

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

FORT MYER CONSTRUCTION CORP.)	
)	CAB No. P-452
Under IFB No. 93-0115-AA-2-0-KA)	

For the Protester: Mr. Thomas M. Mero, *pro se*. For the Government: Howard S. Schwartz and Warren J. Nash, Assistants Corporation Counsel. For Southern Maryland Restoration, Inc., Intervenor: Leonard A. Sacks, Esquire.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judges Lorilyn E. Simkins and Phyllis W. Jackson, concurring.

OPINION

Fort Myer Construction Corporation has filed a protest of Department of Public Works Invitation No. 93-0115-AA-2-0-KA, alleging that the low bid of Southern Maryland Restoration, Inc. ("SMR"), is nonresponsive because of a defect in SMR's bid bond, namely, that SMR's corporate secretary failed to execute a "Certificate as to Corporation" included on the bid bond. The District has moved to dismiss the protest on the ground that Fort Myer initially misfiled its protest with the contracting officer and by the time the protest was refiled with the Board, the statutory 10-working-day filing deadline had passed. On the merits, the District argues that the bid bond of SMR is not defective notwithstanding the unexecuted certificate because SMR's surety properly executed the bid bond thereby legally obligating itself to pay should SMR fail to fulfill its obligations. With regard to the jurisdictional issue of timely filing of a protest, we hold that the protester's misfiling of the protest with the contracting officer within the statutory time period was the functional equivalent of filing the protest with the Board, and we overrule our prior decisions holding to the contrary. On the merits, we agree with the District that the bid bond was not defective. Accordingly, we deny the protest.

FACTS

On February 20, 1996, the Department of Public Works ("DPW") issued IFB No. 93-0115-AA-2-0-KA in the open market for the FY-94 1st Federal Aid Resurfacing Contract. (Agency Report ("AR") at 1). The solicitation contains a "Bid Bond for Construction" Form No. DC 2640-5. The instructions on page "c" of the bid bond form set forth the requirements for execution of the bid bond. Instruction Nos. 2 and 4 provide in relevant part:

2. Corporation's name should appear exactly as it does on Corporate Seal and inserted in the space designated "Principal" on the face of this form. If practicable, bond should be signed by President or Vice President; if signed by other official, evidence of authority must be furnished. Such

evidence should be in the form of an Extract of Minutes of a Meeting of the Board of Directors, or Extract of Bylaws, certified by the Corporate Secretary, or Assistance [sic] Secretary and Corporate Seal affixed thereto. CERTIFICATE AS TO CORPORATION must be executed by Corporate Secretary, or Assistant Secretary.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall sign full first name, middle initial and last name opposite the word "seal"; two witnesses must be supplied, and their addresses, under the word "attest"

Paragraph 10 of the solicitation's Special Provisions, entitled "PROTESTS", states:

Any aggrieved person may protest this solicitation, award or proposed contract award. The protest shall be filed, in writing, with the Contract Appeals Board within ten (10) calendar days after the basis of the protest is known. The address of the Contract Appeals Board is 717 14th Street, N.W., Suite 430, Washington, D.C. 20005. The aggrieved person shall also mail a copy of the protest to the Contracting Officer.

Paragraph 10 incorrectly states that protests must be filed within 10 *calendar* days. It should read 10 *working* days. D.C. Code § 1-1189.8(b).

DPW opened bids on April 5, 1996, and determined that SMR submitted the low bid of \$777,245.50, followed by Fort Myer as next low bidder. (AR at 2). The contract has not been awarded.

SMR's bid is signed by its vice president, Mr. Stephen W. Fye, and is accompanied by a corporate attestation. The bid form references an enclosed bid guaranty in the amount of 5 percent of the total amount bid. The bid bond attached to SMR's bid is dated March 25, 1996. The bid bond's "Surety" block is properly completed and contains the signature of an authorized representative of the surety. The bid bond references the correct IFB by number, contains SMR's name and address as principal, and is signed by the same SMR vice president who signed the bid, including a corporate attestation and the corporate seal. The block on the bid bond labeled "Certificate as to Corporation" is complete with typewritten information, except that the line calling for the signature of the corporate secretary is blank.

