

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of PATCO DISTRIBUTORS,            )  
INC.    )  
  )  
Under Mass Transit Administration        )  
Bids for Small Buses and School         )  
Bus Vehicles                                )

Docket No. MSBCA 1270

April 14, 1986

Contract Award - Late Bid - Burden of Proof - Appellant failed to establish that the lateness of its bid should be excused pursuant to the exception set forth in COMAR 21.05.02.10B permitting consideration of a late bid where the bid would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees.

Contract Award - Late Bid - Use of the word "may" in the context of the exception set forth in COMAR 21.05.02.10B for consideration of late bids is not to be construed as permitting an agency to excuse a late bid at its discretion based on its perception of a bidders bona fides. The specific exception must be demonstrated to exist for a late bid to be considered.

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  & Nolan, P.A.  
  Annapolis, MD

APPEARANCE FOR THE RESPONDENT:        William B. Tittsworth, Jr.  
  Assistant Attorney General  
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OPINION BY CHAIRMAN HARRISON

This timely appeal arises from a procurement officer's final decision denying Appellant's protest regarding acceptance of its late bid.

Findings of Fact

1. On September 29, 1985 the Mass Transit Administration (MTA) issued a Request for Bids (RFB) for the procurement of 20 - passenger small buses and two types (218" and 235" wheelbase) of school bus type vehicles. Bid opening was scheduled for October 29, 1985 at 10:00 a.m. The RFB required that bids "shall be transmitted on or before October 29, 1985 at 10:00 a.m. to:

Mr. Lester D. Edwards  
Program Coordinator  
Capital Program Unit  
Mass Transit Administration  
300 West Lexington Street  
Baltimore, Maryland 21201"

and that "[a]ny bids received after that date will not be considered and will be returned to the bidder unopened."

2. At bid opening on October 29 only one bid was received for the 20 - passenger buses and for each of the two school-bus type vehicles. None of these bids was from Appellant. The next day, October 30, at 9:30 a.m. Appellant's sealed bid package was received by Mr. Edwards at 300 West Lexington Street through MTA's interoffice mail. (Tr. 39-40). The bid package was marked to identify the content as bids pertaining to both the 20-passenger bus and school bus type vehicle procurements.

3. By letter dated November 18, 1985, MTA advised Appellant that its bid could not be opened and considered because it had been received after bid opening. Appellant filed a timely protest of this determination with the procurement officer.

4. The delivery of Appellant's bid had been committed to United Parcel Service (UPS) on October 24, 1985. (Tr. 31-32, 35-37; Appellant's Ex. 3). Appellant's bid package (Ex. 3, Agency Report; Appellant's Ex. 1) was prepared at its office in Annapolis and affixed thereto was a gummed address label with the following typewritten address:

Mr. Lester D. Edwards  
Program Coordinator  
Mass Transit Administration  
300 West Lexington Street  
Baltimore, Maryland 21201

However, a line was drawn with pen through the 300 West Lexington Street portion of the address and handwritten along side of it was "moved 1515 Washington Blvd." An X was also drawn through the last digit of the zip code. These changes were made by Mr. Gary Landen, the UPS driver whose route included 300 West Lexington Street and in whose truck Appellant's bid package had been pre-loaded for delivery to that address after pick-up at Appellant's office in Annapolis. (Tr. 10-12).

5. Accompanying Appellant's protest was a UPS address correction slip dated October 28, 1985 and noting an address correction to "1515 Washington Blvd., Balto., Md 21230." Appellant's bid package was apparently delivered to the Receiving and Stores (Purchasing) Department at MTA's Washington Boulevard facility by another UPS employee<sup>1</sup> sometime between 9:00-9:30 a.m. on October 29 (Tr. 40), although it did not arrive at 300 West Lexington Street until 9:30 the next day. The MTA Purchasing Department located at 1515 Washington Boulevard is approximately a 15 minute drive by automobile from 300 West Lexington Street. (Tr. 42-43).

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<sup>1</sup>MTA's premises at 1515 Washington Boulevard are on another UPS route.

6. Written on the bid package in large letters with a magic marker type device are the words "RIGHT AWAY" in red and "PURCHASING" in blue. The record does not reflect the authorship of these markings. Also appearing on the bid package is a UPS identification number and handwritten notations by Mr. Edwards concerning the times and dates of delivery to MTA's Washington Boulevard and Lexington Street addresses.

