

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of SOLON AUTOMATED SERVICES, INC.)
Under UMBC Request to Bid No. BC 12567H) Docket No. MSBCA 1046

January 20, 1982

Jurisdiction — Where a bid protest is filed, the Board has jurisdiction to consider whether the procurement officer has adhered to the law and regulations, or otherwise has exercised reasonably the discretion provided therein.

Jurisdiction — While the Board is not empowered to compel a State agency to act or refrain from acting in a particular manner, it may issue a declaratory ruling, pursuant to Art. 41, Md. Ann. Code, § 250, which is binding on the agency in the absence of an appeal to the courts. Where a State procurement officer disregards the declaratory ruling, an interested party may request the appropriate court to enforce the Board's ruling.

Jurisdiction — Where a number of issues are resolved by the procurement officer in his final decision, the filing of an appeal concerning one of these issues will not preclude other interested parties from challenging the remaining determinations made by the procurement officer.

Jurisdiction — Once a timely appeal is filed, other interested parties also may challenge the procurement officer's final decision, notwithstanding their failure to file an appeal within the time provided by law.

Responsiveness — Where a laundry service contract was to be awarded to the bidder who offered the highest percentage return of revenue received from the use of washer and dryer machines required to be priced at \$.50 each per use, and a party submitted a bid based upon a different pricing structure, that bid was determined to be non-responsive.

Contracts - Formation — When a party seeks to prove the existence of an implied contract, it must show that an agreement was made, in whatever form, by persons having the capacity to bind each contracting party.

Equitable Estoppel — Where Appellant was unable to prove that it had relied to its detriment upon a statement or directive issued by an authorized representative of the State, the doctrine of equitable estoppel was determined to be inapplicable.

Rejection of All Bids — The procurement officer's decision to reject all bids and resolicit was determined to be arbitrary since it was not in the State's financial or best interests to so act. In determining whether it was in the State's best interests to reject all bids, the procurement officer should have weighed the benefits to be derived by rejecting all bids against the harm caused to the procurement system.

Advertisement of Procurement — Although both Art. 21, Md. Ann. Code, § 3-202(c) and COMAR 21.05.02.04B require a notice of invitation for bids to be published in the Maryland Register 30 days before bid submission date, that requirement was determined to be directory and not mandatory". Further, since adequate competition was obtained and the failure to comply with the notice requirement was inadvertent and not intended

to restrict competition, the failure to comply with the law was not fatal to the procurement.

Amendment of IFB-Informal — Although formal amendments of an IFB are preferred, an informal amendment may be made where good cause is shown and no real prejudice is demonstrated. The State here was permitted to informally amend the time set for bid opening in the IFB.

Late Bids — Bids received after the time set in the IFB are late and cannot be considered even if submitted before all other bids on a procurement are opened.

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OPINION BY CHAIRMAN BAKER

This appeal is from a final decision issued by Mr. Leland R. Beitel, the procurement officer and Director of Business Services for the University of Maryland Baltimore County (UMBC), denying a bid protest by Macke Laundry Services and affirming his preliminary determination that Macke's bid, submitted pursuant to UMBC's Request for Bids No. 12567H, was non-responsive. In denying Macke's bid protest, Mr. Beitel concomitantly stated that UMBC planned to reject all bids and readvertise the contract for policy reasons. Solon Automated Industries, Inc., the apparent "high" bidder¹ under the initial solicitation and an interested party in the bid protest proceedings, filed this appeal as a result of Mr. Beitel's decision to reject all bids and resolicit.

During the proceedings before this Board, Macke Laundry Services participated as an interested party. In addition to presenting arguments concerning the propriety of the procurement officer's rejection of all bids, Macke requested this Board to consider the bid protest grounds which it had presented previously to the procurement officer. This request was objected to by Solon Automated Industries on the basis that it was untimely. Further, UMBC has raised a number of issues concerning Solon's right to appeal the determination to resolicit. These jurisdictional issues along with the

¹In this instance, where the contract results in revenue to the State, award is made to the "highest" bidder, i.e., that bidder who promises the greatest return of revenue.

substantive questions pertaining to Mr. Beitel's procurement actions are before the Board for resolution.

I. FINDINGS OF FACT

A. Development of Bid Documents

UMBC provides on-campus housing for students in three dormitories and two apartment complexes. As a service to the residents of these buildings, UMBC's Residence Life Office maintains a number of utility rooms containing, among other things, coin-operated washer/dryer equipment. This equipment traditionally has been provided to the resident students pursuant to a contractual arrangement between UMBC and a commercial vendor who pays UMBC a percentage of the gross revenues received from the machines in return for the exclusive right to place them in the university-owned dormitories and apartments.

In January 1981, UMBC's Vice-Chancellor for Administrative Affairs expressed a desire to solicit bids for a new laundry service contract to become effective upon the July 31, 1981 expiration of the existing contract with Macke Laundry Services, Inc. Macke had been performing under this contract for the previous 5-1/2 years and the UMBC Vice-Chancellor was anxious to obtain competition under a new solicitation to increase the financial return to UMBC. This revenue was important to UMBC as it was used to finance all the operations of its Residence Life Office. Under the contract with Macke Laundry Services, prices had been established at \$0.35 for both washer and dryer use, with UMBC receiving 57% of the gross revenues produced by these machines. In analyzing this price/revenue structure during the spring of 1981, Mr. Christopher Keating, UMBC's then Assistant Director of Residence Life for Environment, concluded that present revenues would be insufficient to cover continually rising utility costs. On the assumption that a new contract would not provide an increase to UMBC in the percentage return of gross revenues generated by washer and dryer usage, Mr. Keating recommended to Mr. Beitel that prices be increased to \$0.50 per wash and \$0.50 per 60 minute cycle for the dryer under the new contract. Mr. Beitel accepted this recommendation and the invitation for bids was prepared to reflect this new pricing structure. The procurement package thereafter was transmitted to Mr. Joseph Hunter, UMBC's Director of Purchasing, who distributed it to six firms on July 15, 1981.

