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Unbalanced = Unresponsive

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In denying two appeals brought by Brawner Builder's, Inc. ("Brawner") against the State Highway Administration ("SHA"), the Maryland Board of Contract Appeals (the "Board") upheld a decision by SHA that an unbalanced bid submitted by a contractor was unresponsive.

The project in question involved bridge deck overlay and painting work for two bridges in Howard County, Maryland. Of the eight bids received, Brawner submitted the low bid, however, SHA deemed it to be materially unbalanced. This was due to the inclusion in Brawner's bid of a charge of \$1.00 or less on 47 of 51 items contained in the Schedule of Prices.

After bid opening, SHA analyzed the bid quantities included in the Invitation For Bid and determined that certain quantities were in error. When the bid quantities were recalculated and the bidders' unit prices were applied, Brawner's bid was not the lowest. SHA decided to reject all of the bids and re-bid the project using the correct quantities. Brawner protested the decision on the basis that a rejection of all bids was not in the fiscal interest of Maryland.

On re-bid, Brawner was the low bidder, but, again, SHA deemed its bid unbalanced and rejected it. This time, Brawner's bid contained two unit prices that were out of proportion when compared to all other bidders' prices. Brawner again protested the decision, this time reasoning that the State's obligation to award the project to the lowest bidder prohibited rejection of its bid for being unbalanced.

SHA issued a final decision that denied both of Brawner's protests. Brawner then appealed both decisions. In denying both of Brawner's appeals, the Board declared that the express statutory authority of the State to reject all bids and cancel or reissue a solicitation is extremely broad. As to the first appeal dealing with the rejection of all bids, the Board stated that Brawner did not assert any factual basis to support its claim, nor did it make any allegation of arbitrariness, capriciousness

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or unlawfulness by the State. Thus, the Board held that Brawner did not state sufficient grounds to sustain an appeal.

With respect to the second appeal, Brawner argued that 1) its bid was not unbalanced, and, even if it was, 2) SHA did not have the power to reject unbalanced bids in view of the Maryland law requiring award to the lowest responsive and responsible bidder. In denying this appeal, the Board relied on General Provision 2.17 which states:

- a. Any bid may be rejected in whole or in part when it is in the best interest of the State to do so.
- b. Reasons for rejection of a bid may include but are not limited to: ... (3) The bidder submitting the bid is determined to be non-responsible. A determination of nonresponsibility may be made for, but is not limited to, any of the following reasons: ... (b) The unit prices contained in a bid are unbalanced.

The Board held that SHA has the authority to reject an unbalanced bid and to suggest otherwise, i.e. that the State must accept the lowest bid regardless of whether the bid is responsive, is preposterous.