

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Ace Uniform Services, Inc. *

Under *
Maryland Transit Administration *
IFB for Contract No. MTA-1459 *

Docket No. MSBCA 3027

Appearance for Appellant *

Aaron J. Turner, Esq.
Levin & Gann, PA
Towson, MD

Appearance for Respondent *

Damon A. Brown, Esq.
Assistant Attorney General
Byron T. Smith, Esq.
Principal Counsel
Maryland Transit Administration

* * * * *

OPINION BY MEMBER STEWART

The Appellant failed to meet its burden of proving that the determination by the procurement officer that the bidder selected for award submitted a bid that was responsive to the solicitation was arbitrary, capricious, unreasonable or unlawful.

FINDINGS OF FACT

On September 29, 2014, Respondent, the Maryland Transit Administration (“MTA”) issued Invitation for Bids (“IFB”) for Contract No. MTA-1459 (the “Contract”) for the provision of Uniform Rental and Maintenance Services, including Walk Off Mats, for its transit union and maintenance employees who clean and maintain Respondent’s bus and rail systems as mandated by the applicable collective bargaining agreement. The Contract term was for five (5) years. The Contract was to be an “indefinite quantity contract” with fixed unit pricing as defined by COMAR 21.06.03.06. The Contract was to be awarded via Competitive Sealed Bidding per COMAR

21.05.02 to the responsible bidder submitting a responsive bid with the most favorable total bid price, as defined by COMAR 21.05.02.13, for the goods and services specified therein.

The IFB in Section 3.2B. Clothing Specification provided that Respondent's mechanics permitted to wear pants that are not flame resistant be provided six (6) pairs meeting the following specifications:

Pants shall be navy blue, 7-1/2 oz. full cut, straight leg, no cuff and have heavy duty brass zipper with button top, bartacks at the stress points, six pockets (2-front, 2-rear and 2-leg/cargo style) with a through button or button flap on both rear pockets have at least seven heavy duty belt loops. Pants cargo pockets shall be between 7 to 9 inches deep with expansion ribs and heavy duty Velcro/Snap/ Button flap. Pants shall be comfortable and fade resistant. (emphasis added).

Section 3.2B. provided that Respondent's mechanics required to wear flame-resistant pants be provided eight (8) pairs meeting the following specifications:

Pants shall be made of 100% Flame Resistant cotton and must meet NFPA 70E (Flame Resistant 'FR' Clothing) and NFPA 2112 (Standards for Flame Resistant Garments) such as trade name INDURA or an approved equal. The testing procedure is available (for a fee) from the American Society for Material testing (ASTM 1002). Pants shall be navy blue, full cut, straight leg and have no cuffs, and have heavy duty brass zipper with button top, bartacks at all stress points, six pockets (2-front [sic], 2-rear and 2 leg/ cargo style) with a through button or button flap on both rear pockets and have at least seven (7) heavy duty y belt loops and have a self-adjusting comfort waist band. Pants cargo pockets shall be between seven (7) to nine (9) inches deep with expansion ribs and heavy duty Velcro/button/ snapflap. (emphasis added).

Section 3.2B provided that Respondent's supervisors be provided six (6) pairs of pants meeting the following specifications:

Pants shall be dark grey, 7-1/2 oz. full cut, straight leg, no cuff and have heavy duty brass zipper with button top, bartacks at the stress points, six pockets (2-front, 2-rear and 2-leg/cargo style) with a through button or button flap on both rear pockets have at least seven heavy duty belt loops. Pants cargo pockets shall be between 7 to 9 inches deep with expansion ribs and heavy duty Velcro/Snap/ Button flap. Pants shall be comfortable and fade resistant. (emphasis added).

Section 3.2B further mandated that “[t]he successful bidder provide samples of all garments to the [Respondent] for evaluation,” and that the “Contract shall not proceed until acceptable samples are presented.” All garments supplied during the Contract were mandated by the Section 3.2B to “match the quality of the samples provided.”

The Procurement Officer (“PO”) listed in the IFB was Garry Fleming. There were six Addenda to the IFB. None of the Addenda changed the specifications for cargo pants to be provided to Respondent’s maintenance employees. A pre-bid conference was held on October 6, 2014, at which questions were entertained from prospective bidders including representatives of Ace Uniform Services, Inc. (“Ace”), the Appellant, who was the incumbent provider for uniform rentals and walk-off mats for Respondent, and Clean Rental Uniforms. Prospective bidders were informed at the pre-bid conference that the closing date for questions would be October 10, 2014. In addition to the Addenda, the Respondent provided two sets of answers to questions submitted. The first set of answers, provided on October 9, 2014, contained the following question and answer:

Question: In addition to the current accepted fastening device for cargo pants pockets i.e. Velcro, Button, and Snap Flap will zippers also be considered and acceptable fastening devices for all Cargo Pants?

Answer: Yes, for all pants within MTA’s Uniform Contract (Mechanic & Supervisor) zippers will be an acceptable fastening device for all cargo pockets. Disregard the Velcro option for all FR-Rated clothing (unless the Velcro itself has the required FR-Rating).

