

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of PINNACLE ELECTRONIC )  
SYSTEMS, INC. )

) MSBCA Docket No. 1967  
)

Under MAA Contract Nos. )  
MAA-CO-96-014 )  
MAA-MC-97-005 )

September 30, 1996

Responsiveness - Omission of the penal sum in a bid bond required by the invitation for bids is a material defect rendering the bid non-responsive.

APPEARANCES FOR APPELLANT

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APPEARANCE FOR INTERESTED PARTY  
LOCKHEED MARTIN

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Great Neck, NY

OPINION BY BOARD MEMBER STEEL

This matter came before the Board on the timely appeal of Pinnacle Electronic Systems, Inc. (Pinnacle) from the final decision on Pinnacle's protest of the Maryland Aviation Administration's rejection of Appellant's low bid because the required bid bond failed to specify a penal sum.

Findings of Fact

1. On May 16, 1996, The Maryland Aviation Administration (MAA) received technical information packages (Envelope A) and sealed bid cost proposals (Envelope B) under MAA

Contract Nos. MAA-CO-96-014 (Installation and Upgrade) and MAA-MC-97-005 (Maintenance) for the Baltimore/Washington International Airport (BWI) Controlled Access Security System (CASS) and Federal Inspection Services (FIS). The construction phase involves the expansion and replacement of the existing CASS system throughout the BWI Airport complex, as well as the new International Terminal. The maintenance phase involves provision of personnel, maintenance and repair work for a five year period following construction acceptance.

2. At a pre-bid meeting on April 16, 1996, bidding requirements were discussed, including the requirement of GI 1.02, Technical Provisions, Volume 1, that a single Bid Guaranty/Bid Bond issued for a minimum of 5% of the total price of both contracts be submitted. Addendum No. 1, issued April 24, 1996, contained the minutes of the pre-bid meeting, including reference to the 5% bid bond requirement, and Addendum No. 2, issued May 7, 1996, contained Revised Bid Forms.

Pinnacle acknowledged receipt of Addendum Nos. 1 and 2.

3. The technical information packages contained in Envelope A were reviewed by MAA's project engineer and design consultant, and each of the prospective bidders was requested to submit supplemental information on June 4, 1996. Thereafter each bidder's technical package was determined to be acceptable.

4. On June 25, 1996, Envelope B -- Bid Cost Proposals -- were publicly opened at 4:15 p.m.<sup>1</sup> Appellant submitted the lowest bid; however the entry of a penal sum in the required bid bond was omitted. That portion of the bid bond was left blank. MAA announced the omission of the penal sum in the Bid Guaranty contained in Pinnacle's bid at the bid opening.

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1 The bid results were as follows:

<u>Company</u>	<u>Combined Bid Price</u>
Pinnacle Electronic Systems, Inc.	\$ 2,749,475
Lockheed Martin Tactical Defense Systems	\$ 3,391,242
LaCorte E.C.M.	\$ 3,539,772
Diebold, Inc.	\$ 3,860,649
Sensormatic	\$ 4,712,777

The original engineer's estimate for cost of this work was \$1,666,700. After bids were received, the engineer's estimate was revisited because it had not taken into account the cost of performing the work at an operating airport. On July 18, 1996, a revised engineer's estimate of \$2,915,200 was received by MAA, and a determination was made by MAA not to resolicit bids.

5. On the same day, Lockheed Martin Tactical Defense Systems (Lockheed) wrote to MAA stating that Pinnacle's bid was non-compliant in that a fully-executed bid bond was not provided. Pinnacle submitted a letter on June 26, 1996 attaching correspondence noting that the omission was a clerical error.

6. Thereafter, and upon advice of counsel, the Procurement Officer notified Appellant that he deemed the omission of the penal sum to be a material defect, and that therefore Appellant's bid was rejected as non-responsive, citing prior MSBCA decisions in H.A. Harris, Inc., MSBCA 1109, 1 MSBCA ¶38 (February 4, 1983), and Corun & Gatch, Inc., MSBCA 1490, 3 MSBCA ¶240 (February 27, 1990).

7. On July 15, 1996, Appellant timely filed a bid protest regarding the rejection of its bid, arguing that its surety was "unambiguously liable for the requisite sum at the time Pinnacle submitted its bid and at all times thereafter," and stating that the circumstances of its bid were distinguishable from those pertaining to the Board determinations cited.

8. On July 23, 1996, the MAA rejected Appellant's protest, and this timely appeal followed. On August 6, 1996, the MAA issued a notice of Recommended Award to the next lowest bidder, Lockheed.

### Decision

Section 13-208 of the Maryland State Finance and Procurement Code sets forth the following with regard to bid security:

#### **§13-208 Proper Security**

(a) *In General.* -- 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**. (emphasis supplied.)