The procurement package (solicitation) consisted of a one-page bid sheet, a three-page invitation for bids (IFB), and an 11-page contract. The scope of work therein was described, in part, as follows:

"Contractor shall have the sole and exclusive right, permission, license, and privilege of providing personal clothes washer and dryer services within Residence Halls located on the UMBC campus, at locations requested by the University and provided by the Contractor. The scope of the operation may be modified by mutual agreement between the two contracting parties, when deemed advisable because of changing needs. (See Exhibit 1.)

"The Contractor is required to provide washer and dryer services at the facilities as cited in Exhibit 1 unless the scope of the operation is modified by mutual agreement between the

two contracting parties. Such scope changes may occur due to the changing needs of the University community."

Exhibit 1 to the contract (page 9) showed the number of washers and dryers required at each residence hall and apartment complex. It indicated that a total of 39 washers and 43 dryers would be necessary to meet UMBC's requirements.

The contract was to run from August 1, 1981 through July 30, 1984 and competitive sealed bids were to be opened on July 27, 1981 at 11:00 a.m. In submitting their bids, bidders were obligated to acknowledge "...complete understanding of the requirements of the contract and familiarity with the physical conditions under which the contract is to be performed." Bidders also were cautioned that:

"The University reserves the right to reject any and all bids, to waive informalities in bidding, and to select as a Contractor the Bidder whom in UMBC's estimation will serve the best interests of the University. Any contract resulting from acceptance of a bid will be subject to approval by the Chancellor, University of Maryland, Baltimore County campus." (Exh. 3, p. 1)

B. Opening of Bids

On July 27, 1981, prior to the scheduled bid opening, Ms. Kathleen Chiodi, an account executive with Solon Automated Industries, phoned UMBC's Joseph Hunter and informed him that she would be late for the bid opening because of traffic congestion. When the phone call was received, the representative of another bidder, Coin Operated Services, was present in the room and he was asked if there would be any objection to delaying the bid opening until Ms. Chiodi arrived. He raised no objection. At 11:00 a.m., the original appointed time for bid opening, only one sealed bid had been received by Mr. Hunter. That bid had been mailed to UMBC by Macke Laundry Services. The representative of Coin Operated Services, while present for the bid opening, informed Mr. Hunter that his company's bid had been transmitted by registered mail from his home office two or three days earlier. Ms. Chiodi arrived with Solon's sealed bid by 11:30 a.m. She was asked whether there was any objection if UMBC received a telephone bid from Coin Operated Services in her presence. Ms. Chiodi did not object and the Coin Operated Services' quote was received in this manner prior to the opening of the two sealed bids. The three bids were recorded as follows:

Coin Automated Laundry Equipment Co.	61.24%
Macke Laundry Services, Inc.	67.40%
Solon Automated Services, Inc.	68.50%

Since Solon was the apparent "high" bidder, Mr. Hunter advised Ms. Chiodi to make an appointment with UMBC's housing representatives to view the laundry utility rooms.

C. Solon's Post-Bid Actions

On July 28, 1981, Solon's Ms. Chiodi made arrangements with UMBC's James Hoppa, the new Assistant Director of Residence Life for Environmental Affairs, to visit the utility rooms where washer/dryer equipment was to be placed. The following day, Ms. Chiodi and Solon's service manager, Mr. William Diacont, were shown three residence areas which Mr. Hoppa considered to be representative as to the various types of facilities provided by UMBC. The first area observed consisted of a traditional

dormitory utility room which had free-standing washers and dryers and conventional electrical, mechanical, and plumbing installations. Mr. Diacont concluded that he would have no difficulty in placing his equipment in this and similar utility rooms. Solon's representatives next were taken by Mr. Hoppa to the West Hills Apartments complex. At this location, stackable dryers were in place. Solon's representatives explained that they ordinarily did not utilize stackable dryers and Mr. Hoppa was asked whether the vending machines, an ice machine, and a pay telephone contained therein could be relocated to accommodate their free-standing dryers. Mr. Hoppa stated that he would look into it. The final location visited was the new Terrace Apartment complex which had not previously been equipped with any laundry machines. The electrical, plumbing, and mechanical installations in this room clearly anticipated stackable dryers. Further, after measuring the room, a question arose as to whether the required number of dryers could fit therein if free-standing units were installed. Mr. Diacont, on his own, after leaving Mr. Hoppa, concluded that Solon would have to furnish and install stackable dryers in the apartment complexes in order to assure compatibility with UMBC's facilities.

Solon's representatives had based the company's bid on the planned use of new, free-standing washers and dryers. Prior to preparing this bid, Mr. Howard Lockhart, the regional vice-president for Solon, visited the campus to observe existing laundry facilities. While he did not attempt to gain admission into the locked apartment utility rooms to see the mechanical/ electrical installations, he did look through a window at the West Hills complex and notice stacked dryers in use. Mr. Lockhart nevertheless concluded that Solon could place free-standing dryers within this room. Although the contract documents expressly did not require stacked dryers, Article XIX, paragraph C of the contract did mandate that:

"The Contractor shall install all new energy-efficient, heavy-duty washers and dryers of a type acceptable to and compatible with the University facility space in which they will be located...." (Underscoring added.)