7. Mr. Landen testified that he routinely delivered approximately 400 packages to 100 different locations and picked up 300 to 400 packages at 40 different locations on an average day. (Tr. 11). He could not recall the circumstances of his delivery to 300 West Lexington Street on October 28, 1985. However, he did acknowledge that he had written the 1515 Washington Boulevard address on the package and noted this address correction (along with two other packages addressed to 300 West Lexington Street) for that day's UPS Irregularity Record. (Tr. 13-23; Appellant's Ex. 2). He testified that he usually made deliveries to 300 West Lexington Street sometime between 11:30 a.m. and 12:30 a.m. He stated that his procedure was to give packages addressed to the MTA facility at 300 West Lexington Street to whomever he first encountered in the MTA reception area on the 4th floor<sup>2</sup> who appeared to be working there and requested them to sign for the package. If such person would not agree to accept the package, Mr. Landen would ask this person what he should do with the package. (Tr. 22-27). However, having no recollection of this particular delivery, he did not know whom he may have requested to sign for the package or who might have told him that the correct address for the package should be 1515 Washington Boulevard.

8. Officer Craig Stewart was the MTA security guard on duty on October 28, 1985. Officer Stewart manned the reception desk in the MTA reception area at 300 West Lexington Street on the 4th floor. He testified that he was not familiar with Appellant's bid package. (Tr. 62). He acknowledged that he had occasionally suggested re-addressing of a package intended for the MTA Purchasing Department at 1515 Washington Boulevard that was addressed to 300 West Lexington Street. (Tr. 62-63). However, he testified that he knew Mr. Edwards and would not have refused to accept Appellant's package addressed as it was. (Tr. 62-66). He further testified that he would not have suggested that a package be redirected to the MTA Purchasing Department at 1515 Washington Boulevard without calling Purchasing first and making inquiry as to where the package should go. (Tr. 63). Officer Stewart's daily report for October 28, 1985 reflects that he arrived at 300 West Lexington Street at 7:00 a.m. and left at 5:00 p.m. and was on duty at the 4th floor reception desk from 7:30 a.m. until 1:10 p.m. and from 1:40 p.m. to 4:30 p.m. (Respondent's Ex. 1).

9. Ms. Sharon A. Conquest, a part-time clerk typist working in the MTA Personnel Department, was on duty at her desk in the 4th floor reception area on October 28, 1985. She testified that she normally accepts packages addressed to the Personnel Department. To be of assistance, she would also accept packages if Officer Stewart was away from his desk.

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<sup>2</sup>MTA occupies floors 4-6 at 300 West Lexington Street. Hutzler's, a department store, occupies floors 1-3. (Tr. 73).

Ms. Conquest testified that she would not have refused to accept a package addressed to MTA if the person noted on the address was either known to her or listed on the MTA employee roster. She would then call such person to advise that a package had arrived. (Tr. 71-73). Her testimony regarding Appellant's bid package was as follows:

Q. Now, before you, Miss Conquest, is Exhibit Number 1, being the sealed bid of Patco. Can you identify that?

A. No.

Q. If that package would have been delivered to you for acceptance, would you have accepted it?

A. Not before looking on our employee run down to find out if indeed Mr. Edwards was an employee. And if so, I would call his department and let them know that there was a delivery here for him, would he like for me to sign or would he like to come sign or should I send the UPS person or whoever the courier is to his department for him to sign. (Tr. 71).

10. The record does not support a finding that either Officer Stewart or Ms. Conquest were involved in the misdirection of Appellant's bid package.

11. From the determination of the procurement officer that Appellant's bid could not be considered because it was untimely, Appellant takes this appeal.

#### Decision

Appellant's bid was late since it was not received in the place designated in the solicitation until after the time set for receipt of bids. COMAR 21.05.02.10A. COMAR 21.05.02.10B provides with respect to late bids that:

"A late bid . . . may not be considered. Exception[s] may be made when a late bid is received before contract award, and the bid . . . would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees."<sup>3</sup>

Appellant claims that an exception should be made regarding consideration of its late bid asserting that the evidence demonstrates a probability that its bid was received late due to the action of an employee of MTA and but for such action the bid would have been timely received. MTA disagrees on grounds that misdirection of Appellant's bid cannot be traced to the action or inaction of MTA personnel directing the procurement activity or their employees. Both

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<sup>3</sup>This language concerning treatment of late bids appears in substantially the same form in the RFB except that the RFB language uses the words "will not be considered" instead of "may not be considered." RFB General Provisions, page GP-1.

parties look to this Board's analysis of COMAR 21.05.02.10B in American Air Filter Co., MSBCA 1199 (November 19, 1984) involving a University of Maryland (University) procurement as supportive of their position.