(b) *Exceptions for deficiencies.* -- A procurement officer may accept a bid or proposal that is accompanied by bid security in less than the amount required if:

(1) the procurement officer determines that:

(i) the deficiency in the amount is insubstantial; and

(ii) acceptance of the bid or proposal would be in the best interests of the State; and

(2) the procurement officer further determines that:

- (i) the bid or proposal was the only one submitted and there is no time for rebidding;
- (ii) the bid security became inadequate as a result of the correction of a mistake in the bid or proposals or as a result of a modification in the bid or proposal in accordance with applicable regulations, and the bidder or offeror increased the amount of bid security to required limits within 48 hours after the correction or modification; or
- (iii) after consideration of the risks involved and the difference between the lowest bid and the next lowest bid, it would be fiscally advantageous to the State to accept the lowest bid or proposal.

Appellant argues that under §13-208(b), the procurement officer must perform a balancing test -- weighing the risks involved in accepting a blank bid bond against the price difference between the low and second-low bid. We disagree. Under §13-208, the Procurement Officer can only perform such a balancing test, i.e., only has discretion to perform the evaluation set forth under §13-208(b), when under §13-208(a) he has first satisfied himself that the security (bid bond) is proper. If the bid bond is not "proper security", the procurement officer has no discretion, and "shall reject a bid or proposal that is not accompanied by proper security." §13-208(a).

Bid security is defined by Md. State Fin. & Proc. Art. §13-207 as cash or a bond provided by a surety company authorized to do business in this State. Where a bidder elects to provide a bond in lieu of cash, that bid bond, pursuant to the IFB, must be evidenced by an executed bid bond form. That form was here provided with the initial bid package as well as Addendum 1 issued on April 24, 1996. That document provides a blank space within which a penal sum must be entered.

Thus, in order to be a "proper" bid bond, the bond must evidence that a surety is bound to provide at least 5% of the bid or price proposal (§13-207(b)(2)). Where there is no penal sum entered on the bid bond, the document is not sufficiently executed to bind the surety, and thus, is not a proper bid bond. This issue was discussed at length in Corun & Gatch, Inc., *supra*, an appeal on all fours with the essential facts of this case.

In that appeal, a similar 5% bid security was required, and at bid opening, Appellant's bid was announced as irregular due to the fact that the enclosed bid bond did not indicate a penal sum either by dollar amount or by a percentage figure. The absence of a penal sum was the only apparent irregularity in the bid bond. *Id.* at 2. The second low bidder filed a protest challenging the

responsiveness of Appellant Corun's bid, and Corun argued that the absence of a penal sum did not render the bid non-responsive. In Corun (as here), the surety apparently agreed orally or in other documents to act as surety for the contract at issue in a penal sum required by the bond, and the bid bond was signed by a person authorized to bind the surety. However, the bid bond submitted at bid opening did not have an amount entered in the blank where the penal sum was to be inscribed. The next day, the surety provided a corrected bid bond showing a penal sum of "5% of amount bid,"<sup>2</sup> and acknowledged its obligation under the original bid bond submitted at bid opening.

The Board in Corun, *supra*, found that Appellant Corun's bid was properly rejected as non-responsive due to a material defect, the absence of a penal sum in its bid bond, citing §13-208 and H.A. Harris, Inc., MSBCA 1109, 1 MICPEL ¶38 (1983).<sup>3</sup> The Board reiterates the findings of Harris and Corun that under Maryland's Procurement Law, the surety's intention to be bound must be evidenced on the face of the bid document, particularly in the absence of Maryland case law construing the enforceability of a bid bond where the penal sum is omitted. See also, Madigan Construction Co., Inc., MSBCA 1350, 2 MICPEL ¶162 (1987).

In a case cited by Appellant, R&B Builders Inc. v. School District of Philadelphia, 202 A.2d 82 (Pa.1964), the Pennsylvania Supreme Court, sitting in equity, found that an omission of a penal sum in the bid bond was not material because it found that the Surety was bound for the full amount of the difference between the low bid and the next low bid by specific language contained in the bid bond in question. By contrast, a review of the bid bond used in this solicitation does not satisfy this Board that the surety is bound absent entry of a penal sum in the bond.

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<sup>2</sup> Appellant has raised the issue that the second low bidder in the instant appeal likewise entered "Five percent of amount bid" in the blank where a penal sum is to be entered on the bid bond, despite the fact that the bid bond indicates that dollar amounts should be written out. The Board finds that since the percentage/dollar amount can be specifically determined from the bid documents received at bid opening themselves, the surety is on its face bound by the bid bond submitted at bid opening, and the bid bond submitted by the second low bidder, Lockheed Martin, is not non-responsive. By contrast, Appellant's bid bond penal sum cannot be determined from the bid bond and the bid amount without a leap of faith. See discussion of reading contract documents together, pages 6-7, *infra*.

<sup>3</sup> H.A. Harris' bid bond also failed to include any penal sum on the bid bond. The Corun Appellant argued that its case was different from Harris because apparently the Harris surety *intentionally* left the penal sum blank to be filled in by the bidder prior to bid opening, and in the Corun case the person executing the bid bond for the surety *mistakenly* left the penal sum blank. The Board found this factual difference immaterial. In the instant appeal, Appellant avers that the failure was inadvertent and a clerical error. As in Corun, the Board finds that the controlling fact is that the bid bond is silent as to penal sum, not the underlying reason therefor.