On the afternoon of July 28, 1981, Mr. Lockhart called his office and learned from Mr. Diacont that stackable dryers would be necessary in the apartment complexes. Mr. Lockhart directed Mr. Diacont to purchase the stackable dryers and have them ready for installation by the August 1, 1981 contract start date. An order for eight stackable units (16 dryers) immediately was placed and the dryers were received by Solon on August 3, 1981. In addition to this purchase, Mr. Lockhart testified that 43 free-standing dryers and 39 washers previously had been ordered for installation at UMBC. Solon's total expenditure for washers and dryers, in anticipation of contract award was approximately \$43,000. Mr. Lockhart testified that he believed it essential to order this equipment before the contract formally was awarded in order to assure installation by August 1, 1981.

D. UMBC's Post-Bid Actions

Approximately three or four days after bid opening, Mr. Hunter received a call from Mr. Leon Wolfe of Macke Laundry Services inquiring as to the identity of the high bidder for the washer/dryer contract. During this conversation, Mr. Hunter was apprised that Macke's bid contained the following footnote:

"Note: The above monthly percentage (67.4%) is based upon a \$.35 wash cycle and \$.35 dry cycle/ 60 minutes. If UMBC decides to charge \$.50 per wash cycle and

leave the dry cycle at \$.35, Macke will raise the percentage payment to 69%...."

After studying this paragraph, Mr. Hunter concluded that Macke's bid was the highest of those received and, on August 6, 1981, submitted his recommendation to Mr. Beitel that it be accepted. Mr. Beitel, however, determined Macke's bid to be non-responsive since the percentage quoted was based upon prices other than the \$.50 wash, \$.50 dry mandated by exhibit 3 to the contract. Macke, upon learning that its bid had been determined to be non-responsive, filed a prompt bid protest with Mr. Beitel who subsequently denied it in a written final decision dated September 3, 1981.

Sometime in August 1981, during consideration of Macke's bid protest, UMBC's Christopher Keating and James Hoppa met to discuss the bids received under the laundry services solicitation. Both men expressed surprise at the high percentage returns offered by the bidders. Mr. Keating testified that had he realized what the percentage return to UMBC would be under the new contract, he never would have recommended raising the price to students. At a meeting in late August 1981, Mr. Hoppa and Mr. Keating informed Mr. Beitel that if the contract could be rebid with prices set at the existing \$.35 charge for both washers and dryers, it appeared that UMBC still would derive a return of revenue sufficient to meet the rising cost of providing laundry services to its students. During this meeting, Mr. Beitel also was apprised of a number of errors in the original procurement process. The deficiencies identified included the submission of two bids subsequent to the scheduled 11:00 a.m. bid opening, the failure of UMBC to advertise the IFB in the Maryland Register and the omission of a pre-bid conference to show bidders the various laundry rooms.² Mr. Beitel testified that these errors were not realized earlier because both he and his staff were just becoming familiar with the new Maryland procurement law and regulations at the time of this procurement. Further, because (1) the proper purchasing procedures were not followed, and (2) the pricing structure for machine usage was higher than necessary to provide adequate revenue, Mr. Beitel testified that he decided to reject all bids and resolicit the laundry services contract. Accordingly, a written contract with Solon Automated Industries was not executed.

E. Macke's Bid Protest

Macke's letter to Mr. Beitel dated August 12, 1981 alleged the following two grounds for support of its bid protest:

- i. Never having received any papers referring to pricing, whereas the competitors had.
- ii. Entering a higher bid, based on a \$.50 wash, which was not considered." (Exh. 7, p. 2)

During the hearing of this appeal, Macke's Mr. Wolfe testified that he never received exhibits 1, 2, and 3 to the contract. Nevertheless, he read the contract terms which reference those exhibits and signed Macke's bid form attesting to his understanding of

²Pre-bid conferences are not mandatory. See COMAR 21.05.02.07, 8:9 Md. R. S-45 (May 1, 1981).

the contract. Mr. Beitel noted these facts in denying Macke's bid protest and no written appeal to the Board was taken by Macke from Mr. Beitel's final decision.

F. New Solicitation for Laundry Services

On or about October 19, 1981, "Request for Bids" No. BC 12567H-1 was transmitted to prospective bidders by UMBC. This request for bids differed in three respects from the original solicitation of July 1981. First, UMBC changed the contract price structure to \$0.35 for both the washers and dryers. Second, UMBC required a total of 39 washers and 50 dryers, all of which were to be stackable in design. Third, UMBC required coin machines to be furnished in each of the apartment complex laundry rooms. With the exception of the price per machine use, however, Mr. Beitel did not contend that these changes were reasons for resoliciting. UMBC advertised the procurement in the Maryland Register and conducted a pre-bid walk-through of its facilities for prospective bidders. The record does not identify the high bidder on the second procurement.

II. DECISION

A. The Board's Jurisdiction to Consider Solon Appeal

Preliminarily, UMBC contends that the Board has no jurisdiction to consider the propriety of a State procurement officer's decision not to award a contract. In support of this position, UMBC first cites COMAR 21.10.02.02A³ which states that "[a]n interested party may protest to the respective procurement officer representing the State agency against the award or proposed award of a contract for supplies, services, maintenance, or construction." This regulation is said to limit an interested party's right to file a bid protest to those situations where a contract award is either being proposed or previously has been made. UMBC further contends that this interpretation of the regulations is supported by COMAR 21.10.07.08C⁴ which provides that:

"Decisions rendered by the Appeals Board under these regulations permit the Appeals Board to:

1. Order the cancellation of a contract;
2. Order improperly awarded contracts to be terminated for the convenience of the State; and
3. Prohibit the awarding of a contract."