American Air Filter Co. involved the attempted hand delivery of a bid by courier. The Appellant in American Air Filter Co. had either not received or misplaced the bid return envelope which contained the University address for bid opening that was supposed to accompany each bid package. Appellant made a call to the telephone number listed in that Invitation for Bids (IFB) (as changed by addendum) to ascertain the correct address for hand delivery of the bid by courier service. The unidentified person to whom Appellant spoke gave an incorrect address. This Board found that this person was neither the procurement officer or any other person authorized to respond on his behalf to questions regarding the IFB. Regarding Appellant's contention that the University's actions were such as to excuse the lateness of its bid pursuant to COMAR 21.05.02.10B we said:

Although the University alleges that Appellant contributed to the lateness of its bid by failing to ascertain the correct address from an authorized procurement representative, we can't agree. COMAR 21.05.02.01B(1) requires that an IFB set forth the address where bids are to be delivered. Here the IFB gave only an address suitable for the mailing of bids. Those wishing to hand deliver bids and/or attend the public opening were not given a room number or building name. Under such circumstances, a reasonable person would call the University's Purchasing Department at the phone number listed in the IFB. This phone number, incidentally, was considered important enough by University procurement officials, that they noted its correction by addendum to the IFB.

Appellant has established by telephone records that it called the phone number set forth in the addendum to the IFB on the day before bid opening and during normal office hours. There would be no logical reason for Appellant to have transmitted its bid to the Central Receiving Warehouse Building unless a University employee provided it with that address. Despite the fact that Appellant did not ask to speak with the University procurement officer or his authorized representative, we cannot say that his actions were negligent or that the University should not be held responsible for the confusion. Compare Department of General Services v. Cherry Hill Sand and Gravel Company, Inc., 51 Md. App. 299 (1982).<sup>4</sup>

<sup>4</sup>Despite this finding, the Board denied the appeal stating that:

"Notwithstanding the foregoing finding, Appellant has failed to establish that the lateness of its bid was attributable solely to the incorrect address given it by University employees. In this regard, Appellant presented no evidence showing when Federal arrived on campus. If Federal arrived at the wrong address after 11:00 a.m., the bid would have been late under any circumstances. Similarly, if Federal arrived on campus well before the 11:00 a.m. bid opening, Federal's actions may have contributed to the lateness of the bid. The question becomes difficult only if Federal arrived at the wrong address shortly before 11:00 a.m. and did not have sufficient time to reach the correct site for bid opening by the appointed time. Given that the bid ultimately

Appellant, herein, first argues that the evidence demonstrates that the most probable explanation for why its bid was re-directed to 1515 Washington Boulevard is that Mr. Landen received such instruction from MTA personnel directing the procurement activity or their employees and thus the misdirection falls within the exception set forth in COMAR 21.05.02.10B. As indicated in our opinion in American Air Filter Co., however, Appellant bears the burden to demonstrate that the late bid falls within the exception. In American Air Filter Co., we held that the State's conduct brought it within the exception by finding that the bidder was entitled to rely on the address (albeit erroneous) given by whomever responded to its telephone call to the number listed for such purposes in the University's IFB. In other words, whoever answered the University phone was constructively held to be a University employee either directing the procurement activity or an employee of such person since the IFB in that procurement indicated that the phone number was that of University procurement personnel to whom questions about the procurement should be directed.

