet of paint over) when multiplied by its bid cost of \$.40 does not produce an extended price of \$200.00. In fact, when the 100 square feet is multiplied by \$.40 the resulting product is \$40.00. With the correction of this error, the Signs of the Times total bid amount becomes \$340.00, making it the lowest bid. As a result of this correction, the total bid amounts are now the following:

**CORRECTED BIDS**

**Signs of the Times**

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1001 sq. ft. of powerwash	500 sq. ft.	.60	\$300.00
			<hr/>
Item 1002 sq. ft. of paint over	100 sq. ft.	.40	\$ 40.00
			<hr/>
		Bid Amount	\$340.00

**Appellant**

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1001 sq. ft. of powerwash	500 sq. ft.	.70	\$350.00
			<hr/>
Item 1002 sq. ft. of paint over	100 sq. ft.	.45	\$ 45.00
			<hr/>
		Bid Amount	\$420.00

E.G. Painting. Co.

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1001 sq. ft. of powerwash	500 sq. ft.	1.15	\$575.00

	<u>Quantity</u>	<u>Bid Cost</u>	<u>Total</u>
Item 1002 sq. ft. of paint over	100 sq. ft.	.45	\$ 45.00

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Bid Amount      \$620.00

5. The Procurement Officer, upon realizing the obvious mathematical error, advised the bidders that the Contract had been awarded to Signs of the Times. Upon being advised of this, Appellant filed a bid protest.
6. The Procurement Officer's final decision was written and dated on July 15, 2003. On July 18, 2003, the Procurement Officer sent notification of SHA's decision by three methods: 1) facsimile, 2) first class mail, and 3) certified mail.
7. The facsimile was received by Appellant on July 18, 2003.
8. Appellant appealed to this Board on August 4, 2003.
9. Appellant did not comment on the Agency Report, and neither party requested a hearing.

#### Decision

Respondent requests that this Board dismiss the appeal for lack of jurisdiction.

The Procurement Officer's final decision, dated July 15, 2003 was sent to Appellant on July 18, 2003 by three methods: facsimile, first class mail, and certified mail. All three methods of delivery were noted on the decision itself. The facsimile was received by Appellant on July 18, 2003 as indicated by the Transmission Verification Report (confirmation sheet). No other receipt from Appellant exists. The certified mail envelope verifies that the decision was sent by certified mail on July 18, 2003 to Appellant at the address listed on its letterhead. The receipt returned by the U.S. Postal Service indicates that the letter was unclaimed.

The Procurement Officer's final decision, delivered by facsimile on July 18, 2003, contained a notice of Appellant's appeal rights, directing Appellant to file an appeal with the Board of Contract Appeals no later than ten (10) days following the receipt of the decision. COMAR 21.10.02.10A requires that an appeal to this Board must be filed within ten (10) calendar days of receipt of notice of the final procurement agency action.

Respondent argues that Appellant received the final decision on July 18, 2003 and, thus, its appeal should have been filed with this Board no later than July 28, 2003 in accord with Md. Code Ann., State Finance and Procurement Article, § 15-220(b) and COMAR 21.10.02.10A. However, Respondent's argument continues that because Appellant's appeal was not filed with this Board until August 4, 2003, seventeen days after receipt of the Procurement Officer's decision, it was late, and under COMAR 21.10.02.10B, "an appeal received by the Appeals Board after the time prescribed in Section A (ten days) may not be considered. ..."

The final decision of the Procurement Officer was transmitted to Appellant on Friday afternoon, July 18, 2003 through a facsimile machine located at the SHA District Office in Brooklandville. The facsimile machine produced a confirmation sheet which indicated that the entire final decision was transmitted to Appellant on July 18, 2003, commencing at ten minutes after four o'clock in the afternoon and concluding three minutes later.

COMAR 21.10.02.09D requires the Procurement Officer to furnish a copy of the decision to the protestor by certified mail, return receipt requested, or by any other method that provides evidence of its receipt. Once received, the ten day period to file an appeal commences. Nutrition America, Inc., MSBCA 1612, 3 MSBCA ¶290 (1991) (date of receipt by Appellant's attorney of the Procurement Officer's final decision commenced the ten (10) day period to file an appeal). The Piscataway Company, Inc., MSBCA 1595, 3 MSBCA ¶281 (1991) (where Appellant permitted a friend to sign for the Appellant's mail, receipt by the friend was sufficient to commence the running of the date for filing an appeal). Thus the date of receipt is important, as is the establishment of such date.