Bids were publicly opened, reviewed and tabulated by PO Fleming on December 8, 2014. Two bids were received in response to the IFB. UniFirst Corporation (“UniFirst”) bid \$1,471,503.76, and Appellant bid \$1,760,080.00. The final version of the amended Bid Form provided with the IFB, on Schedule A, requires bidders to enter unit prices for maintenance employee uniforms as follows:

Item	Description	Unit Price
01	Mechanic's Uniform	_____
02	Mechanic's Uniform 100% Flame Resistant Cotton	_____
03	Supervisor's Uniform	_____

UniFirst bid a Unit Price of \$2.40 for Item 01 Mechanics Uniform; \$4.65 for Item 02 Flame Resistant Mechanic's Uniform; and \$2.40 for Item 03 Supervisor's Uniform. Appellant bid a Unit Price of \$2.50 for Item 01 Mechanic's Uniform; \$6.25 for Item 02 Flame Resistant Mechanic's Uniform; and \$4.50 for Item 03 Supervisor's Uniform.

The IFB in Section 1.31E. prohibited bid protests to be filed electronically.¹

On January 16, 2015, Respondent issued a Letter of Intent to UniFirst, indicating that it had been selected as the Contract awardee. The Board of Public Works approved the award of the Contract on March 18, 2015. On March 19, 2015, the State, acting through Respondent, and UniFirst executed the Contract. On March 31, 2015, Respondent issued a Notice to Proceed to UniFirst. Respondent assigned its Director of Bus Maintenance, Dave Varner, as Project Manager for the Contract.

Aaron Finkelstein, President of Appellant, testified at the hearing on the merits that he first learned that UniFirst was awarded the Contract sometime in February or March of 2015. Mr.

"The following transactions related to this procurement and any Contract awarded pursuant to it are *not authorized* to be conducted by electronic means:

1. submission of initial Bids or Proposals;
2. **filing of Bid Protests;**
3. filing of Contract Claims;
4. submission of documents determined by the Department to require original signatures (e.g., Contract execution, Contract modifications, etc.); or
5. any transaction, submission, or communication where the Procurement Officer has specifically directed that a response from the Contractor or Bidder/Offeror be provided in writing or hard copy." (emphasis added).

Finkelstein's testimony and evidence in the record indicate that Appellant was supposed to continue providing Respondent with uniform rentals and walk-off mats until June 24, 2015, pursuant to a change order extending the term of its original contract with Respondent for a period of four months.

Mr. Finkelstein testified that sometime in April of 2015 that Appellant's route men servicing its contract with Respondent called in to inform him that UniFirst was providing walk-off mats and uniforms to Respondent. This information prompted Mr. Finkelstein to call Respondent's Office of Procurement to clear up any confusion.² Someone in the Office of Procurement informed Mr. Finkelstein that Mr. Varner was in charge of the Contract awarded to UniFirst, told him to contact Mr. Varner and gave him Mr. Varner's telephone number.

On or about May 14, 2015, Mr. Finkelstein attempted to call Mr. Varner, but did not reach him because Mr. Varner was on vacation. When Mr. Varner returned from his vacation he reached out to Appellant's General Manager, Mike Dinsmore, to set up a meeting to clear up the confusion regarding the transition from Appellant's contract to the Contract awarded to UniFirst. Mr. Varner, Mr. Dinsmore and a representative of UniFirst met sometime in late May 2015 to discuss the transition period. The result of the meeting was that uniforms and walk-off mats provided by UniFirst at the different Respondent locations were to be set aside while Appellant finished its contract extension.

Mr. Finkelstein testified that on June 4, 2015, one of his District Managers, Dave Graff, informed Mr. Finkelstein that he had just returned from servicing Respondent pursuant to Appellant's contract extension, and that he saw two of Respondent's employees dressed in

² Records of Respondent show that as of May 15, 2015, that John Alozie was the PO for the Contract.

uniforms provided by UniFirst. Mr. Graff further informed Mr. Finkelstein that neither of the employees were wearing cargo pants. Based on this information, Mr. Finkelstein testified that he:

...I knew something was wrong, but I had only had -- my experience was I knew two people out of a thousand people weren't wearing cargo pants. And we had several exceptions. If somebody was allergic to something, we had to give them something else. So two people was no reason to think anything other than something was wrong because it was so clear through all the meetings and the pre-bids and the addendums, and every time they wrote something they wrote the pockets have to be eight to nine inches. I mean, they were so specific about these cargo pockets, it seemed unbelievable to me that there were pants going in there that weren't cargo pockets. Tr. 70:17-25 – 71:1-4, February 27, 2019.

Mr. Finkelstein immediately tried to contact PO Alozie because, by that time, Mr. Finkelstein had learned that PO Fleming no longer worked for Respondent. Mr. Alozie was unavailable so Mr. Finkelstein asked to speak to his boss and was directed to Anna Lansaw, the Director of the Office of Procurement for Respondent at that time. Mr. Finkelstein was unable to reach Ms. Lansaw and left her a long voicemail demanding a face-to-face meeting. Mr. Finkelstein also sent an email to Ms. Lansaw that same day. In his email, Mr. Finkelstein told Ms. Lansaw that Appellant had “just been made aware of a situation involving the bid [by UniFirst]...that requires immediate attention on your part.” Mr. Finkelstein’s email went on to characterize his concern as “an extremely urgent matter that needs your immediate attention,” and requested an in-person meeting with Ms. Lansaw. Mr. Finkelstein went on to recount how Appellant has been the uniform supplier for Respondent’s light rail and bus division for the past 17 years, and informed Ms. Lansaw that he wanted to let her know “directly and in person about the tremendous error that has occurred, which will definitely affect the recent award and current installation activity of the new contract.” Mr. Finkelstein concluded his email by telling Ms. Lansaw that he was available to meet “at any time today, tomorrow, or as soon as possible.”