On April 8, 1996, Fort Myer submitted a 5-page letter addressed to DPW's contracting officer, entitled "PROTEST", arguing that SMR's bid was nonresponsive on account of a defective bid bond. In an April 17, 1996 letter, received by Fort Myer on April 23, 1996, DPW's contracting officer acknowledged receipt of the April 8 protest letter and advised Fort Myer that "[a]ll protests are to be filed with the District of Columbia Contract Appeals Board

... ." Fort Myer refiled the identical protest with the Board on April 24, 1996.¹

On May 21, 1996, the District filed a Motion to Dismiss the protest as untimely. The District's motion to dismiss included as exhibits the solicitation (Exhibit 1), the bid tabulation (Exhibit 2), and Fort Myer's April 8, 1996 protest letter to the DPW contracting officer (Exhibit 3). Fort Myer submitted an opposition to the motion to dismiss on May 30, 1996. On June 14, 1996, we ordered the District to file an Agency Report to address the merits of the protest. On June 25, 1996, the District filed its Agency Report. Additional exhibits attached to the Agency Report included SMR's bid (Exhibit 4), SMR's bid bond (Exhibit 5), a blank bid bond Form No. DC 2640-5 (Exhibit 6). On July 10, 1996, Fort Myer filed a response to the Agency Report. SMR as intervenor has filed comments in support of the District's motion to dismiss and the Agency Report.

DISCUSSION

I. Jurisdiction

We first address the District's motion to dismiss because it raises the threshold question of Board jurisdiction. The Board's primary jurisdiction-granting provision of the Procurement Practices Act, D.C. Code § 1-1189.3 (1992), states with regard to protest jurisdiction:

The Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo:

- (1) Any protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award of a contract.

Section 1-1189.8(b) of the D.C. Code requires that a person aggrieved by a solicitation or award "shall file a protest with the Board within 10 working days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based." The 10-day filing requirement is a prerequisite to Board jurisdiction and cannot be waived. *Consolidated Maintenance Supply, Inc.*, CAB No. P-308, Oct. 2, 1992, 40 D.C. Reg. 4568, 4569.

The District correctly states that in a number of cases we have dismissed protests as untimely, holding that misfiling a protest with the contracting officer does not constitute timely filing with the Board. *E.g.*, *Xerox Corp.*, CAB No. P-125, Feb. 15, 1991, 38 D.C. Reg. 3234, 3235; *D.H. Kim Enterprises, Inc.*, CAB No. P-293, Dec. 12, 1991, 39 D.C. Reg. 4365, 4366; *J.G. Robinson Heating & Air Conditioning*, CAB No. P-337, Oct. 8, 1992, 40 D.C. Reg. 4572, 4573; *M&T Electrical Contractors, Inc.*, CAB No. P-367, Aug. 10, 1993, 41 D.C. Reg. 3537. In addition, our rules provide that protests "shall be filed with the Board" and that "[f]iling

¹ The letter is redated April 23, 1996, and contains an introductory sentence referring to its April 8 protest letter and the response from DPW's contracting officer.

occurs when the protest is received by the Board." Board Rules 301.1 and 301.3, 36 D.C. Reg. 2710. Nonetheless, for the reasons discussed below, we conclude that a protest filed with the contracting officer within the statutory 10-day time period is functionally equivalent to filing with the Board. To the extent that our prior decisions have held otherwise, we overrule those holdings.

We start with the principle that courts and boards should decide cases, wherever possible, on the merits rather than on procedural technicalities. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988) ("the requirements of the rules of procedure should be liberally construed and . . . 'mere technicalities' should not stand in the way of consideration of a case on its merits"); *Anderson v. District of Columbia*, 72 F.3d 166, 168 (D.C. Cir. 1995). At the same time, the Board's jurisdictional scope is limited to that conferred by statute. The question is whether the Council of the District of Columbia intended -- by stating in sections 1-1189.3(1) and 1-1189.8(b) that protests be "addressed to" and "filed with" the Board -- to exclude our treating an otherwise proper protest timely filed with the contracting officer as tantamount to filing with the Board. We believe the better interpretation is that the Council did not intend to foreclose our treating such a protest as timely filed with the Board for purposes of jurisdiction. As a statutory rule of construction, the Procurement Practices Act "shall be liberally construed and applied to promote its underlying purposes and policies." D.C. Code § 1-1181.1(a). Treating an otherwise proper protest directed to the contracting officer within the 10-working-day statutory period as functionally equivalent to filing with the Board, and resolving the protest on its merits, promotes fair and equitable treatment of all participants while safeguarding and maintaining a procurement system of quality and integrity.

Our interpretation neither minimizes nor defeats the very clear legislative purpose for the 10-working-day filing requirement. The Council intended to require prompt filing of protests so that the Board could "promptly decide" protests and avoid any undue disruption of District agency procurements. Treating a protest filed with the contracting officer as tantamount to filing with the Board for purposes of timeliness will not prevent the Board from meeting its obligation to resolve protests expeditiously. We can hardly imagine a situation where the contracting officer, upon receiving what is obviously a protest, would be unable to furnish the protest to the Board within a day of agency receipt. Moreover, our treatment of a protest misfiled with the contracting officer will not cause prejudice to the District. The Board's rules require the Board promptly to docket and forward an acknowledgement of the protest to the contracting agency and its legal counsel. Board Rules 303.1-303.3. The contracting agency is responsible for preparing and submitting the Agency Report within 25 days of receipt of the Board's acknowledgement. Thus, in the case of a protest misfiled with the contracting officer, the agency still would have 25 days from the date of receiving the Board's acknowledgement to file the Agency Report. Using actual notice of the protest as the measure, the contracting officer has more time to file the Agency Report where the protester misfiles than where it initially files only at the Board. Even in a case where the protester is successful on the merits before the Board, any prejudice caused by a brief delay arising from the protester's misfiling, through no fault of the agency in forwarding the protest to the Board, will work against the protester, not the agency, when the Board fashions a remedy. See D.C. Code § 1-1189.8(e); Board Rules 314.1-314.3.

