

Maryland State Board of Contract Appeals 2015 In Review

Summarized by:

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MSBCA Year in Review

The Appeal of Southern Improvement Company, Inc., MSBCA 2904 (2015) – The MSBCA explained what works and what does not work for demonstrating to a procurement officer that a contractor has the appropriate bonding for a project.

The Appeal of Intellect Corp., MSBCA 2905 (2015) – The MSBCA explains that, while a contractor may request an extension of time to submit a bid, the denial of a request for extension to submit a bid cannot be appealed.

The Appeal of McChesney Associates, Inc. 2907 (2015) – What happens when pricing is disclosed to competitors and no contract is awarded. The State can re-solicit a bid after bid-opening and where other contractors see each other's pricing so long as all contractors are treated equally.

The Appeal of Cigna Corporation, MSBCA 2910 (2015) – A contracting agency may reject all submitted bids if in the State's bid interest, even after the initial award of the bid to a contractor. Additionally, an agency cannot extend a contract after the original's contract expiration, but must submit a request for competitive bidding.

The Appeal of Tech Contracting Company, MSBCA 2912 & 2916 (2015) – The MSBCA has clarified that problems with MBE participation schedules can be remedied by a bidder within 72 hours after the bidder realizes the problem. This rule applies where the bidder learns that one of its MBE subcontractors is no longer available to do the work or was not eligible.

The Appeal of KBE Building Corporation, MSBCA 2915 (2015) – The MSBCA clarified whether a final determination may be issued by the procurement officer after consultation with a reviewing authority under COMAR 21.10.04.04C. The MSBCA held that procurement officers are authorized to issue notices of final decisions on construction projects, but must comply with statutory requirements.

The Appeal of Trinity Services Group, MSBCA 2917, 2931 & 2935 (2015) – The MSBCA provided guidance on what constitutes an "emergency procurement" under COMAR. It's not what you think and it has resulted in an investigation by the Maryland Attorney General's Office and a potential overhaul of State procurement.

The Appeal of Concrete General, MSBCA 2918 (2015) – Construction bids may be modified when the mistake and the intended correction are clearly evidenced on the face of the bid document; however, if extrinsic documentation must be referenced to correct the mistake, the bid will be deemed non-responsive.

The Appeal of Active Network, LLC, MSBCA 2920 (2015) – For bid protests in Request for Proposals and Invitations for Bid, contractor seeking to bring forth a protest must ensure that they have a reasonable possibility of a substantial chance to be awarded the project if the bid protest is successful.

The Appeal of Shirley Contracting Company, MSBCA 2932 (2015) – Is a higher priced "good" proposal better than a lower priced "good" proposal? In an RFP, a superior technical proposal can outweigh a lower price, provided that there is no "double counting" for certain aspects of the solicitation.

**MARYLAND STATE BOARD OF CONTRACT APPEALS RULES THAT THE
FAILURE TO SUPPLY AN ORIGINAL POWER OF ATTORNEY
WITH BID BOND IS NOT FATAL TO THE BID.**

In *Appeal of Southern Improvement Company, Inc.*, MSBCA 2904, the Maryland State Board of Contract Appeals considered whether the failure to supply an original Power of Attorney with a bid bond constituted a “minor irregularity,” which may be waived, or in the alternative, rose to a level of deficiency to render a bid non-responsive thereby disqualifying it from the solicitation. In this appeal, Southern Improvement Company challenged the sufficiency of the bid bond documents supplied by another interested party. This other party had used a bid bond on the form provided by the procuring agency and had correctly identified the bidder, obligee, surety, amount of the bond and the applicable contract. It was also appropriately executed by the President of the interested party and contained the raised seal of the surety. However, the Power of Attorney provided by the bonding agent as evidence of the valid execution of the bid bond by a duly authorized agent of the surety was a copy and not the original. The POA also contained a watermark stamp of the word “void,” as well as the statement “this document is not valid unless printed on gray shaded background with a red serial number in the upper right hand corner. If you have any questions concerning the authenticity of this document, call 800-475-4450.” The POA supplied with the bid was black and white copy.

Upon discovering that the POA was a copy, the procurement officer contacted the interested party to ask for the original. Southern Improvement Company filed a bid protest objecting to the eligibility of the interested party on the basis that it had failed to provide a valid bid bond. The procurement agency denied the protest stating that the provision of a copy of a POA was a “minor irregularity.”