Here, the evidence reflects the afternoon of July 18, 2003 as the date Appellant received a copy of the decision by facsimile. In addition, SHA sent the Procurement Officer's final decision by certified mail and first class mail on that same date.

There is no express requirement in either the State Procurement Article or COMAR that the decision be furnished by any particular method, only that it be furnished and there be evidence of receipt, pursuant to the provisions of COMAR 21.10.02.09D. The confirmation sheet reflects that Appellant did receive the facsimile copy of the final decision. Respondent also asserts in the Agency Report that there was a follow-up telephone confirmation. However, no details of this telephone conversation are provided.

The Board had previously determined that facsimile transmission was "another method" encompassed within a reasonable reading of COMAR regulations dealing with receipt of a procurement officer's decision in contract claims. MFE Inc. / NCP Architects, Inc., MSBCA 1781, 4 MSBCA ¶356 (1994). However, on appeal of the Board's decision, the Court of Appeals never reached the merits, determining that the Board lacked jurisdiction over the appeal. See University of MD v. MFE, 345 Md. 86 (1997). Nevertheless, focusing on bid protest decisions of a procurement officer we conclude that transmission of bid protest decisions by facsimile was an available "other method" when COMAR 21.10.02.09D was promulgated in the early 1980s. This Board recognizes many years later that transmission of copies by facsimile has become an everyday event in the ordinary course of business which is accurate and reliable. We find,

Indeed, in the instant appeal, there is no other actual receipt available since the certified mail delivery was unclaimed. The address on the certified mail is the same address on the letterhead used by Appellant in its appeal. The notice of the certified mail was delivered by the U.S. Postal Service.

The final decision reached Appellant as evidenced by the appeal itself. We have noted that, according to the confirmation sheet, the facsimile was received by Appellant after 4:00 p.m. on Friday. We will thus assume that the facsimile copy was not actually read until the following Monday morning, July 21, 2003, by Appellant's employees. Thus the appeal was due in the Board's offices no later than Thursday, July 31, 2003. The filing date with this Board of August 4, 2003 is thus past the ten (10) calendar day requirement. We also note that though there is no receipt for the first class mail delivery, even allowing extra time for delivery, the Procurement Officer's final decision would have been delivered to Appellant by regular mail by July 22, 2003, and thus the appeal was still due by Friday, August 1, 2003.

Appellant did not file its appeal within the ten (10) day period prescribed by State Finance and Procurement Article § 15-220(b), COMAR 21.10.02.10, and COMAR 21.10.07.01B(3).<sup>1</sup> The final decision of the Procurement Officer, in the absence of waiver or equitable estoppel — and we find none based on the record herein — became binding, and the right to an appeal was lost. Compare State Finance and Procurement Article 15-220(b), COMAR 21.10.02.10, Coopers & Lybrand, MSBCA 1098, 1 MSBCA ¶37 (1983), and Kennedy Temporaries v. Comptroller of the Treasury, 67 Md. App. 22, 42 (1984) with Engineering Mgt. v. State Highway, 375 Md. 284 (2003).

Assuming *arguendo* that the appeal, notwithstanding the foregoing, may be determined to be timely, or that waiver or equitable estoppel toll the ten day limitations period, we would deny the appeal on the merits for the following reasons.

On June 20, 2003, SHA received three bids for the above captioned Contract. It was clear on the face of the bids that the bid submitted by Signs of the Times contained an error made when extending the unit price of Item 1002. Therefore, the Procurement Officer did not award the Contract at bid opening. SHA then performed a mathematical audit of all the bids for the Contract. The audit of Signs of the Times's bid revealed the following discrepancy: the \$.40 unit price for Item 1002 does not generate a total of \$200.00 when multiplied by the approximate quantity of 100 square feet, but instead yields the lower figure of \$40.00.

The record reflects that when such a discrepancy is revealed, SHA first applies the formulae set forth in the SHA General Provisions at GP-2.19 to derive a bid price.

**GP-2.19 (b) Determination of Lowest Bidder.** Bids shall be evaluated to determine which bidder offers the lowest cost to

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<sup>1</sup>Day is defined to mean calendar day by COMAR 21.01.02.01(32) and COMAR 21.10.07.01B(3) in the context of an appeal to the Board.