Since no specific mention is made of the Board's power to review a decision to reject all bids and not award a contract, it is contended that such authority was not intended by the Legislature.

³See 8:9 Md. Register S-117 (May 1, 1981).

⁴See 8:9 Md. Register S-137 (May 1, 1981).

The procurement regulations relied upon by UMBC were promulgated pursuant to Article 21, Maryland Annotated Code, §§ 2-101 and 7-202(c)(2). These regulations were required both to be consistent with Article 21 and carry out its underlying purposes and policies. Art. 21, Md. Ann. Code, § 2-101(C)(D). The regulations thus implement Article 21 and cannot limit the procedural and substantive rights conferred by statute.

In enacting Article 21, the Legislature expressly empowered this Board to "...hear and decide..." all disputes relating to the formation of a State contract. Art. 21, Md. Ann. Code, §§ 7-202(c)(1), 7-201(d)(1). Under § 7-201(A) of Article 21, "...[d]isputes relating to the formation of a contract include but are not limited to those concerning the qualification of bidders or offerors and the determination of the successful bidder or offeror..." (Underscoring added.) This definition of a contract formation dispute (bid protest) is extremely broad and obviously encompasses more than the limited issue as to whether a contract properly was or should be awarded to a particular contractor.

Article 21 of the Code further prescribes requirements for all steps in the procurement process including (1) the determination of the method of source selection, (2) the selection of the type of contract to be used, (3) the preparation of the bid and contract documents, (4) the bid opening or negotiations, (5) the determination of responsiveness and responsibility, and (6) the award of the contract or rejection of all bids. Where the law and regulations pertaining to each step in the procurement process are not followed or applied reasonably, a prospective bidder may be prejudiced. In view of this, and in contemplation of the purposes and policies expressed by the Legislature in § 1-201 of Article 21⁵, the Board concludes that an unqualified right to file a bid protest

⁵Art. 21, Md. Ann. Code, § 1-201 provides as follows:

- "(A) Unless otherwise indicated, this Article shall be liberally construed and applied to promote the underlying purposes and policies specifically enumerated in subsection (B).
- (B) The underlying purposes and policies of this Article are, among others to:
- (1) Provide for increased public confidence in the procedures followed in public procurement;
 - (2) Insure the fair and equitable treatment of all persons who deal with the procurement system of this State;
 - (3) Simplify, clarify, and modernize the law governing procurement by this State;
 - (4) Permit the continued development of procurement regulations, policies, and practices;
 - (5) Provide increased economy in State procurement activities and to maximize to the fullest extent the purchasing power of the State;
 - (6) Provide safeguards for the maintenance of a procurement system of quality and integrity;
 - (7) Foster effective broad-based competition through support of the free enterprise system; and
 - (8) Promote development of uniform procurement procedures to the extent possible."

exists whenever an interested party⁶ considers that a State procurement officer has omitted to adhere to the legal and procedural requirements essential to the procurement process, or otherwise has failed to exercise reasonably the discretion provided therein. Since Solon's appeal addresses the issue of whether UMBC adhered to the law and regulations in rejecting all bids, it unqualifiedly falls within the scope of the Board's jurisdiction.

While the Board thus has jurisdiction to hear and decide the instant bid protest appeal, there remains a question concerning the Board's power to grant relief under the facts present. Solon has asked this Board to order UMBC to award it a contract for laundry services. UMBC contends that the Board is not vested with such authority and thus the appeal is moot.

We agree that the Board is not empowered to compel a State agency to act or refrain from acting in a particular manner. However, bid protests still may be resolved effectively by the Board through the issuance of declaratory rulings concerning the applicability of the procurement law and regulations. (Maryland Administrative Procedure Act (APA), Art. 41, Md. Ann. Code, § 250). These rulings will be binding upon State procurement agencies and their officers unless judicial review is sought in the State courts. Where the State procurement officer disregards the Board's ruling, an interested party may request the cognizant court to order whatever enforcement action is deemed necessary and appropriate under the circumstances. Accordingly, while the Board may not grant the relief requested, it can determine whether the State procurement law and regulations permit UMBC's procurement officer to reject Solon's bid and readvertise the contract for laundry services.

UMBC next contends that the Board has no jurisdiction to consider this appeal since Solon initially failed to submit its bid protest to the procurement officer for final agency determination. In this regard, both Article 21, Md. Ann. Code, § 7-201 and COMAR 21.10.02.02A⁷ clearly contemplate that all bid protests first be submitted to the appropriate State procurement officer for consideration. In the event the bid protest cannot be resolved at the procurement officer's level, COMAR 21.10.02.08⁸ requires that a written final decision be issued by the procurement officer containing the following:

- (1) A description of the controversy;
- (2) A statement of the procurement officer's decision, with supporting material;
- (3) A paragraph substantially as follows:

"This is the final decision of the procurement officer.
This decision may be appealed to the Maryland State

⁶Interested party is defined as an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest. COMAR 21.10.02.01A., 8:9 Md. Register S-117 (May 1, 1981).

⁷See 8:9 Md. Register S-117 (May 1, 1981).

⁸See 8:9 Md. Register S-118 (May 1, 1981).

Board of Contract Appeals. If you decide to make such an appeal, you must file written notice of appeal to the Appeals Board within 15 days from the date you receive this decision."

Here UMBC did issue such a final decision in conjunction with the bid protest filed by Macke. In this decision, UMBC's procurement officer apprised Macke and the other interested parties, including Solon, that all bids would be rejected. This was interpreted by Solon as a final determination of the procurement officer that all bids were being rejected and a timely appeal to this Board was taken therefrom.