In considering this appeal, the MSBCA highlighted those instances in which a defect in the bid bond documentation would disqualify a bidder: (1) a bid bond’s failure to reflect the State of Maryland as an obligee; (2) a bid bond that references an incorrect contract number; (3) a bid bond that does not provide the measure of protection required in the solicitation; (4) a bid bond that fails to include the penal sum of the bond; and (5) bid bond that fails to include a provision for automatic extension of the surety’s obligation for a period of time without the consent of the surety where the State has required an extension as a condition of the bond assuring the validity of a bid.

However, where an alleged defect “has no impact on the validity of the bond, it may be presumed to be a minor irregularity.” In this instance, the bond itself had contained the surety’s raised seal and complied in all other material respects. Moreover, there was no contention that the surety agent did not have actual authority to supply the bond. The MSBCA stated that “even without the power of attorney at all, the Bid Bond alone documents the enforceable obligation of the surety to the State, because the Bid Bond appears to be enforceable with or without the original Power of Attorney, the bid is responsive.” However, the MSBCA qualified this statement by indicating that it is a better practice to include the POA with the bid bond.

**MARYLAND STATE BOARD OF CONTRACT APPEALS RULES
THAT THE REFUSAL TO GRANT AN EXTENSION OF A BID DUE DATE
IS NOT A BASIS FOR A VALID PROTEST OR APPEAL**

In *Appeal of Intellect Corp.*, MSBCA 2905, the Maryland State Board of Contract Appeals found that the refusal to grant a prospective bidder's request for an extension of a bid due date deadline is not a basis for a valid protest or appeal.

In this appeal, the Maryland Transit Administration ("MTA") issued an Invitation for Bids related to a project on the Baltimore Metro Heavy Rail system. After the issuance of two addendums by the MTA, Appellant Intellect Corporation requested that the advertised due date be extended beyond the due date. The procurement officer for the MTA informed Intellect that the bid due date and time would not be extended.

As a result of the denial to extend time, Intellect did not submit a bid. In actuality, only one contractor submitted a bid for the project. Intellect subsequently filed a bid protest with MTA, which was summarily denied. An appeal was brought before the MSBCA. The MSBCA found that the decision to extend the bid deadline falls within the lawful discretion of the agency stating:

It is perfectly fine for appellant there to have requested an extension of time within which Intellect might have been permitted to complete and submit its bid, but that is a far cry from suggesting that the State must bow to such request.

Additionally, the MSBCA also noted that the appeal was filed by Intellect and not legal counsel, as required by COMAR 21.10.05.03. The failure to retain counsel for a protest was another grounds for denial of the appeal. As a practical matter, contractors in Maryland are required to retain counsel when seeking to file an appeal with the MSBCA.

MARYLAND STATE BOARD OF CONTRACT APPEALS UPHOLDS STATE'S RIGHT TO ISSUE NEW SOLICITATION AFTER BID OPENING

This appeal arose out of a solicitation for snow removal services at 14 MVA facilities across the State of Maryland. In the *Appeal of McChesney Associates, Inc. 2907* (2015), the Maryland State Board of Contract Appeals considered whether after bid opening but prior to contract award, the State may release all bidders and allow them to rebid on work not previously submitted in its initial bid. During the first round of bidding, various contractors bid on some but not all of the 14 facilities. As a result, the State received a single bid for eight of the facilities and no bids for two facilities. The State asked the contractors to rebid and to consider bidding on the facilities for which no bids were received. McChesney interpreted this new solicitation as allowing a contractor to modify its previous numbers and to bid on either of the facilities for which no other bid was received. However, it did not believe the revised solicitation allowed a contractor to rebid a facility where a competitor's numbers had been released after the bid opening. As a result, McChesney was underbid by another contractor on a facility where it had submitted the only bid.

McChesney protested stating that it was prejudiced by the State's disclosure of its bid to other contractors. McChesney's argument would have had some weight had it not revised its bid upwards on the facility for which it had previously been the single bidder. The MSBCA rejected the appeal, reasoning that since all bidders were provided an equal opportunity to rebid on all facilities, the State had acted appropriately.