**GP-2.19 (b) Determination of Lowest Bidder.** Bids shall be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the Invitation for Bids.

Except as otherwise provided under GP-2.14 Mistakes in Bids:

- (1) The unit price will govern in the event of a discrepancy between the unit price bid and the extended price (product of unit price multiplied by the quantity).
- (2) The sum of the extended prices will govern in the event of a discrepancy between the total lump sum bid and the extended prices.
- (3) The written words will govern in the event of a discrepancy between the prices written in words and the prices written in figures.
- (4) If a unit price has been omitted, the unit price will be determined by dividing the extended price by the quantity.

The Administration reserves the right to make the award by item, or groups of items, or total bid if it is in the best of interest of the State to do so unless the bidder specifies in his bid that a particular or progressive award is not acceptable.

According to these provisions, when there is a discrepancy between the unit price and its extension, the unit price prevails. Thus, the Signs of the Times bid of \$.40 per square foot, when properly extended, would result in a bid of \$40.00, not \$200.00. This mathematical result derived from GP-2.19 does not end the inquiry, however, because the result must be consistent with the provisions of GP-2.14 Mistakes in Bids. GP-2.14 Mistakes in Bids is derived from COMAR 21.05.02.12 which provides the operative rules for mistakes in bids. COMAR 21.05.02.12C states in pertinent part:

**Confirmation of Bid.** When the procurement officer knows or has reason to conclude that a mistake had been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected ... if any of the following conditions are met:

- (1) If the mistake and the intended correction are clearly evident on the face of the document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are ... errors in extending unit prices. ...

Thus, in order for a bid price mistake to be corrected, both the mistake and the intended bid price must be evident on the face of the bid documents. In determining whether the intended bid price is evident on the face of the bid document, the procurement officer necessarily must rely on his experience and common sense. Richard F. Kline, Inc., MSBCA 1116, 1 MSBCA ¶39 (1983). *See also* Techlawn International, Inc., MSBCA 1848, 4 MSBCA ¶374 (1995); Denison Landscaping, Inc., MSBCA 1538, 3 MSBCA ¶258 (1990); The Hardaway Company, MSBCA 1932, 5 MSBCA ¶388 (1996). While the procurement officer, in deciding whether or not to permit correction, may not examine any bid estimates, backup data or quotes received by the bidder, he may review the prices submitted by other bidders relevant to the procurement at hand. Richard F. Kline, Inc., *supra*. *See also* P. Flanigan & Sons, Inc., MSBCA 1068, 1 MSBCA ¶54 (1983).

The prices from the other bidders for paint over items were: \$.45 by Appellant and \$.45 by E.G. Painting Company. In comparison to the other bidders' pricing for this item, a price of \$.40 would be consistent with the \$.45 price for this item from the other bidders, while a price of \$2.00 per square foot would be over four times as much.

The record reflects that after reviewing the facts and consulting with the Office of the Attorney General, the Procurement Officer had no doubt that there was a mistake contained in the pricing for the paint over item stated in Signs of the Times's bid. His conclusion was that the discrepancy admits to only one reasonable interpretation ascertainable from the face of the bid, the range of the other bids, and reliance on the Procurement Officer's common sense and experience. However, while the Agency Report suggests that the Procurement Officer followed the requirements of COMAR 21.05.02.12, the Board cannot determine from the record if Signs of the Times was, in fact, contacted pursuant to COMAR 21.05.02.12C.

Assuming Signs of the Times was contacted and alleged mistake, we would deny the appeal, finding that once the bid submitted by Signs of the Times was corrected for its mathematical error, and all the bids were considered, Signs of the Times was the low bidder.



Accordingly, Appellant's appeal is remanded to SHA for a determination of whether Signs of the Times was, in fact, contacted pursuant to COMAR 21.05.02.12C, and, if so, whether mistake was alleged. So Ordered this 18<sup>th</sup> day of September, 2003.

Dated: September 18, 2003

Robert B. Harrison III  
Board Member

I Concur:

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:

- (a) the date of the order or action of which review is sought;
- (b) 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
- (c) 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2362, appeal of M&J's Powerwash, Inc. under SHA Contract No. SGR0304.

Dated: September 18, 2003

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Michael L. Carnahan  
Deputy Recorder