

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF TRANSPORTATION)
SAFETY CONTRACTORS, INC)

Under MdTA Contract No.)
MA-316-000-006)

) Docket No. MSBCA 2301
)
)
)

September 4, 2002

Late Bid - The State may not consider a late bid delivered by a private commercial carrier under the exception set forth in COMAR 21.05.02.10B for lateness due to the "action or inaction of State personnel directing the procurement activity or their employees" unless State action or inaction is the sole or paramount cause of the late receipt.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Sandra E. Clifford
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Appellant, Transportation Safety Contractors, Inc. (TSC), timely appeals from a final agency action regarding the lateness of its bid in connection with the Maryland Transportation Authority's (MdTA) solicitation for the installation of a closed circuit television (CCTV) system along I-95 and I-895, at the Fort McHenry Tunnel, Baltimore Harbor Tunnel, and the John F. Kennedy Memorial Highway. For reasons that follow the appeal will be denied.

Findings of Fact

1. The solicitation in question is for Contract No. MA-316-000-006 (Contract) for the installation of Closed Circuit Television Systems along I-95 and I-895, at the Fort McHenry Tunnel, Baltimore Harbor Tunnel, and the John F. Kennedy Memorial Highway. The deadline for timely receipt of bids was 12:00 noon on July 26, 2002.
2. On July 26, 2002 at 12:00 noon, Keith Duerling, P.E., the MdTA's Director of Engineering, acting as Procurement Officer, and Richard A. Pagano, the MdTA's Chief of Engineering Administration, unlocked the MdTA's bid box, which is located on the second floor of the MdTA's Engineering building, located at 300 Authority Drive, Baltimore MD 21222.
3. Mr. Duerling and Mr. Pagano removed a total of nine (9) bids from the bid box and brought them into the adjoining Engineering Conference Room. A statement was made to all parties present for the contract's scheduled bid opening that no bid opening would be held on that

day as the procurement was under review by an outside regulatory agency. All parties were told that no further information was available at that time and that all bidders would be informed when a new public bid opening was scheduled.

4. At 12:35 p.m. on that date (July 26, 2002) the MdTA received two (2) late bids via Federal Express delivery: one from Appellant TSC and one from Trans Tech Electric, Inc. (Trans Tech).¹ Federal Express is a private commercial carrier.
5. By certified letter dated July 29, 2002, the MdTA, in a final agency action, rejected TSC's and Trans Tech's bids as late and returned them unopened.²
6. TSC appealed this rejection to the Maryland State Board of Contract Appeals on July 29, 2002.
7. In its appeal, TSC contends that, due to a Federal Express plane crash in Florida, delivery service was disrupted. TSC further contends that poor weather in Baltimore on the morning of July 26, 2002 contributed to the delay of take-off and landing of Federal Express planes in Baltimore. TSC argues that these factors, as well as the postponement of the public bid opening, have caused this solicitation to be "irregular" and that it should be canceled and re-advertised.
8. The review by the outside regulatory agency has now been completed. The MdTA scheduled a public bid opening, gave notice to all bidders, and opened the bids (that had previously been timely received) publicly on August 16, 2002 at 11:00 a.m.
9. Appellant did not comment on the Agency Report and neither party requested a hearing.

Decision

COMAR 21.05.02.10A - Policy states that: "Any bid received at the place designated in the solicitation after the time and date set for receipt of bids is late." COMAR 21.05.02.10B - Treatment states: "A late bid, late request for modification, or late request for withdrawal may not be considered."

COMAR 21.05.02.10B then sets forth an exception where the only acceptable reason for a bid's lateness is due to "the action or inaction of State personnel directing the procurement activity or their employees." Under this exception the State may not consider a late bid delivered by a private commercial carrier (i.e., Federal Express) "unless improper State action is the sole or paramount cause of the late receipt." Viron Energy Services, MSBCA 2122, 5 MSBCA ¶463 (1999); American Air Filter Co., MSBCA 1199, 1 MSBCA ¶89 (1984); see also The Tower Building Corp., MSBCA 1057, 1 MSBCA ¶13 (1982).

¹Trans Tech also appealed to this Board from a final agency action regarding the lateness of its bid. By letter dated August 23, 2002, Trans Tech withdrew its appeal.

²There is no evidence of record that Appellant ever filed a protest under COMAR 21.10.02 concerning the lateness of its bid. Accordingly, the MdTA final agency action may be viewed as a nullity, and this Board as lacking in jurisdiction to consider the matter. If the appeal to the Board is viewed as a protest, we note that protests are required to be filed with the Agency Procurement Officer. COMAR 21.10.02.02. Because a final agency action letter (i.e., Procurement Officer final decision) was issued that included advice concerning the right to appeal to this Board in accordance with COMAR 21.10.02.09, this Board docketed the appeal.

In this procurement, the solicitation provided that "bids will be received until twelve (12) noon on the 26th of July, 2002, in the Bid Box of the Maryland Transportation Authority Engineering Building, 2nd Floor, located at the Francis Scott Key Bridge, Baltimore, Maryland."

Bidders are responsible for choosing the method and manner in which they transmit their bids. American Air Filter Co., supra; Viron Energy Services, supra; Pioneer Oil Company, Inc., MSBCA 1060, 1 MSBCA ¶16 (1982). Ultimately, "it is the responsibility of a vendor to get its bid to the appointed place in a timely manner." Delmarva Drilling Company, MSBCA 1096, 1 MSBCA ¶36 at p.4 (1983).

Appellant chose to use Federal Express, a private commercial carrier, and State action was not the sole or paramount cause of the late receipt. A Federal Express plane crash and bad weather were the alleged causes of delay. Neither involved a State employee. Thus the exception set forth in COMAR 21.05.02.10B does not apply.

Appellant also contends that by rejecting its late bid, MdTA "altered" its bid procedure and that the MdTA should re-advertise the procurement as it should be considered "irregular." This position is simply incorrect. Late bids are to be rejected (absent the exception not present here) and returned unopened to bidders. This is what occurred. As stated above, Appellant's bid was late and its lateness was not due to the "action or inaction of State personnel directing the procurement activity or their employees."

Therefore, the MdTA had no choice but to reject TSC's late bid, pursuant to COMAR 21.05.02.10. Accordingly, the appeal is denied.

Wherefore, it is Ordered this 4th day of September, 2002 that the appeal is denied.

Dated: September 4, 2002

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (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 2301, appeal of Transportation Safety Contractors, Inc. under MdTA Contract No. MA-316-000-006.

Dated: September 4, 2002

Loni Howe
Recorder