MARYLAND STATE BOARD OF CONTRACT APPEALS HOLDS AGENCY MAY REJECT ALL BIDS AND RE-ADVERTISE THE SOLICITATION IF IN THE STATE'S BEST INTEREST, BUT REQUIRES COMPETITIVE BIDDING FOR EXTENSION TO EXISTING CONTRACT

In *Appeal of Cigna Corporation*, MSBCA 2910, the Maryland State Board of Contract Appeals considered two issues on appeal: 1) whether the State properly rejected all bids and re-issued solicitations because of deficiencies in the originally requested pricing information and 2) whether the State's extension of the contract to the incumbent vendor, while the bid was reissued, should have been subject to competitive bidding. The MSBCA held that the State may reject all bids during the procurement process when the rejection is in the State's best interest; however, the MSBCA found the extension of a contract, past the terms of the contract, to be impermissible under Maryland law.

In this matter, the Maryland Transit Administration ("MTA") issued three Requests for Proposals ("RFPs"), seeking administrative services for management of health care benefits. The MTA erroneously released the RFPs without the authorization of the Department of Budget and Management. Pursuant to the RFPs, Appellant Cigna Corporation and CareFirst of Maryland, Inc., the incumbent vendor, submitted proposals pursuant to the RFPs. MTA subsequently requested submission for Best and Final Offers ("BAFOs"); however, the BAFOs forms used by the MTA were simplistic compared to the nature of the proposals. Specifically, the forms failed to provide space to indicate the following: total price, any pricing information for the two options years of the contract, discount rates, and other substantive information. Despite the dearth of substantive information provided in the BAFOs, the MTA awarded the project to Cigna.

CareFirst appealed the decision to the MSCBA (MSBCA No. 2903); however, before the MSBCA heard the appeal, the MTA voluntarily rejected all bids, stating that it was in the State's best interest to reject all proposals and re-advertise. As the re-advertisement and re-bid process could not be completed before the MTA employees' health insurance lapsed, the MTA requested that a one-year extension be provided to the existing CareFirst contract, which was subsequently approved by the Board of Public Works. Cigna appealed on both issues.

The MSBCA determined that the rejection of all bids lay within the discretion of the agency and permissible, as long as the basis for the rejection of all bids is fiscally advantageous or otherwise in the State's best interest. The opinion acknowledges the late timing of the rejection, as Cigna had already been awarded the project, but found the need for greater clarity in the pricing sheets a prerequisite necessary to ensure a fair and thorough procurement process.

Conversely, the MSBCA held the MTA and Board of Public Works' approval of a one-year extension to be unlawful. The expiration of the original contract, without any options for renewal, precludes the MTA from simply agreeing to an extension. The MSBCA determined this action to undermine the entire procurement process for governmental contracts. As such, the MSBCA rendered the one-year contract extension between MTA and CareFirst null and void.

THE MSBCA CLARIFIES THE “72 HOUR RULE” FOR AMENDING MBE PARTICIPATION SCHEDULES.

In *Tech Contracting Company*, the Maryland State Board of Contract Appeals (“MSBCA”) clarified the scope of the “72 hour rule” that allows a contractor to make changes to its MBE Participation Schedule after bid submission. In this instance, the prevailing bidder, Forrester Construction, listed an MBE contractor that did not have the proper NAISC code. Tech Contracting protested claiming that the prevailing bidder could not meet the ten percent MBE requirement for the project because one of Forrester’s designated MBEs did not qualify to do the work. Forrester disagreed. One month later, the State concurred with Tech, but allowed Forrester to amend its bid. Forrester investigated the situation and four days later amended its MBE participation schedule.

Historically, State agencies had taken an overly restrictive and often harsh approach to any contractor that submitted a bid that contained any defect in its MBE forms. In response to growing criticism that the rejection of bids that contained minor defects to the MBE participation schedules had a detrimental impact on State finances, the Maryland legislature amended section 14-302 of the State Finance & Procurement Article to allow for a 72 hour period in which a bidder or offeror could notify the State that a designated MBE was no longer available or otherwise ineligible.