The purpose of requiring an interested party to submit a bid protest initially to the State procurement officer is to provide the procuring agency with an opportunity to correct expeditiously any defect in the procurement process or otherwise resolve its own procurement disputes. In this regard, the Legislature has conferred broad powers on State procurement officers to negotiate and resolve such disputes. Here, however, UMBC's procurement officer is not seeking the right to review his decision to reject all bids nor is he alleging that his decision as transmitted to Solon was not final. Instead, UMBC seeks dismissal of the bid protest without consideration of its substantive affects. Under the circumstances, the Board denies UMBC's request to dismiss this appeal. In so doing, we find that UMBC's final decision on the Macke protest constituted a final agency determination to reject all bids, thereby permitting any interested party to appeal that final determination to this Board.

B. Appeal of Macke Bid Protest

1. Jurisdiction

Maryland law provides that:

"Within 15 days of receipt of notice of a final action disapproving a resolution or approving a decision not to resolve a dispute relating to the formation of a State contract, the bidder or offeror or prospective bidder or offeror may appeal the action to the State Board of Contract Appeals..." (Art. 21, Md. Ann. Code, § 7-201(D)(1).

While Solon did file an appeal within the time prescribed by statute, Macke did not. In this regard, Macke states that it believed such an appeal would be futile in the light of UMBC's decision to reject all bids and the Board's apparent inability to compel an award under the original solicitation. Solon contends that Macke, as a result of its inaction, is precluded from raising issues other than those pleaded by Solon in its appeal to this Board.

As a general proposition, it is essential that a State agency know, after a reasonable time, that their procurement decisions and actions are free from legal challenge. Accordingly, in this State, the Legislature has decided that 15 days is a reasonable period for an interested party to appeal a procurement officer's decision rendered on a bid protest. This time limitation was enacted solely for the benefit of the State and its agencies and may not be pleaded by one interested party in derogation of the right of another to participate in an appeal before the Board.

From the State's standpoint, once a timely appeal is taken from a procurement officer's decision, no finality attaches to any part of that decision until the

administrative process is concluded and judicial review, where sought, is exhausted. Consistent with the procedures of the Board and the due process requirements of the Maryland Administrative Procedure Act, once an appeal is timely filed, other interested parties are entitled to enter their appearances and challenge any portion of the final determination appealed from. Accordingly, the Board is vested with jurisdiction to hear and decide the issues raised by Macke which were ruled upon previously by Mr. Beitel in his final decision.⁹

2. Substantive Issues Raised by Macke

UMBC sought to procure its laundry services contract through a competitive process. Under the applicable procedures, award was to be made to the responsive and responsible bidder whose bid offered the highest percentage¹⁰ return of revenue to UMBC. See Art. 21, Md. Ann. Code, § 3-202(G); COMAR 21.05.02A., D. (8:9 Md. R. S-48 (May 1, 1981)). While Macke did offer the highest percentage return, the procurement officer concomitantly determined that Macke was a non-responsive bidder and rejected its bid.

The term responsive bidder "...means a person who has submitted a bid which conforms in all material respects to the requirements contained in the solicitation." Art. 21, Md. Ann. Code, § 3-101(I). A deviation from the requirements of the solicitation is considered material when it affects the price, quantity, or quality of the article offered. Prestex, Inc. v. United States, 162 Ct. Cl. 620, 320 F.2d 367 (1963). In the instant appeal, it is obvious that the price to be charged for each cycle of washer and dryer use affected the percentage return offered by Macke. This is established by Macke's bid which reflects that a percentage return of 67.4% would be realized if the washers and dryers were set at \$0.35 each per cycle, whereas a return of 69% would be made if the washers were set at \$0.50 and the dryers at \$0.35 per cycle. Since Macke did not base its bid upon the pricing structure set forth in the solicitation and since this impacted the percentage return it offered, the procurement officer acted reasonably in rejecting Macke's bid as non-responsive.

Macke also contends that its bid was responsive because a pricing structure was not set forth in the contract. However, Article VIII C. of the contract, entitled "Establishment and Adjustment of Prices", provided, in pertinent part, that:

"Unless otherwise authorized in writing by the University, the Contractor will not be permitted to establish prices higher than those agreed upon at the beginning of the contract. (See Exhibit 3)."

Exhibit 3, contained on page 11 of the contract form, appeared as follows:

⁹UMBC has not objected to our reviewing Macke's bid protest.

¹⁰As stated in footnote 1, where a revenue contract is involved, the contract is awarded to the highest responsible and responsive bidder.

PRICING
August 1, 1981

Washers	.50 cents
Dryers	.50 cents (for 60 minutes operation)

This exhibit thus set forth the mandatory price structure to be followed at the beginning of the contract. Although Macke argues that this exhibit was not part of the contract, the Board does not agree. Further, even if it is considered that exhibit 3 is a document separate and apart from the contract form, this exhibit is identified and alluded to in the contract and thus is incorporated by reference therein. Ray v. Eurice, 201 Md. 115, 128, 93 A.2d 272 (1952). This is true even though exhibit 3 may not have been attached physically to the copy of the contract form received by Macke. Williston, Third Edition, § 628.

C. Substantive Issues Raised by Solon

1. Existence of Implied In Fact Contract

Solon initially contends that UMBC was unable to reject all bids because an implied in fact contract had been created between the parties.¹¹ This implied in fact contract is said to have resulted from the identification of Solon as the highest bidder coupled with a subsequent directive from UMBC's James Hoppa ordering Solon to purchase stacked dryer units for installation by August 1, 1981.

