



## Maryland Procurement ALERT || June 2024

### Confusing or not, those who compete must fill out the form correctly

*The Maryland Procurement ALERT is now featured in [The Daily Record](#). This [article](#) ran on June 13, 2024. It is archived on [LinkedIn](#).*

Recently, I was in a hearing when a judge lamented over the confusing nature of State provided forms. "It is a problem that we are used to" the judge professed. Those bidding for government contracts experience this problem and must be aware.

The Maryland State Board of Contract Appeals recently sent a warning to bidders for State contracts to be careful in filling out and submitting bid bond forms, though the form is provided by the State. In [First Fruits Excavating, Inc.](#) the Department of General Services rejected First Fruits' bid for roadway maintenance and repairs as non-responsive because the bid bond "failed to include a project number and a brief description of the project on its bid bond" and, therefore, "the [bid] bond is defective and not enforceable by the State against the surety."

Maryland law requires bid security on procurement contracts for construction if the bid price will likely exceed \$100,000. [State Finance & Procurement \("SF&P"\) § 13-207\(a\)](#). The purpose of such security, which is often in the form of a bond, is to protect the State against failure of the contract awardee to execute the contract. In such an event, the

State will enforce the bond to cover the added cost of awarding the contract to the second lowest bidder. It is thus important that there are no questions about enforceability of a bid bond.

For this reason, the law instructs procurement officers to “reject a bid or proposal that is not accompanied by proper security.” [SF&P § 13-208\(a\)](#). There is another reason why procurement officers should reject bids that are accompanied by bid bonds that are arguably unenforceable. Sometimes, low bidders experience “buyer’s remorse” after seeing how much lower their bids are as compared to the next lowest bid. There have been cases where the low bidder has attempted to seize upon an irregularity in the bid bond to have their low bid thrown out.

To promote uniformity, the State created a “preferred form” for bid bonds, which is set forth in [COMAR 21.06.07.09D](#). The form has blanks at the top to identify the bidder and boxes for execution by the bidder and bonding agent. In the middle of the form is a somewhat innocuous parenthetical that instructs: “(Identify project by number and brief description).”

First Fruit apparently missed the parenthetical instruction. It submitted a bid bond form, using the “preferred form,” but it failed to include the project number and brief description of the project. Due to this omission, the Board held that the procurement officer did not arbitrarily, capriciously, unreasonably or otherwise unlawfully reject First Fruit’s bid.

The law and regulations give procurement officers limited discretion to determine if a bid bond is adequate. The procurement officer may look to factors such as “(1) a correct identification of the bid opening date, (2) an accurate description of the type of services sought (e.g., a project description and a solicitation number), and (3) a designation of a maximum penal sum in an amount which correlates with the amount of the bid.” [FMC Technologies, Inc., MSBCA 2312 at 5 \(2003\)](#). Without the information requested in the

preferred form's parenthetical, First Fruit could not satisfy any of these factors.

The Board acknowledged that the preferred form may be confusing. It suggested an amendment to COMAR. But the Board held that the burden was on the bidder to ensure that its submissions satisfy the State's requirements. Though the result may be seen as harsh and may in the short-term cost the state more money, it is important that bid bonds are correct and enforceable so that the State is protected and achieves the benefit of open, fair competition.

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