In this recent opinion, the MSBCA clarified that the 72 hour period begins when the bidder or offeror makes a determination that an MBE is either “unavailable or ineligible,” and not when the State or some other party makes that determination. In this appeal, however, the MSBCA went further and stated that even where the State informs a bidder that an MBE is ineligible, the bidder is not on notice to start the 72 hour period if the bidder disputes the State’s position in good faith. Thus, the three day period begins only when the bidder adopts the State’s position. The MSBCA also underscored that the 72 hour period applies to the time period for notice and not the time period for the bidder or offeror to request to amend the participation schedule.

Finally, the MSBCA offered further interpretation of the statutory language that stated “the bidder or offeror determines that a minority business enterprise identified in the minority business enterprise participation schedule has become or will become unavailable or ineligible.” According to the MSBCA, this allows a bidder to make changes in two instances. The first where an MBE contractor was once available but for some reason is no longer available, and the second where the MBE was never eligible or became ineligible. The MSBCA underscored that the “distinction between an MBE being ‘unavailable’ as compared to ‘ineligible’ is a significant one.” For example, an MBE could have graduated out of the MBE program or just gone out of business and thus becomes “unavailable.” To be “ineligible”, the MBE may have the wrong NAISC code for a project or have some other limitation such that it does not qualify as a relevant MBE for a project. Thus, in this instance, Forrester was allowed to amend its MBE participation schedule.

On the basis of these clarifications to the 72 hour rule, the MSBCA has set the groundwork to allow a contractor whose bid includes an ineligible MBE contractor to make a change within 72 hours after the time in which that contractor, for the first time, in good faith believes that the MBE contractor is not eligible. The MBE need not have ever been eligible to trigger this rule. Likewise, contractor whose bid includes and MBE contractor that has become unavailable also falls within this Rule.

**MARYLAND STATE BOARD OF CONTRACT APPEALS RULES THAT
PROCUREMENT OFFICERS, NOT REVIEWING AGENCIES, ARE AUTHORIZED
TO ISSUE NOTICES OF FINAL DECISION FOR PROJECTS**

In *Appeal of KBE Building Corporation*, MSBCA 2915, the Maryland State Board of Contract Appeals considered whether a procurement officer has the authority to issue a final determination or if the final determination must be issued by the “reviewing authority and the Office of the Attorney General”, pursuant to COMAR 21.10.04.04C.

In this appeal, the Maryland Aviation Administration (“MAA”) awarded Appellant KBE Building Corporation (“KBE”) a contract to construct the International Building Expansion of Baltimore/Washington International Thurgood Marshall Airport (“BWI”). During the course of construction, KBE filed a claim with the MAA for a 48-day extension and payment of \$146,71.00 for alleged contract acceleration. The procurement officer of MAA, after consultation with the Office of the Attorney General, denied KBE’s request, issuing a final determination on October 24, 2014.

KBE filed an appeal to the MSBCA on November 6, 2014; however, erroneously mailed the appeal to an incorrect address. On December 10, 2014, the MSBCA docketed KBE’s appeal dated December 9, 2015.

KBE argued that the procurement officer for the MAA acted unilaterally by issuing the final determination because the regulatory provision requires the procurement office to first submit the letter for review to the reviewing authority and the Office of the Attorney General. Therefore, under KBE’s argument, only another reviewing authority may issue a final determination.

The MSBCA found the issuance of a final determination by a procurement officer, after consultation with the Office of the Attorney General, routine and permissible under the regulatory requirements outlined by COMAR. Further, the MSBCA found that the appeal had been filed untimely, as it had not been filed within 30 days of the final determination. Therefore, the appeal was also denied because appellant failed to note its appeal in a timely fashion.

MARYLAND STATE BOARD OF CONTRACT APPEALS PROVIDES GUIDANCE ON “EMERGENCY” PROCUREMENTS

The Maryland State Board of Contract Appeals addressed the State's power to issue an "emergency" procurement pursuant to COMAR. *Trinity Services Group, MSBCA 2917, 2931 & 2935*. This matter arose out of the Maryland Department of Public Safety and Correctional Services (“DPSCS”) issuance of a RFP for a private vendor to provide food services to certain correctional facilities in the State of Maryland. The presumptive awardee, Crystal Enterprises, Inc., had several problems with its proposal including the failure to provide a performance bond and an exceptionally low price. Crystal had secured a letter from its bonding agent that vouched for its ability to secure a two million dollar performance bond, but did not actually supply the bond as required by the solicitation. Also, Crystal’s proposal was more than 50 million dollars less than the incumbent contractor. At the Board of Public Works hearing, State Comptroller Franchot expressed serious reservations about the low price but commented that the presence of a performance bond would provide a measure of protection for tax payers from a default. The DPSCS confirmed the existence of a performance bond even though Crystal had yet to provide one.