An "[e]xpress contract' and implied in fact contract differ only in that in an express contract parties arrive at their agreement by words, either oral or written, sealed or unsealed, while an implied contract agreement is arrived at by consideration of acts and conduct." Anderson v. Bresman & Carrick Co., 287 Ill. App. 507, 4 N.E.2d 639, 641 (1936); Williston, Third Edition, § 3. The distinction thus lies only in the form of expression of the offer and acceptance. When a party seeks to prove the existence of an implied in fact contract, he still must show that an agreement was made, in whatever form, by persons having the capacity to bind each contracting party. Williston, Third Edition, § 18. Where the government is alleged to be a party to a contract, it further must be established that the government employee who entered into an agreement had actual authority to do so. Compare Gontrum v. Mayor and City Council of Baltimore, 182 Md. 370, 35 A.2d 128 (1943); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383 (1947); Horton v. U.S., 57 Ct. Cl. 395, 401 (1922).

In the instant appeal, Solon has failed to prove either that UMBC's Mr. Hoppa acted in a manner which conveyed acceptance of its bid on the laundry services contract or that he was authorized to award the contract. The evidence instead

¹¹The issue here does not concern whether Solon has any enforceable rights under such a contract, but rather whether UMBC legally could reject all bids after a contract had come into existence. For this reason, there is no issue raised concerning the jurisdiction of this Board to hear and determine a question of contract law under its bid protest procedures and it further is unnecessary for the Board to comment on the effect of the statutory defenses set forth in Art. 21, Md. Ann. Code, § 7-101 981 Repl. Vol.) - Sovereign Immunity and Art. 39C, Md. Ann. Code, § 1(3) (1978 Repl. Vol.) - Statute of Frauds.

establishes that Mr. Hoppa neither requested Solon to install its equipment nor directed it to purchase stacked dryers and other equipment. Further, the record reveals that Mr. Hoppa was unaware that Solon even intended immediately to order special stacked dryer units. With regard to Mr. Hoppa's authority to bind UMBC contractually, it is clear that he had none and we so find. The person authorized to act contractually on behalf of UMBC was Mr. Beitel, the procurement officer. Any award of a contract by Mr. Beitel, was subject further to approval by the Chancellor, University of Maryland, Baltimore County Campus. In the absence of any evidence showing that these authorized individuals constructively accepted Solon's bid, no implied in fact contract can result.

2. Applicability of Equitable Estoppel Doctrine

Solon alternatively contends that the alleged directive given by Mr. Hoppa to order stacked dryers and have them ready for installation by August 1, 1981 and Solon's detrimental reliance on this directive estops UMBC from denying the existence of a contract. As the Board previously has determined however, Mr. Hoppa neither directed Solon to order stacked dryers nor had authority to do so. Under such circumstances, the doctrine of equitable estoppel is inapplicable. See Johnson Lumber Co. v. Magruder, 218 Md. 440, 446 (1958); Anne Arundel Co. v. Whitehall Venture, 39 Md. App. 197, 205 (1978); Gontrum v. Mayor and City Council of Baltimore, supra (35 A.2d at 131).

3. Propriety of UMBC's Rejection of All Bids

Solon's final contention concerns the propriety of UMBC's rejection of all bids. In this regard, Solon states that UMBC's procurement officer failed to demonstrate a compelling reason for his action and thus, his rejection of all bids, after opening, was impermissible.

A State procurement officer, with the approval of the agency head or his designee, has statutory authority to reject all bids if he determines "...that it is fiscally advantageous or is otherwise in the best interests of the State..." Art. 21, Md. Ann. Code, § 3-301. COMAR 21.06.02.O1C.¹² further provides that:

- "(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement officer, with the approval of the agency head or his designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:
- (a) The State agency no longer requires the supplies, services, maintenance, or construction;
 - (b) The State agency no longer can reasonably expect to fund the procurement;
 - (c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;

¹²8:9 Md. R. S-64 (May 1, 1981).

- (d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
 - (e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;
 - (f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or
 - (g) All otherwise acceptable bids or proposals received are at unreasonable prices.
- (2) A notice of rejection of all bids or proposals shall be sent to all vendors that submitted bids or proposals, and it shall conform to § B(2).

D. Documentation. The determination of the reasons for cancellation or rejection of all bids or proposals shall be made a part of the procurement file."

The determination of whether it fiscally is advantageous or otherwise in the State's best interest to reject all bids thus has been left to the collective discretion and judgment of the procurement officer and agency head. Under Maryland law, this Board only may review the exercise of such discretion to ascertain whether it was fraudulent or so arbitrary as to constitute a breach of trust. See Biddison v. Whitman, 183 Md. 620, 624, 625; Hanna v. Board of Education of Wicomico County, 200 Md. 49, 51, 87 A.2d 846, 847 (1952); and compare CCTW & M v. U.S. Environmental Protection Agency, 452 F. Supp. 69 (D.C., N.J. 1978); City of Rochester v. U.S. Environmental Protection Agency, 496 F. Supp. 751 (D. Minn., 1980); Comp. Gen. Dec. B-175828 (Nov. 28, 1972); Comp. Gen. Dec. B-179338 (Dec. 21, 1973); Comp. Gen. Dec. B-167733 (Feb. 9, 1970); 36 Comp. Gen. 62, 66 (1956).¹³

¹³ Maryland's new procurement law and regulations are derived principally from comparable federal procurement statutes and regulations. Since Maryland courts generally have not construed these provisions to date, this Board previously has stated that it would look to the federal common law for guidance. See C. J. Langenfelder & Son, Inc., MDOT 1000, 1003, 1006 (Aug. 15, 1980) at p. 18; Dewey Jordan, Inc. v. Maryland National Capital Park and Planning Commission, 265 A.2d 892 (C.A. Md., 1970). In the federal system, the great majority of bid protests are resolved by the Comptroller General of the United States. See Cibinic & Lasken, "The Comptroller General and Government Contracts", 38:3 The George Washington Law Review 349 (March 1970). Over the past 60 years, through the issuance of thousands of decisions, the Comptroller General has developed a formidable body of precedent concerning the proper application of the federal procurement statutes and regulations. In analogous situations therefore, this body of precedent will be looked to by the Board for guidance and referred to in our decisions.