There are two lines of precedent which support our reasoning, one concerning the

specificity requirements for notices of appeal in federal appellate practice and the other concerning notices of appeal filed with federal boards of contract appeals from contracting officers' final decisions on claims.

Rule 3(c) of the Federal Rules of Appellate Procedure² specifies the required content of a notice of appeal to federal appellate courts. In construing the "specificity requirement" of Rule 3(c), which is jurisdictional, courts have held that improperly designating the wrong appellate tribunal in the notice of appeal filed in the lower tribunal does not by itself constitute a jurisdictional defect requiring dismissal. *E.g.*, *Anderson v. District of Columbia*, 72 F.3d at 168; *United States v. Musa*, 946 F.2d 1297, 1301 (7th Cir. 1991). Central to the specificity requirements for notices of appeal under Rule 3(c) is the principle of fair notice to the opposing party and to the court. *Torres*, 487 U.S. at 318; *Anderson*, 72 F.3d at 168; *Musa*, 946 F.2d at 1301. In *Anderson* and *Musa*, the appellant's naming the wrong appellate court in his notice of appeal did not render the notice jurisdictionally defective because the notice unambiguously informed the appellee and the district court what judgment or order appellant was appealing and the court of appeals was the only court to which an appeal could be taken. *Accord*, *McLemore v. Landry*, 898 F.2d 996, 999 (5th Cir.), *cert. denied*, 498 U.S. 966 (1990) (appellant's failure to designate any circuit in the notice of appeal not a bar to jurisdiction because the Fifth Circuit was the only court to which an appeal could be taken).

Section 7 of the Contract Disputes Act of 1978, 41 U.S.C. § 606 (1994),³ specifies the requirements for a contractor to file an appeal to a federal board of contract appeals from a final decision of an agency contracting officer. In construing the 90-day statutory filing requirement, also jurisdictional, the federal boards have routinely treated an otherwise proper appeal misdirected to the contracting officer within the required time period as tantamount to filing an appeal with the board. *E.g.*, *Yankee Telecommunication Labs., Inc.*, ASBCA No. 25240, 82-1 BCA ¶ 15,515; *Orbas & Assocs.*, ASBCA No. 30201, 85-1 BCA ¶ 17,915 at 89,720; *Inventory*

² Rule 3(c) provides:

A notice of appeal shall specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. . . . A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. . . .

³ 41 U.S.C. § 606 provides:

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

Section 607 does not supply any additional pertinent requirements concerning the actual filing of a notice of appeal.

Accounting Service, ENG BCA No. 5797, 93-1 BCA ¶ 25,230 at 125,671; *Contraves-Goerz Corp.*, ASBCA No. 26317, 83-1 BCA ¶ 16,309; *Dawson Constr. Co.*, EBCA No. 155-2-81, 81-2 BCA ¶ 15,162. A contracting officer's failure to forward the notice of appeal to the board does not defeat the board's jurisdiction. *Yankee Telecommunications*, 82-1 BCA at 76,962-63; *Inventory Accounting Service*, 93-1 BCA at 125,671.

Based on the circumstances presented in the record, we conclude that Fort Myer's filing of its protest with the contracting officer was functionally equivalent to filing the protest with this Board and that we should not dismiss the protest as untimely. Fort Myer's letter was unambiguously a protest from the standpoint of form and content. It was filed the first working day after bids were opened and it challenged the responsiveness of the apparent low bid. When Fort Myer delivered its protest to the contracting officer, it certainly provided fair notice to the appellee, the District of Columbia, and to the agency through the person of the contracting officer. From the record, there can be no ambiguity that the protester intended to file a protest. The Procurement Practices Act vests only this Board with jurisdiction over protests from agencies subordinate to the Mayor. See D.C. Code § 1-1181.4(c). Thus, there is no issue as to whether the protester intended an agency protest or a Board protest. Cf. *The Miklin Group, Inc.*, GSBGA No. 9322-P, Jan. 20, 1988, 88-1 BCA ¶ 20,516 at 103,712-13.

