

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MARYLAND SUPERCRETE	)	
COMPANY	)	
	)	Docket No. MSBCA 1079
Under SHA Contract No.	)	
P-594-501-324	)	

October 14, 1982

Responsiveness - Waiver of Minor Informality - The failure of a bidder to have his signature on an anti-bribery affidavit verified by a notary public properly was waived as a minor informality since: (1) the information contained therein did not affect the bidder's commitment to perform the work at a stated price and in accordance with the specifications and (2) verification was achieved by acceptable language incorporated in the affidavit.

Anti-Bribery Affidavit - The statutorily required anti-bribery affidavit is intended to assist the State in determining a bidder's eligibility for a contract award. As such, it pertains to a bidder's responsibility and not responsiveness.

APPEARANCE FOR APPELLANT:

Mr. Glenn A. James  
Annapolis, MD

APPEARANCES FOR RESPONDENT:

Stephen M. LeGendre  
Louis J. Kozlakowski, Jr.  
Assistant Attorneys General  
Baltimore, MD

OPINION BY CHAIRMAN BAKER

This timely appeal has been taken from a State Highway Administration procurement officer's decision to reject the lowest bid received under a solicitation for landscaping work and award a contract for that work to the second lowest bidder. The Appellant is the third lowest bidder who alleges that he should have received the contract award because both the first and second lowest bidders were nonresponsive. The parties to this dispute have waived their right to a hearing and have agreed to submit the appeal for decision based on the written record furnished pursuant to the Board's regulations.

Findings of Fact

1. Sometime prior to April 27, 1982, the State Highway Administration (SHA) issued an invitation for bids (IFB) on Contract No. P-594-501-324 for the performance of streetscape improvements on MD Route 704 from the District of Columbia Line to Addison Chapel Road.

2. The IFB stated that the project being bid upon was a Federal-aid project and that certain Federal laws would apply. Among the numerous Federal requirements was the following:

F.A.P. BIDDING REQUIREMENTS

Every bidder on this project will be required to comply with Section 112(c) of Title 23 U.S.C. and submit with its bid a sworn statement certifying that such person, firm, association or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion or otherwise taken any action in restraint of free competitive bidding in connection with the contract. The statement shall be executed by or on behalf of the person, firm, association, or corporation submitting the bid. The sworn statement should be in the form of an affidavit executed and sworn to by this bidder before a person who is authorized by the laws of the State to administer oaths. Consideration of award of this contract will not be given until the original of such sworn statement is filed with the State Highway Administration.

See IFB page 168. Two copies of the foregoing bidders affidavit of non-collusion were included at pages 169-170 of the IFB and read as follows:

AFFIDAVIT

State of \_\_\_\_\_  
County of \_\_\_\_\_

This is to certify, in compliance with Section (17)(B) of the Federal Highway Act of 1954, that \_\_\_\_\_, bidder on Maryland Contract No. \_\_\_\_\_, has not either directly or indirectly, entered into any agreement, participated in any collusions, or otherwise taken any action in restraint of free competitive bidding in connection with this contract.

\_\_\_\_\_  
(Signature and Title)

(Clause requiring verification by notary public omitted.)

3. COMAR 21.05.08 also mandates both the inclusion of an anti-bribery affidavit in all State solicitations and a non-collusion certificate in all State solicitations where the contract amount is expected to exceed \$25,000. The language of these two documents is required to compare substantially with the following:

Solicitation Identification and  
Number (if applicable): \_\_\_\_\_

**NON-COLLUSION CERTIFICATE**

I HEREBY CERTIFY I am the \_\_\_\_\_  
(Title)

and the duly authorized representative of the firm of \_\_\_\_\_

whose address is \_\_\_\_\_

AND THAT NEITHER I nor, to the best of my knowledge, information and belief, the above firm nor any of its other representatives I here represent have:

- (a) Agreed, conspired, connived or colluded to produce a deceptive show of competition in the compilation of the bid or offer being submitted herewith;
- (b) Not in any manner, directly or indirectly, entered into any agreement, participated in any collusion to fix the bid price or price proposal of the bidder or offeror herein or any competitor, or otherwise taken any action in restraint of free competitive bidding in connection with the Contract for which the within bid or offer is submitted.

In making this affidavit, I represent that I have personal knowledge of the matters and facts herein stated.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Printed or Typed Name)

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ANTI-BRIBERY AFFIDAVIT

I HEREBY CERTIFY THAT

1. I am the \_\_\_\_\_ and the duly authorized representative of the firm of \_\_\_\_\_ whose address is \_\_\_\_\_ and that I possess the legal authority to make this affidavit on behalf of myself and the firm for which I am acting.