UMBC's Mr. Beitel gave two reasons for his decision to reject all bids. First, he stated that it was in the State's best interest to reduce the cost to students for laundry services in view of their limited financial resources. Second, Mr. Beitel indicated that errors in the solicitation and bid opening procedure were serious enough to mandate a new solicitation. With regard to Mr. Beitel's first reason for rejecting bids, UMBC has conceded that it would not benefit financially from such an action. UMBC, in fact, recognized after bids were opened under the initial solicitation, that they would receive more revenue under a contract with Solon than they needed to provide laundry services for students. Accordingly, UMBC's intent in resoliciting bids was to sacrifice this excess revenue in order to reduce student costs.

This leaves for determination whether Mr. Beitel reasonably concluded that it otherwise was in the State's best interest to reject all bids and resolicit. It is well settled that "[t]he rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without an award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance." 52 Comp. Gen. 285 (1972); 53 Comp. Gen. 587 (1974). Harm to the procurement system especially is grievous where, as here, the resolicitation is for the same services originally sought. Under such circumstances, an auction atmosphere is created "...wherein the new bids...constitute responses to the prior exposed bid prices rather than to any significant change in the salient characteristics" of the services required. 52 Comp. Gen. 285 *supra*. Since the principles and policies set forth in Maryland's procurement law underscore a strong public interest in fostering competition through the fair and equitable treatment of bidders, the rejection of all bids clearly was inconsistent with the State's interests. See Art. 21, Md. Ann. Code, § 1-201.

In order to conclude that the rejection of all bids was in the best interests of the State therefore, it would be necessary to find that the State's interest in reducing the price for laundry services reasonably could be perceived as outweighing the resulting prejudice to bidders and harm to the competitive bid process. Compare Massman Construction Co. v. United States, 60 F. Supp. 635, 643 (Ct. Cl. 1945); 52 Comp. Gen. 285 (1972). This we cannot do. Even if one concedes that the State has an interest in providing low cost laundry service to students, in this instance, it is not a strong one. Here at the \$0.50 price per wash and dry, the cost to students would be compatible with machine costs at other state universities and less than the price charged at local commercial laundry facilities (Tr 89-90). Further since UMBC was to realize greater revenue than it needed to support the laundry services program, it is conceivable that student costs could have been reduced in other areas or increased services provided at no additional cost. Accordingly, we find that Mr. Beitel acted in an arbitrary fashion in rejecting all bids for the first reason stated.

With regard to Mr. Beitel's second reason for rejecting all bids, it is necessary to examine each procedural error made to determine its effect on the procurement process. The first such error concerned UMBC's failure to advertise the procurement in the Maryland Register as required by Article 21, Md. Ann. Code, § 3-

202(c) and COMAR 21.05.02.04B.¹⁴ The initial issue for consideration is whether this statutory and regulatory language is mandatory or directory. The Maryland Court of Appeals has stated in this respect that:

"If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. *** In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had, or had not so vital an influence *** as probably prevented a free and full expression of the popular will.'" Hammond v. Love, 187 Md. 138, 145, 49 A.2d 75 (1946). Citing Soper v. Love, 171 Md. 643, 648, 187 A. 833, 835 (1937).

When the language permits, a requirement may be held to be directory and not mandatory. Carr v. Hyattsville, 115 Md. 545, 549, 550, 81 A. 8 (1911). Here we view the notice requirement as directory. While it is clear that the Legislature intended that notice be given in the Maryland Register for competitive sealed bids of this magnitude, the law expressly does not mandate the rejection of all bids where such notice has not been provided. Thus, where adequate competition is obtained in connection with a procurement and it appears that the failure to comply with the notice requirement was

¹⁴COMAR 21.05.02.04B incorporates the requirements of Art. 21, Md. Ann. Code, § 3-202(c) and provides the following:

"B. Publication.

- (1) Notices of invitation for bids on State contracts for which the bid amount is reasonably expected to be over \$25,000 shall be published in the Maryland Register. Publication shall be 30 days before the bid submission date. Publication of notice less than 30 days before bid submission is defective unless the project is exempt from competitive sealed bidding by State law. Notice of subsequent awards of contracts exceeding \$25,000 and notices of award of contracts exempt from the bid notice publication requirement shall be published in the Maryland Register by the procurement agency.
- (2) Ten days public notice of invitation for bids on State contracts for which the bid amount is reasonably expected to be less than \$25,000 shall be given by posting on a bid board or published in a newspaper." See 8:9 Md. R. S-45 (May 1, 1981).

inadvertent and not intended to restrict competition, bids should not be rejected in favor of a resolicitation. Compare Comp. Gen. 973 (1975).¹⁵

Although Mr. Beitel thus had no obligation to reject all bids because of UMBC's failure to advertise the procurement in the Maryland Register, we still must consider whether he reasonably concluded that it would be in the State's best interest to reject all bids and give notice of resolicitation through the Maryland Register. In this regard, we note that no potential bidders have complained that they were excluded from bidding on the original solicitation, that competition on the original solicitation included the two largest firms in the area, Solon and Macke, and otherwise appeared to be adequate, and that Coin Operated Services, a competitor under the initial solicitation, stated to UMBC's Mr. Hunter that they would not compete on the resolicitation against the two "biggies," Macke and Solon. (Tr 190) Accordingly, UMBC officials had no reasonable basis to conclude that competition could be increased by rejecting all bids and thereafter resoliciting in the Maryland Register. Under such circumstances, Mr. Beitel's decision to reject all bids and readvertise was arbitrary.