Crystal immediately ran into problems on the contract and because it had priced its proposal so aggressively it could not overcome those issues without incurring negative cash flow. Crystal threatened to stop work unless it received price concessions. Because a stop work would have meant the cessation of food services to the correctional facilities, DPSCS terminated the existing agreement and issued an emergency short term six month contract to Crystal that increased the contract price and obviated the need for a performance bond. It then planned to reissue the solicitation. The incumbent contractor protested.

The decision by the MSBCA primarily focused on the COMAR definition of emergency. "Emergency" is defined by COMAR 21.01.02.01B(36) as “a sudden and unexpected occurrence or condition **which agency management reasonably could not foresee** that requires an action to avoid or to mitigate serious damage to public health, safety or welfare.” (Emphasis added). The MSBCA noted that COMAR, unlike the dictionary, defined “emergency” to include a lack of foreseeability in its meaning. It noted that a hurricane can be both foreseeable and an emergency but for whatever reason, COMAR seemed to restrict the definition of emergency to only those situations that were truly unforeseen. In this instance, it was clear to all that Comptroller Franchot foresaw problems with this contract as he flagged it on the record at a BPW hearing. However, the MSBCA reasoned that no one foresaw the failure by Crystal to procure a performance bond as evidenced by DPSCS’s erroneous representation that Crystal had procured a performance bond, and thus this failure created the “emergency” as defined by COMAR. Consequently, this "emergency" procurement was upheld.

MARYLAND STATE BOARD OF CONTRACT APPEALS RULES BIDS CANNOT BE MODIFIED AFTER SUBMISSION IF EXTRINSIC DOCUMENTATION IS REQUIRED

In *Appeal of Concrete General*, MSBCA 2918, the Maryland State Board of Contract Appeals denied the appellant the opportunity to correct errors in its initially submitted bid because the requested corrections required reference to extrinsic information not included in the initial bid. As such, the bid was deemed non-responsive and ineligible to be considered for the project.

In this appeal, the State Highway Administration (“SHA”) issued Invitations for Bids to perform roadway improvements at Catoctin Mountain Highway and Monocacy Boulevard in Frederick County, Maryland. Appellant Concrete General submitted the apparent low bid; however, in lieu of using the Schedule of Prices provided by the SHA, Concrete General elected to submit its own Schedule of Prices form. Contractors are permitted to issue its own Schedule of Prices form so long as the forms emulate the Schedule of Prices form provided by the SHA and contain specific information.

Concrete General’s Schedule of Prices form, however, contained a number of errors, including a duplicate entry that resulted in incorrect item references and no reference to the last item on the Schedule of Prices – Item 5034. The next lowest bidder, Kibler Construction Co., Inc. (“Kibler”), submitted a bid protest objecting to the award of the contract to Concrete General, claiming that Concrete General’s bid was unbalanced and non-responsive. The SHA did not agree with Concrete General’s allegations, but determined that the bid was not responsive because it failed to submit a complete and accurate Schedule of Prices. Concrete General appealed the SHA’s decision to the MSBCA.

The MSBCA acknowledges that COMAR 21.05.02.12C allows a bidder to revise its initially submitted bid only when “the mistake and the intended correction are clearly evidenced on the face of the bid document.” Thus, if any information outside of the documents submitted as part of the bid is needed to revise the bid, then the bid may not be modified.

The MSBCA found the errors arising out of the duplicate listing could not be corrected with reference to information not contained in the initial bid, thereby precluding the bid from being modified. As such, the bid was deemed non-responsive and the appeal was denied.

MARYLAND STATE BOARD OF CONTRACT APPEALS DISMISSES APPEAL WHERE CONTRACTOR HAD NO REASONABLE POSSIBILITY OF BEING AWARDED THE REQUEST FOR PROPOSAL

In *Appeal of Active Network, LLC*, MSBCA 2920, the Maryland State Board of Contract Appeals considered whether the appellant had standing to bring forth a bid protest. Specifically, in response to a Request for Proposal, appellant ranked 7th out of 7th for both price and technical expertise, but claimed it would be entitled to the contract award. The MSBCA held that the appellant did not have standing, as appellant did not have a reasonable possibility of a substantial chance to be awarded the project.