Mr. Finkelstein got a reply email from Ms. Lansaw that same day stating that she could meet with him the next day, June 5, 2015, at 9 a.m.³ The meeting took place as scheduled with Mr. Finkelstein, Ms. Lansaw and PO Alozie in attendance. Regarding the issue of alleged non-delivery of cargo pants, Ms. Lansaw said she would “check into it” and if that were the case she would have PO Alozie fix it. Mr. Finkelstein testified that this upset him because :

...it was at that point that I felt like, what do you mean let them fix this? If they bid the wrong thing, I was the responsive bidder. I should have been handed this bid. You got to go further. You've got to find out if they bid the right thing. Tr. 75:6-11, February 27, 2019.

Mr. Finkelstein testified that he took no further steps to investigate the matter, but left it up to Respondent. Ms. Lansaw testified at the hearing on the merits that she did start an investigation which consisted of tasking PO Alozie to gather more information from Mr. Varner and her contacting UniFirst to determine what type of pants they were providing under the Contract. After the June 5, 2015 meeting, Appellant hired counsel, Howard L. Alderman, Jr., Esquire, of Levin & Gann, P.A. On June 10, 2015, Mr. Alderman sent a letter via email and FedEx Priority Overnight addressed to: “Anna Lansaw, Director of Office of Procurement, Maryland Department of Transportation, Mass Transit Administration, 6 St. Paul Street, Baltimore, MD 21202-1614,” regarding the IFB and the resulting Contract awarded to UniFirst. Records indicate that the letter was delivered by FedEx on June 11, 2015, at 9:39 a.m. and signed for at the front reception desk by C. Wiley at 6 St. Paul Street, Baltimore, MD 21202. The subject line of the letter was as follows:

RE: Uniform Rental and Maintenance Services
MTA-1459; ADPICS # JO5B5400035 (“**Contract**”)
Non-responsive Performance by Successful Bidder
(emphasis in original).

³ Mr. Finkelstein stressed the importance to him of meeting with Ms. Lansaw as soon as possible by remarking that he had planned to attend his nephew’s high school graduation on June 5th, but instead met with Ms. Lansaw.

In his letter, Mr. Alderman alleged that UniFirst was nonresponsive to the IFB due to its performance of the Contract. Specifically, Mr. Alderman alleged:

Our client has now learned that UniFirst, in purported performance under the Contract, has begun delivering uniforms that fail to meet several of the required specifications as set forth in the Bid Invitation.

UniFirst's complete failure to comply with the Bid Invitation specifications is uncorrectable at this point. It would be unconscionable for you to even consider allowing UniFirst to make attempts to perform under the awarded Contract after having obtained that award by a **flawed bid**.

The Contract award to UniFirst should be terminated and awarded to the company that submitted the lowest, **responsive bid** - our client Ace Uniform. Should the State be unwilling to terminate the Contract as required by applicable law and regulation, please contact me regarding the filing of any required formal protest, beyond that which has already been submitted. (emphasis added).

After receipt of Mr. Alderman's letter, Ms. Lansaw sent it to Assistant Attorney General ("AAG") and Senior Counsel for Respondent, Valerie L. Green, Esquire, because Ms. Lansaw could not tell whether or not the letter constituted a bid protest. There also were a series of emails sent internally between Ms. Lansaw, PO Alozie, Mr. Varner, and AAG Green concerning whether cargo pants were being supplied per the specifications set forth in the IFB and the Contract. Mr. Varner sent an email to Ms. Lansaw, Mr. Alozie, and AAG Green on June 26, 2015, stating:

[UniFirst] will provide cargo pants but every one [sic] at the [March 2015 Kickoff] meeting stated they wanted everyone to wear the same. There would be no cargo pants no matter who won the bid. That was an mta [sic] choice. Do you want them to supply cargo pants, if so what departments or everyone? [UniFirst] do offer them so they meet the specification. MTA wanted the other style pants.

AAG Green responded the same day to Mr. Varner's email: "The question really is what was specified in the solicitation. Whatever was specified in the in solicitation needs to be supplied. It forms the basis of award."

Mr. Varner, later the same day, responded: "Both types were specified. You could have your choice." On July 1, 2015, AAG Green, responded to via letter to Mr. Alderman's June 10, 2015 letter on behalf of the MTA and informed him that:

It is my understanding that the current awardee of the above referenced contract has performed in accordance with the specifications as set forth in the IFB and the Contract MTA-1459. I have no other information to the contrary.

On July 20, 2015, Mr. Alderman sent a letter to T. Byron Smith, Esquire, AAG and Principal Counsel for the MTA and AAG Green, contending that his June 10th letter to Ms. Lansaw was a "letter of protest" and asking for a hearing date on the "protest" before the Board. AAG Green responded via letter on July 31, 2015 that Mr. Alderman's letter dated June 10, 2015 was not a formal protest that met the requirements of COMAR 21.10.02, and that if Mr. Alderman should "determine that it is in the best interest of [his] client to file a formal protest, please do so in accordance with COMAR 21.10.02."