2. Except as described in paragraph 3 below, neither I, nor to the best of my knowledge, the above firm, or any of its officers, directors, or partners, or any of its employees directly involved in obtaining contracts with the State or any county, bi-county, or multi-county agency, or subdivision of the State have been convicted of, or have pleaded nolo contendere to a charge of, or have during the course of an official investigation or other proceeding admitted in writing or under oath acts or omissions committed after July 1, 1977 which constitute bribery, attempted bribery, or conspiracy to bribe under the provisions of Article 27 of the Annotated Code of Maryland or under the laws of any state or federal government.

3. (State "none" or, as appropriate, list any conviction, plea, or admission described in paragraph 2, with the date; court, official, or administrative body; and the sentence or disposition, if any.) \_\_\_\_\_

I acknowledge that this affidavit is to be furnished to the requesting agency, to the Secretary of Budget and Fiscal Planning of Maryland, and, where appropriate, to the Board of Public Works and the Attorney General under Section 16D of Article 78A of the Annotated Code of Maryland. I acknowledge that, if the representations set forth in this affidavit are not true and correct, the State may terminate any contract awarded and take any other appropriate action. I further acknowledge that I am executing this affidavit in compliance with Section 16D of Article 78A of the Annotated Code of Maryland, which provides that certain persons who have been convicted of or have admitted to bribery, attempted bribery, or conspiracy to bribe may be disqualified, either by operation of law or after a hearing, from entering into contracts with the State or any of its agencies or subdivisions.

I do solemnly declare and affirm under the penalties of perjury that the contents of this affidavit are true and correct.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Printed or Typed Name)

4. Consistent with the foregoing State requirements, the SHA prepared a single affidavit form encompassing the non-collusion certification and the anti-bribery statement. This was included in the solicitation at pages 171-173 and was augmented by a clause requiring verification by a notary public. As is apparent from the preceding findings, however, this verification clause was not required expressly by the regulations.

5. Bids were opened on April 27, 1982. The three lowest bidders were identified as follows:

P. M. Construction Co., Inc.	\$ 79,279.49
M. T. I. Construction Company	\$110,224.80
Maryland Supercrete Company	\$130,704.25

6. On April 28, 1982, Maryland Supercrete Co. filed a protest alleging that it was the lowest responsive and responsible bidder. Although P.M. Construction Co. and M.T.I. Construction Co. submitted lower bids, these bids were said to be nonresponsive because:

- a. P.M. Construction Co. did not sign either its bid or its "Bidder Certification of Work Capacity".
- b. M.T.I. failed to have a notary verify the signature of its vice-president who executed the required Maryland anti-bribery and non-collusion affidavit.

7. The SHA procurement officer notified all bidders of the protest and requested advice from the State Law Department. By final decision dated June 2, 1982, the SHA procurement officer apprised Maryland Supercrete Co. that he was rejecting the bid of P.M. Construction Co. but accepting the bid of M.T.I. Construction Co. This determination was based on the procurement officer's conclusion that the failure of P.M. Construction Co. to sign its bid was a non-waivable defect, while the failure of M.T.I. Construction Co. to have its bidder's affidavit notarized was immaterial and thus waivable under Maryland law.

8. While P.M. Construction Co. did not appeal the final decision of the SHA procurement officer, Maryland Supercrete Company (Appellant) filed a timely appeal on June 8, 1982 contesting the award of a contract to M.T.I. Construction Company.

### Decision

COMAR 21.06.02.03 is entitled "Minor Irregularities in Bid Proposals" and provides as follows:

A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid or proposal from the exact requirement of the solicitation, the correction of [sic] waiver of which would not be prejudicial to other bidders or offerors. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

The initial issue presented in this appeal concerns whether the absence of a notary stamp on a bidder's affidavit of non-collusion and anti-bribery constitutes a minor informality under the foregoing regulation.

First, with regard to the certificate of non-collusion, we note that M.T.I. did execute and submit, with its bid, two verified copies of the Federal non-collusion affidavit. Given that the language of these Federal affidavits was substantially similar to that required by Maryland law, any failure on Appellant's part to execute properly the State affidavit of non-collusion was immaterial.