Appellant argues further that the bid documents should be read in harmony with each other, and that if the Board were to do so, that it would be obvious that the surety was bound for 5% of the bid amount. In support of its argument, Appellant cites State Hwy Administration v. Transamerica Insurance Co., 367 A.2d 509, (Md. 1976), where the Maryland Court of Appeals reiterated that “the cardinal rule in the interpretation of bonds, as in the interpretation of all written contracts, is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles”, and found that bonds should be read in harmony with the contracts they refer to. At issue in that case was the extent of liability of the surety under a performance bond. However, in the instant appeal, a contract has not yet been entered into between the State and Appellant, and the bond at issue is a bid bond, not a performance bond, one cannot ascertain the surety’s intention from the face of the bond and there is a specific statutory requirement that proper security be submitted with the bid.

Under those circumstances, this Board finds that §13-208(a) is controlling, and that the Board cannot look beyond the terms of the bid bond and bid itself. In other words, although the Procurement Officer and this Board could presume that the document at issue is a bid bond for a bid in the amount of \$2,749,475, the percentage of the bid the surety has bound itself to is not apparent from review of the bid documents as filled out and submitted by the bidder. See likewise, Castle Construction Co. v. Huttig Sash & Door Co., 425 So.2d 573 (Fla. 1983); Noland Company v. West End Realty Corporation, 147 S.E.2d 105 (Va. 1966), cases involving interpretation of performance or payment bonds after contract formation, not bid bonds.

While the risk in this case of default and subsequent refusal to honor the bond might be minimal, as in Corun, the fact that the surety’s obligation is uncertain is controlling in a determination that the bid bond as submitted is not “proper security” for the purposes of §13-208(a). Since Appellant’s bid was not accompanied by proper security, under §13-208(a), the procurement officer properly rejected Appellant’s bid.<sup>4</sup>

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<sup>4</sup> The language of COMAR 21.06.07.02 supports this conclusion:

A. If a contractor fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive and rejected. . . .

B. Failure to Comply. If a bid does not comply with the security requirements of this regulation, the bid shall be rejected as nonresponsive, unless the procurement officer determines that the deficiency in the amount of security provided is insubstantial and acceptance is in the best interests of the State, and that

Once a determination has been made that the bid bond does provide a proper security, the procurement officer may then go on to apply the balancing test implied in §13-208(b) and COMAR 21.06.07.02B, and if there exists any discrepancy in the amount<sup>5</sup> of the bid bond, make a determination that it is or is not “insubstantial”. Thus, where a bid bond erroneously sets forth a bid bond amount which is 4.9% rather than 5% as required by the invitation for bid because the bidder did not take into consideration amendments or add-ons to the contract, a procurement officer must first determine within his discretion that the discrepancy was insubstantial, before allowing amendment of the amount.

While the procurement officer found that he did not have authority to move on to and consider the provisions of §13-208(b), if he had, he would have had to make the same determination, because the Board finds that a difference of approximately one hundred and thirty seven thousand dollars (\$137,473.75) is not insubstantial for the purpose of §13-208(b).

Finally, Appellant attempts to distinguish itself from §13-208(a) and Corun and Harris, supra, by arguing that since the difference between its low bid and the next lowest bid is \$641,000, a figure five times the amount recoverable under the bid bond, there is a compelling State interest to disregard §13-208(a) and award to Appellant. Appellant poses the question as follows: does §13-208 permit a State procurement officer to waive a low bidder’s inadvertent failure to insert the penal sum in a bid bond form when a substantial monetary advantage will accrue to the State by acceptance of such a bid? While the Board, like the procurement officer, is dismayed that the State will not be able to accept the lowest bid, it believes it has no choice but to correctly apply the law

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(3) After consideration of the risks involved and the difference between the lowest bid and the next lowest bid, fiscal advantage could reasonably be expected to accrue to the State from acceptance of the lowest bid. (Emphasis supplied).

It is also noted that the Corun decision was written in 1990, since the latest amendment of the General Procurement Law which resulted in the current §13-208.

<sup>5</sup> In the instant case, there can be no discrepancy in the amount to evaluate under §13-208(b), when there is no amount stated.

and answer Appellant's question in the negative. A legislative amendment<sup>6</sup> would be necessary to §13-208(a) to permit such waiver.

Accordingly, the appeal is denied.

Wherefore, it is Ordered this 30th day of September, 1996 that the Appeal is denied.

Dated: September 30, 1996

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Candida S. Steel  
Board Member

I concur:

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Robert B. Harrison, III  
Chairman

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Randolph B. Rosencrantz  
Board Member

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<sup>6</sup> Or amendment of the bid bond form to expressly state that a bid bond blank as to penal sum means that the surety is bound to the extent of 5% of the bid price, so that consideration is apparent in the bid bond itself.



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 1967, appeal of Pinnacle Electronic Systems, Inc., under MAA Contract Nos. MAA-CO-96-014 and MAA-MC-97-005.

Dated: September 30, 1996

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Mary F. Priscilla  
Recorder

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