On November 13, 2015, counsel for Appellant, Aaron J. Turner, Esquire, submitted a Maryland Public Information Act ("MD PIA") request to Respondent seeking, among other documents, copies of invoices and statements of account from UniFirst relating to the Contract. After two subsequent letters from Mr. Turner, one on February 16, 2016, following up on his MD PIA request, and another on March 31, 2016, renewing his request for invoices, Respondent subsequently provided copies of invoices issued by UniFirst to it under the Contract. The invoices, covering the month of August 2015, do not show the delivery of cargo pants to Respondent's employees under the Contract.

On May 9, 2016, counsel for Appellant submitted a formal bid protest (the "Formal Protest") to Georgia Peake, Director of the Office of Procurement for Respondent, citing therein that it was directing its protest to Ms. Peake because counsel for Appellant had been notified that

the original PO for the procurement was no longer employed by Respondent, and the Formal Protest also stated that “I am submitting this correspondence directly to you in order to determine the appropriate procurement officer to address this matter.” The Formal Protest further stated that Appellant based its bid strictly on the specifications contained in the IFB as required by COMAR 21.05.02.03B(1).⁴ The Formal Protest cited nonresponsive performance of UniFirst under the Contract. Specifically, Appellant alleged that UniFirst’s failure to deliver cargo pants to Respondent under the Contract was evidence that UniFirst failed to meet the specifications set forth in the IFB: “Based upon information and belief, UniFirst’s bid failed to specify that it would deliver cargo pants as required by the Invitation for Bid.” Appellant further informed Ms. Peake that it had filed a MD PIA request with Respondent to obtain records to substantiate its contention. Attached to the Formal Protest were invoices from UniFirst to Respondent under the Contract for the month of August 2015.

In the months of August, September and October 2016, there were internal meetings and discussions by employees of Respondent regarding the issue of non-delivery of cargo pants by UniFirst under the Contract. On October 26, 2016, Ms. Peake sent a Cure Notice via letter to Robert Beaver, General Manager at UniFirst. The Cure Notice specifically alleged that UniFirst has not been in compliance with the terms of the Contract and that “[t]he Invitation for Bid (IFB) requires UniFirst to supply cargo pants...per section 3.2(B).” The Cure Notice ordered UniFirst to “bring this contract into conformance with the terms of the IFB,” and to “cease supplying non-cargo pants and instead supply cargo pants per the terms of the IFB.” The Cure Notice gave UniFirst 90 days to begin corrective action or face a termination for default.

⁴ “Bids shall be based upon the specifications contained in the invitation for bids.”

Subsequent to the Cure Notice being sent, representatives for Respondent and representatives from UniFirst were in constant communication regarding bringing UniFirst's performance into compliance therewith. A meeting was held on November 22, 2016, attended by Pino Tenuta, General Manager, and Michael Lamartina, District Service Manager, from UniFirst, and several representatives for Respondent concerning UniFirst's compliance with the Cure Notice. Among the attendees for Respondent was Scott Schell, Manager, Service Contract Compliance. Mr. Schell included a summary of that meeting in an email to the other attendees for Respondent on the same day of the meeting. In his email, Mr. Schell notes that while UniFirst restated its commitment to provide all covered employees of Respondent with cargo pants to replace the ones currently provided at no extra cost or up-charge, UniFirst was resistant to provide flame-resistant cargo pants to Respondent without an up-charge. Mr. Schell reported that he indicated that UniFirst should put its concern in a letter to Respondent.

On November 28, 2016, Mr. Tenuta sent a letter to Ms. Peake formally acknowledging and responding to the Cure Notice. In his letter, Mr. Tenuta references the March 2015 Kickoff meeting between representatives of Respondent and UniFirst to discuss the implementation of the Contract. Mr. Tenuta alleges that Respondent's staff and UniFirst agreed to alter "several aspects of the bid." Mr. Tenuta further alleged that those changes included:

- 1) Using an in stock Flame Retardant (FR) cotton pant (ATPV rating 12.4, HRC that was readily available instead of the non-standard cargo style FR pant ATPV rating 12.4, HRC 2) with a longer lead time so that UniFirst could obtain the pants and deliver to the MTA, instead of waiting for what would otherwise be a custom order.
- 2) In return, UniFirst agreed to issue MTA employees 11 sets of uniforms instead of 8 sets at the same bid rate.

On December 13, 2016, Mr. Tenuta sent a letter to Mr. Schell formally requesting an "approved equal" from Respondent, namely, that Respondent approve UniFirst to substitute the 6-pocket

Indura FR cargo pants with UniFirst brand 4-pocket Armorex FR pants – the only difference between the items being the two side pockets on the legs. Mr. Tenuta further noted that the cargo pants meeting the original specifications contained in Section 3.2B of the IFB were manufactured by an outside vendor and required a lead time of two to three weeks per pair, whereas the proposed substitution was an in-house product with a two to three day lead time per pair. Mr. Tenuta also noted that the original FR cargo pants were chosen by Respondent for functionality, but that they posed a safety risk if pockets got caught on something or if something hot were caught by the pockets.

Ms. Lansaw testified that in addition to the safety concern, Mr. Varner had a security concern that employees “were taking tools and pocketing them into the cargo pants, and he didn’t want the cargo pants being delivered, and that’s why he instructed UniFirst to change them out to straight pants.” Michael D. Zimmer, Procurement Analyst with Respondent who had been troubleshooting issues on the Contract, also testified that Mr. Varner did not like cargo pants and did not want them “in his shop.”