The Maryland Department of Human Resources (“DHR”) sought Request for Proposals (“RFPs”) for operation of a statewide full service call center with interactive voice response capabilities and a customer relations management system. Seven proposals were submitted, including incumbent provider and appellant Active Network, LLC. The DHR awarded the contract to ICF Incorporated, who ranked first in technical expertise and third in total cost. Despite ranking last in both categories, Active Network brought forth an appeal, claiming it should have been ranked first in technical expertise.

The DHR sought to dismiss the case, relying on the principle that a bidder which would not be next in line for an award could not pursue a bid protest. While this standard may easily be applied to cases involving Invitations for Bid (“IFBs”), where the agency awards the project to the lowest responsive bidder, the analysis related to standing for RFPs involves additional considerations. For RFPs, the evaluation requires a thorough and in-depth analysis to determine the best value to the State, which includes costs, but also additional criteria. As such, in IFBs, the lowest bidder does not automatically receive the contract.

Appellant’s argument centered on its technical expertise and the alleged erroneous ranking applied by the DHR. Appellant, however, even if it persuasively argued that it could somehow elevate itself above ICF Incorporated and the five other bidders in the technical expertise category, could not address the fact that its costs were the highest amongst all of the bidders. On cost alone, the Appellant’s bid protest failed. The MSBCA acknowledged that a bidder with price and technical expertise closer to ICF Incorporated would have had standing to prevent an outright dismissal of the appeal, which was not the situation in this matter.

From a practical perspective, contractors seeking to bring forth a bid protest must ensure that they have proper standing to bring forth the claim. For IFBs, they must be the next lowest responsive bidder. For RFPs, they must meet all of the criteria set forth for bid award, which includes total cost, but also includes additional factors considered by the awarding agency.

LOWER PRICE OR BETTER TECHNICAL PROPOSAL? MSBCA UPHOLDS AWARD TO HIGHER PRICED CONTRACTOR

The appeal of Shirley Contracting Company, MSBCA 2932 (2015) arose out of an RFP issued by the State Highway Administration for intersection improvements in Prince George's County. The RFP made clear that this was a "best value" procurement that would consider both price and certain evaluation factors set forth in the RFP. The RFP also emphasized that the technical evaluation factors would weigh heavier than the financial considerations in SHA's evaluation. After submission of the RFPs, SHA employed three teams to evaluate each of the three technical factors: (1) project schedule and project management; (2) project technical elements and approach and (3) environmental approach. These three factors were each rated differently. "Project schedule and project management" was considered "significant." The "project technical elements and approach" was considered "critical," and the "environmental approach" was considered "good."

After review of the proposals, Shirley Contracting Company had the lowest price but had scored slightly lower than another contractor, Concrete General Inc., on "project schedule and project management" as well as on "environmental approach." Thus, overall, CGI had received a "Good" technical rating and Shirley received a "Good -" technical rating. Thus, Shirley had a lower price, but a worse technical rating.

Shirley's appeal essentially argued that its lower price made up for the difference in technical rating. This argument was a non-starter given that the RFP was clear that technical review outweighed the financial review. The MSBCA did give some attention to the possibility that CGI may have been given "double credit" for its earlier completion date as SHA had included a liquidated damages formula that reduced the financial advantage of Shirley by assessing per day LDs to its overall price for the difference between CGI's completion date and Shirley's completion date to account for "the daily loss of public benefit." The rationale for this argument was that the technical evaluation also included consideration of project schedule, and thus the inclusion of a reduction in financial benefit for later completion amounted to consideration of the project schedule twice. The MSBCA state that "if a deliberate estimate of the precise full valuation of that benefit was already included in SHA's calculation of adjusted prices used in its financial comparison of the proposals, it would have been improper for SHA in the technical evaluation to give further advantage to CGI for the same factor." However, during the hearing, the procurement officer testified that the LD amount was "not intended to include the entire value of earlier project completion." Thus, the MSBCA concluded that there was no double counting and the appeal was denied.