The second procedural error which concerned Mr. Beitel was UMBC's receipt of two bids after the time set in the invitation for bid opening. In this regard, Maryland law requires that "[b]ids shall be opened publicly at the time and place designated in the invitation for bids." Art. 21, Md. Ann. Code, § 3-202(d). COMAR 21.05.02.10 further implements this law by providing:

"A. Policy. Any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late. Any request for withdrawal or request for modification received after the time and date set for opening of bids at the place designated for opening is late.

B. Treatment. A late bid, late request for modification, or late request for withdrawal may not be considered. Exceptions may be made when a late bid is received before contract award, and the bid, the modification, or withdrawal would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees. A late modification of a successful bid which makes its terms more favorable to the State shall be considered at any time it is received and may be accepted." (See 8:9 Md. R. S-46 (May 1, 1981).

¹⁵Also compare Comp. Gen. Dec. B-179962, 74-1 CPD ¶115 (1974) where the Comptroller General stated:

"We have held that the propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices are obtained, not upon whether every possible bidder was afforded an opportunity to compete. B-172307, July 16, 1971, and cases cited therein. Furthermore, we do not find that the protester was intentionally excluded from the bidders mailing list or otherwise denied a reasonable opportunity to compete."

It is undisputed that the bids submitted by Solon and Coin Operated Services were received after the time originally set forth in the solicitation. Solon contends however that no prejudice resulted since its bid was received before any other bid was opened. While there is no Maryland case law on this point, the Comptroller General of the United States in considering substantially similar statutory and regulatory language¹⁶ has ruled as follows on identical facts:

"It has been consistently held that it is the responsibility of bidders to see that their bids reach the designated office before the time fixed for the opening of the bids. The purpose of the requirement is to give all bidders an equal opportunity, to prevent fraud, and to preserve the integrity of the competitive bid system.

"Under the express terms of the invitation, hand carried bids were required to be submitted prior to 10:00 a.m. Your bid was not submitted prior to the time specified. Your lack of knowledge of the other bids and good faith are, under the circumstances, not for consideration. There must be a time after which bids may not be received, and to permit such considerations to affect or alter the fixed and exact time clearly stated in the invitation would, in our opinion, tend to weaken the competitive system. While the requirement in certain instances may operate harshly, any relaxation of the rule would inevitably create confusion and disagreements as to its applicability in many cases and facilitate the perpetuation of frauds." Comp. Gen. Dec. B-137550 (Dec. 18, 1958).

See also 47 Comp. Gen. 784 (1968); Comp. Gen. Dec. B-164073 (Apr. 24, 1968).

While bids submitted after the time fixed for receipt are late, there remains an issue concerning whether UMBC properly could amend the solicitation informally to permit a later bid opening. Again, both Maryland and federal regulations identically contemplate the utilization of formal amendments to an invitation for bids. Compare COMAR 21.05.02.08 and 41 CFR § 1-2.207 (1981). Nevertheless, in considering the federal regulations, the Comptroller General has ruled that informal amendments¹⁷ to an invitation for bids are permissible when in the government's best interests. In Comp. Gen. Dec. B-153288 (Mar. 19, 1964) for example, a bid opening was scheduled for 3:00 p.m. on November 26, 1963. At 2:15 p.m. a bidder called the government's procurement (contracting) officer and stated that he was experiencing car trouble and could be delayed. The procurement officer had received only a single bid by that time and thus agreed to delay the bid opening until the bidder arrived. No effort was made to apprise other prospective bidders of the postponement. In considering these facts, the Comptroller General stated that there is "...no legal requirement that there be an opening of bids when it is determined to be in the interest of the Government to postpone

¹⁶With regard to the requirement that bids be opened at the time set in the solicitation, compare Art. 21, Md. Ann. Code, § 3-202(d) to 10 U.S.C. § 2305 and 41 U.S.C. § 253(b) and COMAR 21.05.02.10 to 41 CFR § 1-2.303-1 (1981).

¹⁷The Comptroller General has made it very clear that informal amendments are not favored. Nevertheless they have been held permissible where it is in the government's interest to act in this manner. See Comp. Gen. Dec. B-158464 (Mar. 28, 1966).

the opening...." A formal postponement further was not found to be necessary since it did not appear that such an action would have resulted in an increase in the number of bids submitted or the dollar amounts of those bids. See also Comp. Gen. Dec. B-158464 (Mar. 28, 1966 and Comp. Gen. Dec. B-194286, 79-1 CPD ¶1393.

In the instant appeal UMBC informally amended the solicitation to postpone the bid opening until Solon's representative arrived. Had UMBC not postponed the time set for bid opening, it would have received only a single bid on the laundry services procurement. While a formal amendment apprising all prospective bidders of the new bid opening date would have been more appropriate, it clearly was in the State's best interest for UMBC to act as they did in order to obtain competition. Under the circumstances, therefore, Solon's bid neither was untimely nor improperly received. Consequently, UMBC had no right thereafter to reject it as untimely.

Having determined that proper jurisdiction exists for the Board to consider the instant appeal and that UMBC acted arbitrarily in rejecting all bids received on laundry solicitation #12567H, the appeal is sustained. If the laundry services are still required, Maryland law requires that award be made under the original solicitation.