On December 20, 2016, a meeting was held between Respondent’s representatives and UniFirst representatives with two items on the agenda: 1) discussion of the “approved equal” request of UniFirst and 2) obtaining an update of UniFirst’s progress in complying with the Cure Notice. At that meeting, Andrew Seamans, Sales Manager at UniFirst, informed Respondent that it did not make flame-resistant cargo pants and that it would take a half million dollars to meet the flame resistant cargo specification. Representatives of Respondent at the meeting noted that supervisors did not want cargo pants. Representatives from Respondent also commented that supervisors wanted a “nicer” uniform shirt and something other than cargo pants. Discussion was had regarding increasing the number of garments delivered in exchange for waiving the

requirement for cargo pants. Mr. Schell requested a sample change order. The same day as the meeting, Mr. Tenuta sent Mr. Schell a letter outlining UniFirst's efforts to comply with the Cure Notice. In the letter, UniFirst reaffirms its commitment to fulfill orders for the flame-resistant cargo pants, but asked Respondent for a quick decision on its "approved equal" request, noting that it preferred not to start purchasing hundreds of thousands of dollars' worth of new flame-resistant uniforms, only to have the substitute uniforms approved. The letter also noted that UniFirst understood that supervisors may be interested in an alternative to the cargo pants and white work shirt outlined in the bid specifications. Mr. Tenuta stated that UniFirst intended to fulfill the orders for supervisors, provided any and all requests for alternate garments had been completed. Mr. Tenuta stated that UniFirst would prefer not to order cargo pants for supervisors if Respondent was going to approve that as an alternative.

Subsequent to the December 20, 2016 meeting, Respondent's representatives exchanged internal emails on December 22, 2016, regarding following the dictates of the Cure Notice or considering the "approved equal" request. A meeting was set for December 28, 2016, and Mr. Zimmer and Mr. Schell spoke with Mr. Varner on speakerphone regarding how to proceed. Mr. Schell suggested that since flame-resistant cargo pants were more expensive than non-cargo flame-resistant pants, that Respondent ask UniFirst to upgrade the uniform for street supervisors in exchange for the "approved equal." Mr. Schell planned on calling Mr. Tenuta to determine if that would be acceptable. If all agreed, then a change order would be issued. UniFirst agreed to the terms sometime after the December 28, 2016 meeting, and the details were worked out and a change order was drafted.

On February 17, 2017, UniFirst executed Change Order No. 1 to the Contract and the Respondent accepted it on February 27, 2017. Change Order No. 1 (the "Change Order") accepted

the “approved equal” substitute for flame-resistant cargo pants and upgraded street supervisor uniforms at no change in Contract price.

Also, on February 27, 2017, James L. Knighton⁵, Chief of Staff of Respondent, issued the Procurement Officer Final Decision denying Appellant’s bid protest. Mr. Knighton’s first ground for denial was that the sole basis for Appellant’s protest, that UniFirst failed to comply with the terms of the Contract, led him to conclude that Appellant was not an “Interested Party” protesting an award or proposed award of a contract per COMAR 21.10.02.02A. Mr. Knighton’s second ground cited to deny Appellant’s protest was that it was not timely filed per COMAR 21.10.02.03A or COMAR 21.10.02.03B. Mr. Knighton stated that since Appellant was not protesting any impropriety in the solicitation that was apparent before bid opening, which is required to be protested before bid opening per COMAR 21.10.02.03A, meaning Appellant would had to have filed its protest within seven days after the basis for it was known or should have been known per COMAR 21.10.02.03B. Mr. Knighton goes on to flatly state: “No protest was filed.”

Appellant filed an appeal of the Procurement Officer’s Final Decision (“Final Decision”) with this Board on March 9, 2017. Appellant’s Notice of Appeal stated that Respondent misconstrued its protest grounds, that is, Appellant was not protesting UniFirst’s alleged failure to deliver cargo pants under the Contract, but that such alleged failure to perform was evidence that UniFirst did not include cargo pants in its bid, therefore making it a nonresponsive bidder. Appellant also stated in its Notice of Appeal that it filed a protest within seven days of obtaining evidence that UniFirst was a nonresponsive bidder. A hearing on the merits was held on February 27, 2019.

⁵ It is unclear from the record who actually was the PO for the procurement at the time the Final Decision was issued.

STANDARD OF REVIEW FOR BID PROTESTS

“In any appeal of a bid protest, the burden lies with Appellant to show that the agency’s action was biased or that the action was arbitrary, capricious, unreasonable, or in violation of law.” *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Cmty. Servs., Inc.*, MSBCA 2302 at 8, 5 MSBCA ¶523 (2002)).

DECISION

Before deciding the merits of this Appeal, the Board must determine whether Appellant has standing to protest, and if so, whether it filed a timely protest.

STANDING

Respondent contends that Appellant is protesting performance under the awarded Contract, and therefore it is not an “Interested Party” as defined by COMAR 21.10.02.01B(1)⁶, and therefore does not have standing to file a “Protest” as defined by COMAR 21.10.02.01B(2)⁷ and allowed by COMAR 21.10.02.02A.⁸ Appellant contends that the basis for its protest is that Respondent awarded the Contract to a bidder who was nonresponsive, and that it cited alleged nonperformance during the Contract as evidence thereof.