Because we deem Fort Myer's protest filing with the contracting officer within the 10-working-day time period functionally equivalent to filing with the Board, the fact that the protester did not receive notice from the contracting officer of the misfiling until one day after expiration of the 10-working-day period will not defeat Board jurisdiction. In the future, when the contracting officer receives a misdirected protest, the contracting officer shall immediately forward the protest to the Board.

II. Merits

On the merits of Fort Myer's protest, we agree with the District that SMR's bid is not rendered nonresponsive simply because SMR's corporate secretary failed to execute a "Certificate as to Corporation" on the bid bond.

Bid bond requirements are a material part of the IFB, and a contracting officer cannot waive a failure to comply with a bond provision. *Design For Health, Inc.*, 69 Comp. Gen. 712, 714 (1990), 90-2 CPD ¶ 213. The sufficiency of a bid bond depends on whether the surety is clearly bound by its terms and whether the government will receive the full and complete protection it contemplated in the event the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. *Webb Builders Hardware, Inc.*, B-185985, May 27, 1976, 76-1 CPD ¶ 348; *Martina Enterprises*, B-250766, Oct. 21, 1992, 92-2 CPD ¶ 266. Among other things, the terms of the bid bond must clearly establish the liability of the surety at the time of bid opening. *Design for Health*, 69 Comp. Gen. at 714. When the surety's liability is not clear, the bond is defective. This rule is prompted by the law of suretyship that no one incurs a liability to pay the debts of another unless he expressly agrees to be bound. *Martina Enterprises*, 92-2 CPD ¶ 266; *G&C Enterprises, Inc.*, B-233537, Feb. 15, 1989, 89-1 CPD ¶ 163.

Here, SMR's vice president properly executed the bid, he signed the bid bond, the bond properly identified the IFB to which it was applicable, the appropriate penal amount was indicated, and the bond was properly signed by the surety. Under these circumstances, the failure of SMR's corporate secretary to execute the certificate as to corporation could not relieve the surety of its obligation under the bond. This Board and the Comptroller General have held that the surety's obligation, and thus the validity of the bid bond, were not affected even where the principal did not sign the bond at all. *E.g., Norair Engineering Corp.*, CAB No. P-302, Oct. 21, 1992, 40 D.C. Reg. 4636; *Southern Maryland Restoration, Inc.*, CAB No. P-241, Aug. 7, 1991, 39 D.C. Reg. 4268; *Webb Builders Hardware*, 76-1 CPD ¶ 348; *General Ship & Engine Works, Inc.*, B-184831, 55 Comp. Gen. 422, 426 (1975), 75-2 CPD ¶ 269. In *Webb Builders*, the protester challenged another bidder's failure to execute a "certificate as to corporation" on the same bid bond Form No. DC 2640-5 used in the present solicitation. The Comptroller General effectively rejected the challenge on the ground that a defective signature was immaterial because a bid bond unsigned by the bidder does not render the bond invalid if the bond is otherwise in order. In our *Norair Engineering* and *Southern Maryland Restoration* decisions, we also rejected the argument that a bid bond was defective simply because the corporate secretary failed to sign the bid bond.⁴

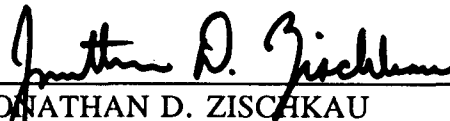
CONCLUSION

Because SMR presented a bid bond properly executed by the surety, and the bond references the IFB and identifies the correct penal amount, the fact that the corporate secretary failed to execute the "certificate as to corporation" is a minor informality. The District will receive the full and complete protection it contemplated in the event SMR fails to execute the required contract documents and deliver the required performance and payment bonds.

Accordingly, the protest is denied.

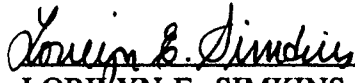
SO ORDERED.

DATE: July 23, 1996



JONATHAN D. ZISCHKAU
Administrative Judge

⁴ We find no merit in Fort Myer's attempt to avoid the force of these cases by arguing that the certificate as to corporation was necessary in light of a typographical error in the portion of the printed bid form where the bidder agrees to furnish executed contract documents and performance and payment bonds with good and sufficient "survey" -- rather than "surety." This error does not vitiate the surety's obligation. The very next clause states that if the bidder fails to satisfy these obligations, "required bid guaranty shall be applied as specified in Instructions to Bidders." Several lines down on the bid form, the bidder also expressly incorporates its "bid guaranty consisting of 5% of the total amount bid" in the form of a bid bond.

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



PHYLLIS W. JACKSON
Administrative Judge

Government of the District of Columbia
CONTRACT APPEALS BOARD
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DATE: July 23, 1996

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SUBJECT: CAB No. P-452, Protest of Fort Myer Construction Corporation

Attached is a copy of the Board's opinion in the above-referenced matter.


MIA J. HOUSE
Clerical Assistant (Typist)

Attachment

cc: Leonard A. Sacks, Esq.
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