Here Appellant was required to demonstrate with reasonable certainty that the misdirection was caused by State personnel directing the procurement activity or their employees at the time it physically attempted delivery. This it has not done. There is no evidence that misdirection was caused by Mr. Edwards or any other MTA employee directing the procurement activity. According to the testimony of Officer Stewart and Ms. Conquest, employees of persons directing the procurement activity<sup>5</sup> and the persons most likely to have caused misdirection, a package addressed like Appellant's would have been accepted by them and not re-directed to 1515 Washington Boulevard. Conversely, Mr. Landen's testimony was that his procedure was to give a package addressed to 300 West Lexington Street to whomever he first encountered in the MTA reception area on the 4th floor who appeared to be working there and ask for that person to sign for it. This does not give us any assurance that such persons would be "State personnel directing the procurement activity or their employees." Indeed, if we were to approve such procedure as evidencing successful delivery, we believe it might give rise to some concern respecting the integrity of the State's bidding procedures under its established procurement system. See: The Tower Building Corp., MSBCA 1057 (April 6, 1982) at pp. 12-14. Accordingly, the appeal is denied on this ground.

As an alternate ground for its appeal, Appellant argues that delivery of Appellant's bid package (clearly marked as such) to the Purchasing Department at 1515 Washington Boulevard between 9:00 - 9:30 a.m. on October 29,

was not delivered properly until 11:53 a.m., however, it appears unlikely that Federal was at the erroneous address prior to 11:00 a.m. In any event, Appellant had the burden to establish this fact. Compare Parmatic Filter Corp., Comp. Gen. Dec. B-209296, March 8, 1983, 83-1 CPD ¶234; Blount Brothers Corp., Comp. Gen. Dec. B-212788, October 21, 1983, 83-2 CPD ¶521."

<sup>5</sup>The Board concludes with certainty that Officer Stewart is a person included within the exception for "State personnel directing the procurement activity or their employees." We have some doubt whether Ms. Conquest, whose principal duties were as a part-time clerk typist in the Personnel Department, should be so included, but we have treated her as if included for purposes of this decision.

1985, within an hour to thirty minutes of the 10:00 a.m. bid opening, left sufficient time for its re-routing by MTA personnel to 300 West Lexington Street, 15 minutes away by automobile, in time for the bid opening. Therefore, it asserts that the lateness of its bid should be excused by the failure of MTA personnel at 1515 Washington Boulevard to deliver the package by 10:00 a.m. to the appropriate location at 300 West Preston Street. The record is devoid, however, of any evidence concerning how packages delivered to the MTA Purchasing Department are handled,<sup>6</sup> and there is no evidence that persons working at the Purchasing Department are "State Personnel directing the procurement activity or their employees." Therefore, Appellant has failed to meet its burden to show that the exception should apply and its appeal is denied on this ground as well.

Finally, Appellant argues that the exception set forth in COMAR 21.05.02.10B for consideration of late bids should be liberally construed because of the use of the words "may." The lateness of its bid should thus be excused it asserts because it attempted to make timely delivery in good faith. In the context of COMAR 21.05.02.10B, however, we believe that "may" is used as if it meant shall and is not intended to permit an agency to excuse a late bid, at its discretion based on its perception of a bidders bona fides, unless the specific exception is demonstrated to exist. See: The Tower Building Corp., supra. Accordingly, the appeal is denied on this ground as well.

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<sup>6</sup>The record reflects that UPS delivered 26 packages to 1515 Washington Boulevard on October 29, 1985. (Ex. 8, Agency Report; Tr. 44-52).

THE FIRST PART OF THE BOOK IS A HISTORY OF THE  
CIVILIZATION OF THE MIDDLE EAST FROM THE  
EARLIEST TIMES TO THE PRESENT. THE SECOND  
PART IS A HISTORY OF THE ISLAMIC WORLD  
FROM THE EARLIEST TIMES TO THE PRESENT.  
THE THIRD PART IS A HISTORY OF THE  
CHRISTIAN WORLD FROM THE EARLIEST  
TIMES TO THE PRESENT. THE FOURTH  
PART IS A HISTORY OF THE MODERN  
WORLD FROM THE EARLIEST TIMES TO  
THE PRESENT.

THE FIFTH PART IS A HISTORY OF THE  
FUTURE OF THE WORLD FROM THE EARLIEST  
TIMES TO THE PRESENT. THE SIXTH  
PART IS A HISTORY OF THE  
UNIVERSAL HISTORY OF THE  
WORLD FROM THE EARLIEST  
TIMES TO THE PRESENT.

THE SEVENTH PART IS A HISTORY OF THE  
UNIVERSAL HISTORY OF THE  
WORLD FROM THE EARLIEST  
TIMES TO THE PRESENT.