The Board agrees with Appellant that it is an Interested Party who has standing to file a Protest. The Board, in *Active Network, LLC*, MSBCA No. 2920 (2015) at 6, set forth the test for standing in a bid protest:

In order to have standing sufficient to pursue a bid protest, an appellant must not only allege that the State did something improper; it must also be able to demonstrate that, had the impropriety not occurred, that that particular offeror would have been awarded the contract.

⁶ "Interested party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.

⁷ "Protest" means a complaint relating to the solicitation or award of a procurement contract.

⁸ An interested party may protest to the appropriate procurement officer against the award or the proposed award of a contract subject to this title...

The Board further stated that evaluation of standing in a protest of an IFB is simpler than in the case of a protest of a Request for Proposal, that is, the protester in an IFB has to be next in line for award. *Id.* at 3-4. In this Appeal, if Appellant's allegation that the Respondent awarded the Contract to a nonresponsive bidder were proved, then Appellant would be next in line for award, being the only other responsible bidder having submitted a bid in response to the IFB.

TIMELINESS

The next issue the Board has to resolve is whether Appellant filed a timely protest. The Final Decision appealed by Appellant concluded that no protest had been filed. Respondent, before this Board, argued that Appellant failed to file a timely protest under COMAR 21.10.02.03B, that is, "...not later than 7 days after the basis for protest is known or should have been known, whichever is earlier."

In *Gilford Corp.*, MSBCA Nos. 2871 & 2877 (2014) at 9-10, the Board properly construes the requirements of filing a timely protest under COMAR 21.10.02.03B as a statute of limitations (and not jurisdictional):

...COMAR 21.10.02.03B provides that a bid protest must be filed "not later than 7 days after the basis for protest is known, or should have been known, whichever is earlier." COMAR 21.10.02.03C further states, "A protest received by the procurement officer after the time limits prescribed ... may not be considered." This statute of limitations is a hard and fast rule that frequently arises in bid protests. In fact, failure to comply with the 7-day filing rule is cited as the sole ground for dismissal of innumerable appeals heard by the Board. (internal citations omitted).

Because this is a requirement imposed by law, it cannot be waived by a State agency. *See, Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984).

Respondent argues that Appellant had actual knowledge of the basis for its protest on June 4, 2015, when it first learned that UniFirst was not delivering cargo pants per the IFB and Contract, and that Appellant did not file a timely protest within seven days thereof. Respondent argues that

it was incumbent for Appellant to file a protest within seven days of this date, and not wait on further discussions with Respondent, or for additional information to turn up as a result of any investigation. Respondent cites *Advanced Fire Protection Systems, LLC*, MSBCA No. 2868 (2014) at 7 in support of its position:

An aggrieved bidder simply has to note its bid protest in timely fashion, even if discussions are at that time still pending and advancing toward a bidder's anticipated resolution of a dispute over a bid rejection.

The Board agrees that a protestor cannot wait until discussions with the procuring agency are completed over the basis for protest once it actually knows the basis thereof. However, in *Advanced Fire Protection*, the Board found that the appellant in that appeal actually knew the basis for its protest upon receipt of a rejection letter from the procuring agency stating the reason its bid was rejected. *Id.* at 6. In this instance, however, the Board finds that Appellant did not have actual knowledge of the basis for its protest until it received invoices in response to its MD PIA Request showing that UniFirst was indeed not supplying cargo pants per the IFB and Contract. Based on this finding, the Board therefore concludes that *Advanced Fire Protection* is not dispositive of the question of timeliness in this Appeal. The Board finds the question of whether Appellant filed a timely protest turns on when Appellant should have known the basis for its protest.

Recently, in *Milani Constr. LLC*, MSBCA Nos. 3074 & 3088 (2019) at 27, the Board addressed the "should have known" prong of timeliness in the context of a potential protestor investigating the basis of its protest, stating that the relevant question was whether the facts and circumstances put a reasonably prudent person on inquiry notice, thus charging that person with actual knowledge of all facts that an investigation would have disclosed.

Based on the testimony and record, the Board finds that Appellant should have known the basis for its protest on June 4, 2015. It was on that date that Mr. Finkelstein was informed by one

of his district managers that UniFirst was not providing cargo pants, and that he knew something was wrong, compelling him to urgently demand a face-to-face meeting with Ms. Lansaw, so if there was an issue, Respondent could “nip it in the bud.” Although Mr. Finkelstein testified that he took no further investigative action because he brought the matter to the attention of Respondent, shortly after the meeting with Ms. Lansaw, Appellant hired legal counsel to pursue the matter. The Board finds that Appellant was on inquiry notice regarding the basis for its protest, or as Mr. Finkelstein put it, “...I felt very strongly that [Respondent] shouldn't let [UniFirst] fix it. If they bid the wrong thing, it should be our bid. There were two bidders. We were the responsive one.”

The Board notes that under the circumstances, given the manner in which the time limits for filing bid protests are strictly construed, a protester cannot wait on the results of an investigation by it or the procuring agency to be concluded before filing a protest. An Appellant who believes it has grounds for a protest must promptly file a protest out of an abundance of caution, and not wait until any investigation bears documentary fruit, if any.