Turning to the anti-bribery portion of the State affidavit, we examine initially its intended purpose. The anti-bribery affidavit is an express requirement of "Maryland's Anti-Bribery Law."<sup>1</sup> This law was enacted

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<sup>1</sup>Code Article 21, § 3-405(h)(1) provides as follows:

Every business entity, including an individual, upon submitting a bid or otherwise applying for a contract with the State, or any county or other subdivision of the State, shall submit an affidavit stating, to its best knowledge, whether it or any of its officers, directors, or partners, or any of its employees who are directly involved in obtaining contracts with the State, or with any county or other subdivision of the State, has been convicted of bribery, attempted bribery, or conspiracy to bribe under the laws of any state or of the Federal government.

to deter acts of bribery or conspiracies to bribe State officials in furtherance of obtaining a contract.<sup>2</sup> Under this law, the affidavit clearly was intended to assist the State in determining the eligibility of a contractor to receive a contract award.

The eligibility of a contractor to receive a contract award is a matter of bidder responsibility. See COMAR 21.01.02.59. Since information bearing on responsibility does not alter an individual bidder's commitment to perform the work at a stated price or in accordance with the requirements of the solicitation, it may be received and considered by a procurement officer, after bid opening, without affecting the competitive position of the bidders. For this reason, therefore, the failure to submit information, with the bid, bearing on responsibility is considered to be a minor informality which may be cured or waived, as appropriate. Compare Fisher Berkely Corp., Comp. Gen. Dec. B-196432, 80-1 CPD ¶ 26; Allied Security, Inc. of Maryland, Comp. Gen. Dec. B-201563, 81-1 CPD ¶ 337; L. Reese & Sons, Inc., Comp. Gen. Dec. B-182050, 74-2 CPD ¶ 255.

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<sup>2</sup>See Article 21, § 3-405 of the code which provides, in pertinent part, that:

(b) Any person convicted under the provisions of Article 27 of the Annotated Code, of bribery, attempted bribery or conspiracy to bribe based upon acts committed after July 1, 1977 in furtherance of obtaining a contract with the State or any of its subdivisions, shall be disqualified from entering into a contract with the State, or any county or other subdivision of the State.

(c) A person not disqualified under the provisions of subsection (b) who (1) has been convicted under the provisions of Article 27 of the Annotated Code, of bribery, attempted bribery, or conspiracy to bribe, (2) during the course of an official investigation or other proceeding has admitted, in writing or under oath, acts or omissions which would constitute bribery, attempted bribery, or conspiracy to bribe under the provisions of that article, or (3) has been convicted under the laws of another state or the federal government of bribery, attempted bribery, or conspiracy to bribe, shall be subject to disqualification, pursuant to the procedure hereinunder established, from entering into a contract with the State, or any county of other subdivision of the State. However, a person is subject to disqualification only for those acts or omissions committed after July 1, 1977 which constitute or result in a conviction of bribery, attempted bribery, or conspiracy to bribe.

Here, the SHA procurement officer waived the defect in the M.T.I. bidder's affidavit and subsequently did not require that a verified copy of the anti-bribery affidavit be furnished prior to award. Since Article 21, § 3-405 (h)(1) of the Code clearly requires the submittal of the affidavit as a condition of award, the remaining issue in this appeal concerns whether the signed anti-bribery affidavit contained in the bid package was valid as submitted.

In enacting legislation requiring the submission of an anti-bribery affidavit as a condition of contract award, the Legislature did not specify the form of affidavit required. This was left to the discretion of the procuring agencies charged with implementing the requirements of Code Article 21. Pursuant to this delegation of authority, the procurement agencies prescribed, by regulation, an anti-bribery affidavit containing, among other things, the representation: "I do solemnly declare and affirm under the penalties of perjury that the contents of this affidavit are true and correct." See Finding of Fact No. 3. The regulations further did not require a verification clause to accompany this affidavit.

Maryland's law requiring the anti-bribery affidavit was enacted during the 1977 legislative session. See Ch. 929, Acts of 1977. In the 5 year period prior to this enactment, the Legislature repeatedly expressed its belief that the requirement that an affidavit be verified before a notary public or other officer had become a burdensome anachronism. See Comments, Estates and Trusts Article, MD Ann. Code, § 1-102, Corporations and Associations Article, MD Ann. Code, § 1-302. Accordingly, in amending various existing statutes, the Legislature provided that an affidavit properly may be verified if it contains the following representation and is signed by the affiant:

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct to the best of my knowledge, information, and belief.

See Estates and Trusts Article, MD Ann. Code, § 1-102(b).<sup>3</sup> For this reason, therefore, we conclude that the affidavit form developed by the procuring agencies was consistent with the intent of the Legislature and, therefore, was adequate to satisfy the requirements of the "anti-bribery" law. Verification of the SHA anti-bribery affidavit by a notary public thus was unnecessary and waivable.

For the foregoing reasons, therefore, the appeal is denied.

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<sup>3</sup>The Maryland Rules of procedure have adopted a similar mode for verification. See Rule 5c.