Since the Board finds that Appellant should have known the basis for its protest on June 4, 2015, then per COMAR 21.10.02.03B, Appellant needed to file its protest within seven days thereof, that is, by June 11, 2015. The Formal Protest filed by Appellant on May 9, 2016, does not fall within the seven-day period after which the Board finds Appellant should have known the basis for its protest. However, the June 10, 2015 letter sent by Appellant's counsel, Mr. Alderman, to Ms. Lansaw via FedEx⁹ and received by her on June 11, 2015, does substantially meet the

⁹ The June 10, 2015, letter was also scanned and emailed to Ms. Lansaw, but the IFB specifically prohibited electronic filing of protests in Section 1.31E.

requirement of protest outlined in COMAR 21.10.02.04¹⁰ and the evidence shows that it was filed timely.

COMAR 21.10.02.04 states that a protest “should” be labeled in an envelope labeled “Protest.” The fact that there is no evidence that the June 10th letter was sent in an envelope labeled “Protest” is not fatal to Appellant’s appeal. The Board has held in *Infosys Public Services, Inc.*, MSBCA No. 3003 (2017) at 5, that the use of “should” in the context of a procurement regulation as opposed to “shall” is discretionary rather than mandatory. The remaining requirements of COMAR 21.10.02.04 are, however, mandatory due to its use of “shall.” See, *McDonnell Contracting, Inc.*, MSBCA No. 2084, 5 MICPEL ¶450 (1998) at 4:

The word “shall” in a statute is presumed to be mandatory and demanding of an imperative obligation on a party inconsistent with the exercise of discretion.(internal citation omitted) We find the same principle or rule of construction to apply to a procurement regulation promulgated by the Board of Public Works pursuant to statutory authority to promulgate regulations to promote the purposes of the General Procurement Law. Such regulation is binding upon this Board and the procurement agencies...

The June 10th letter meets the requirements of COMAR 21.10.02.04A because it lists the name of the protester, “Ace Uniform,” and a contact address, namely, its counsel, whom the Respondent would be required to contact concerning the matter and not his client. The June 10th letter meets the requirements of COMAR 21.10.02.04B because it identifies the procurement, “Uniform Rental and Maintenance Services, MTA-1459, ADPICS # J05B5400035 (“Contract”).” The June 10th letter meets the requirement of COMAR 21.10.02.04C because it sets forth in its subject line,

¹⁰ To expedite handling of protests, the envelope should be labeled “Protest”. The written protest shall include as a minimum the following:

- A. The name and address of the protester;
- B. Appropriate identification of the procurement, and, if a contract has been awarded, its number if known;
- C. A statement of reasons for the protest; and
- D. Supporting exhibits, evidence, or documents to substantiate the reasons for the protest unless not available within the filing time, in which case the expected availability date shall be indicated.(emphasis added)

“Non-responsive Performance by Successful Bidder” and that Appellant had learned that UniFirst had been delivering uniforms that failed to meet the required specifications set forth in the IFB, and that as such its bid was flawed, and that Respondent should terminate the Contract and award it to Appellant, the lowest responsive bidder. Appellant did not include supporting documentary evidence to substantiate its protest per COMAR 21.10.02.04C, but did forward such evidence, in the form of invoices for the month of August 2015, that it received in response to its MD PIA Request, later via its Formal Protest on May 9, 2016.

COMAR 21.10.02.02B. further requires that “[t]he protest shall be in writing and addressed to the procurement officer.” The June 10, 2015 letter, however, is not addressed to the PO, but to Ms. Lansaw. The Board finds that the PO named in the IFB, Garry Fleming, was no longer working on the procurement on June 10, 2015, having left his employment with Respondent. The evidence indicates John Alozie was PO when the letter was submitted. The Board finds it reasonable for Appellant to address its protest to Ms. Lansaw, even though Appellant knew the current PO for the procurement was Mr. Alozie, given the interaction between the parties surrounding the June 5, 2015 meeting attended by Mr. Finkelstein, Ms. Lansaw and Mr. Alozie, which suggested that Ms. Lansaw would be in charge of the issue being protested. Ms. Lansaw’s testimony is that she forwarded the June 10th letter to legal counsel upon receipt, and there is no testimony that she gave it to the PO of record, Mr. Alozie, for his further action.¹¹ Respondent provided no evidence that the failure to address the protest to the PO of record resulted in prejudice to the Respondent. The Board therefore finds, under the specific facts in this Appeal, that the evidence in the record of receipt by Ms. Lansaw on June 11, 2015, satisfies the requirement of COMAR 21.10.02.03C that a protest is “filed” when received by the PO.

¹¹ Neither Ms. Lansaw nor Mr. Alozie issued the Final Decision on behalf of the Respondent.

FINAL ACTION

Respondent asserts that even if the Board finds the June 10th letter to be a protest that meets the requirement of COMAR 21.10.02.04, that the Board has no jurisdiction to hear this Appeal because there was no final action by Respondent on the protest in accordance with § 15-211 of the State Finance & Procurement Article of the Annotated Code of Maryland. Respondent concedes that the basis for protest asserted in the June 10th letter is the same as asserted in the Formal Protest of May 9, 2016.¹² The Board notes that the February 27, 2017 letter from Mr. Knighton is titled, “Procurement Officer Final Decision.” The letter goes on further to state that per COMAR 21.10.02.09 that it “constitutes the final agency action” of Respondent regarding Appellant’s Formal Protest. Mr. Knighton’s letter appears to conform to the requirements of COMAR 21.10.02.04 in all other respects. It is somewhat disingenuous on the part of Respondent to claim that Mr. Knighton, acting in the capacity of the PO, was not presented with, and did not decide the issue that forms the basis of the Appeal before the Board.

RESPONSIVENESS

Since the Board finds that Appellant has standing to file a protest, and filed a timely bid protest, then the Board must decide if the PO properly determined whether Unifirst’s bid was responsive. The Board has held that, “[i]t is well settled, that responsiveness must be determined from the face of the bidding documents.” *PDI-Sheetz Constr., Inc.*, MSBCA No. 2757 (2011) at 10 (citing *Inner Harbor Paper Supply Co.*, MSBCA 1064, 1 MICPEL ¶24 (1982)). The Board has held that responsiveness must be determined at the time of bid opening only on the basis of the information set forth on the face of the bid submission, in contradistinction to an agency’s

¹² See, Closing Argument of Respondent filed on March 29, 2019, at 8: “Instead of filing a compliant protest in accordance with COMAR, Ace elected to send the June 10 Letter setting forth the exact same concerns which later formed the basis of the Protest Letter.”

determination of bidder responsibility, which may be determined subsequent to bid opening at any time prior to the time of contract award. *See, JP Morgan Electronic Financial Services, Inc.*, MSBCA No. 2577 (2007) at 10 (citing *H. A. Harris Co., Inc.*, MSBCA 1392, 2 MSBCA ¶193 (1988)). This Board has also held that a bid must be determined responsive from the face of the bid document and not from information subsequently obtained through a verification process or other extrinsic evidence. *Calvert General Contractors Corp.*, MSBCA 1314, 2 MSBCA ¶140 (1986); *Inner Harbor Paper Supply Co., supra*. A bidder's intention to comply with all IFB specifications must be determined from the face of the bid itself at the time of the bid opening. *PDI-Sheetz Constr., Inc.*, at 12 (citing *Transport Engineering Company, Inc.*, B-185609, 1976, 76-2 CPD 10).

The Appellant has failed to meet its burden to show that the determination by the PO who evaluated UniFirst's bid that UniFirst submitted a responsive bid was arbitrary, capricious, unreasonable or unlawful. Looking at the Schedule A of the Bid Form provided with the IFB, there is no way to discern from unit prices submitted by UniFirst that it did not intend to comply with the specifications for cargo pants set forth in Section 3.2B of the IFB.¹³

The IFB itself, however, does have a built-in safeguard to ensure that the bidder selected will provide garments that meet its specifications, namely, Section 3.2B's requirements that the successful bidder provide samples of all garments for evaluation, and that the Contract shall not proceed until acceptable samples are presented. The Board has held that when a solicitation requires bid samples be provided and evaluated, failure to do so renders the bid nonresponsive.

¹³ Mr. Finkelstein, while not qualified as an expert witness, was allowed to opine that, based on his forty years in the garment industry, that the unit prices bid by UniFirst for Flame Resistant Mechanic's Uniforms and Supervisor's Uniforms "as being the lowest I've seen in 40 years..." However, Mr. Finkelstein, when the asked the question whether it was possible for a company to fulfill the specifications in an IFB for the bid prices submitted by UniFirst without losing money, responded "I can't say that -- I can't answer that question."

See, Irvin H. Hahn Co., Inc., MSBCA No. 1169, 1 MICPEL ¶67 (1984); *Merjo Advert. & Sales Promotions. Co.*, MSBCA No. 1942, 5 MICPEL ¶393 (1996); *H.L. Frey Corporation*, MSBCA No. 2055, 5 MICPEL ¶435 (1998); and *Outdoor Outfits*, MSBCA No. 2588 (2007).

The Appellant has failed to meet its burden to show that UniFirst failed to submit sample cargo pants, and that the PO failed to evaluate said samples before Contract award. There is no evidence on record before the Board that demonstrates that it was UniFirst's intention not to comply with the IFB's specifications regarding cargo pants, but the evidence does show representatives of Respondent pulled a "bait and switch" after award of the Contract. The Board notes that the issue of whether the Respondent solicited bids on one basis and awarded on another in violation of the Procurement Law was not protested by Appellant, nor was it decided by the PO, and therefore is not properly before the Board on appeal. However, the Board notes that it is fundamental that an agency may not solicit quotations on one basis and make an award on another. *PDI-Sheetz Constr., Inc.*, at 10 (citing *Honeywell, Inc.*, MSBCA No. 1317, 2 MICPEL ¶148 (1987) and *Park Net, Inc.*, MSBCA No. 2123, 5 MICPEL ¶473 (1999)).

The record before us begs the troubling question of whether the Respondent's change in the specifications regarding cargo pants after award was a "cardinal change" requiring termination of the Contract in favor of a competitive re-solicitation based on the changed specifications. If so, then the next question to be considered is did the Change Order issued by the Respondent amount to a "sole source" procurement conducted in violation of the Procurement Law? *See, Ullmann & Wakefield*, MSBCA No. 2137, 5 MICPEL ¶471 (1999) at 4. Unfortunately, since Appellant did not raise this issue in its protest filed with the PO, and the PO did not consider it in issuing the Final Decision that is the subject this Appeal, these issues cannot be considered by the Board. *See, Rustler Constr., Inc.*, MSBCA No. 3075 (2018) and *Mercier's Inc.*, MSBCA No. 2629 (2008).

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 contested cases.

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 ten 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 No. 3027, Appeal of Ace Uniform Services, Inc., under Maryland Transit Administration IFB for Contract No. MTA-1459.

Dated: April 3, 2019

15/

Ruth W. Foy
Deputy Clerk