

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of)
Brawner Builders, Inc.)
)
Under State Highway) Docket MSBCA Nos. 2770 & 2771
Administration)
Contract Nos. H04385180)
and H04385180R)

APPEARANCE FOR APPELLANT: Thomas A. Baker, Esq.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Scot D. Morrell
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

These two (2) related bid protests are before the Maryland State Board of Contract Appeals (Board) for ruling on the State's Motions for Summary Disposition and Dismissal, which must be granted due to appellant's failure to assert a claim upon which relief may be afforded.

Findings of Fact

1. On or about September 7, 2010, the Maryland Department of Transportation (DOT), through the State Highway Administration (SHA), issued a certain Invitation for Bids (IFB) known as Contract No. H04385180 for which SHA sought bridge deck overlay and painting work for its Bridge Nos. 1308603 and 1308604, part of Maryland Route 175 over Route 29 in Howard County, Maryland. (Exhibit 1 of Agency Report.)

2. A total of eight (8) bids were received in response to the IFB, including one from appellant Brawner Builders, Inc. (Brawner), which submitted the low bid of \$1,089,070, one from Concrete General, Inc. (CGI), which submitted the second lowest bid at \$1,336,416.00, and six (6) other bids ranging in price from \$1,414,791 to \$1,884,307. (Ex. 3.)
3. Brawner's substantially lower bid price included a charge of \$1.00 or less on 47 of the 51 items set forth in the Schedule of Prices, with the vast bulk of its bid price concentrated on charges offered for the four (4) other remaining elements of the work solicited, an offer which SHA deemed to be materially unbalanced. (Ex. 2.)
4. Brawner bid \$50,000 or more on three (3) of the 51 items set forth in the Schedule of Prices, while CGI bid \$50,000 or more on five (5) of them, but CGI's bid was not deemed to be materially unbalanced while Brawner's was. (Ex. 2.)
5. Brawner submitted a unit price of \$275 for Item No. 1010 in the IFB and a unit price of \$320 for Item No. 1019, such amounts being, respectively, about 15 and 20 times the average unit price submitted by the other seven (7) competing bidders for those particular items. (Ex. 2.)
6. Following bid opening, SHA's Office of Structures analyzed the bid quantities set forth in the IFB and determined that they were in error. (Ex. 4.)
7. Specifically, the IFB stated 980 linear feet as the quantity for Item No. 1010, reset precast temporary concrete barrier needed for maintenance of traffic, and 1,800 linear feet as the quantity for Item No. 1019, precast temporary 32" F-shape concrete barrier needed for additional traffic control, when the correct distances of needed barrier structures are actually 1,700 linear feet for the former barrier type and 2,300 linear feet for the latter. (Ex. 4.)
8. If calculated using the corrected distances of requisite barrier structures based on the pricing it submitted for Item

- Nos. 1010 and 1019, the cost of Brawner's bid is not the low bid. (Ex. 4.)
9. Specifically, recalculating bids using the corrected distances of requisite barrier structures, Brawner's bid increases by \$585,500 to a total of \$1,674,570, a figure slightly higher than the SHA engineers' estimate of \$1,648,250, while CGI's bid increases by only \$22,180 to a total of \$1,358,596, rendering CGI and not Brawner the low bidder. (Ex. 4.)
 10. SHA determined on November 24, 2010 to reject all bids, and re-bid the project using corrected quantity specifications incorporated in revised Contract No. H04385180R, a decision which Brawner protested on December 6, 2010, alleging "that the decision...to reject all bids is not in the fiscal interest of the State of Maryland." (Ex. 5 and 6.)
 11. Bids submitted in response to the revised IFB were opened February 1, 2011 and Brawner was again initially identified as the apparent low bidder, offering a bid totaling \$1,249,195; and CGI was again ranked as the second lowest bidder, offering a bid totaling \$1,289,551, with three (3) other bidders also submitting bids ranging from \$1,327,025 to \$1,734,525; but SHA deemed Brawner's bid again to be unbalanced and therefore on March 15, 2011 rejected it. (Ex. C and F.)
 12. Brawner's offered price for Item No. 4002 of the revised contract, namely, latex modified concrete overlay, is \$3,735 per cubic yard, an amount about twice the cost offered by competing bidders; and the amount of required removal and replacement of old bridge decking surface material is recognized in the industry as being highly variable and under considerable influence by the contractor's equipment operator engaged on site in the hydro-milling procedure, with SHA's experience in estimating prior quantities of needed overlay routinely varying from initial estimate by considerable amounts.

13. Brawner's bid on the revised IFB also offered a charge of \$275 per linear foot for moving road barriers in anticipation of modified traffic flow required for bridge painting work, compared to costs of \$2 to \$10 per linear foot offered by competing bidders for the same work, causing SHA procurement officials reasonably to fear the possibility of a substantial cost overrun or contract dispute in the event that extra barrier relocation may become warranted on the job due to the contractor's scheduling or conduct of stages of its work.
14. Brawner filed a second protest to SHA on March 18, 2011, claiming essentially that as a matter of law the State's obligation to make award to the lowest bidder prohibits the exercise of authority to reject Brawner's bid for being unbalanced, and also asserting by factual allegation that "Brawner's bid is not imbalanced." (Ex. F.)
15. SHA's procurement officer on the project issued a final decision on April 11, 2011 denying Brawner's protests of both of the underlying contract determinations, affirming the decision first to reject all bids and re-bid the project using corrected estimates of required quantities of material, and later to award the contract to CGI. (Ex. 8.)
16. On April 19, 2011, Brawner filed two (2) Notices of Appeal to the Board, neither of which set forth any statement of grounds or factual or legal basis for its appeals or otherwise identifying any issues pertaining thereto, other than stating "Brawner hereby gives a notice of its appeal from the decision which is attached." (Ex. 9 and 10.)
17. On May 17, 2011, SHA filed its Agency Report in both of these appeals and at the same time filed a Motion for Summary Disposition in each case, subsequent to which Brawner submitted Oppositions and SHA followed with Rebuttal, but neither party requested a hearing and SHA's June 23, 2011 Rebuttal notes that it is currently deferring contract award pending Board decision and seeking expedited consideration of

its Motions because of the short summer timeframe available to perform the required bridge repair work, which includes temperature sensitive use of latex modified concrete.

Decision

The pertinent regulation setting forth the State's broad right to reject all bids is Section 21.06.02.02(C)(1) of the Code of Maryland Regulations (COMAR), which states as follows:

After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest.

The foregoing regulation is consistent with statutory authority set forth in the State Finance & Procurement Article (SF&P) of the Maryland Annotated Code which similarly provides:

If, with the approval of the Board [of Public Works], a unit [of state government] determines that it is fiscally advantageous or otherwise in the best interests of the State, the unit may: (1) cancel an invitation for bids... or (2) reject all bids or proposals. (SF&P §13-206.)

The foregoing legal authority is also incorporated into the IFB as General Provision (GP) Section 2.18(a), which states:

All bids or proposals may be rejected in whole or in part when the procurement officer, with the approval of the agency head or his designee, determines that this action is fiscally advantageous or otherwise in the State's best interest.

SHA's November 24, 2010 written determination to reject all bids in order to re-issue the IFB in corrected fashion is stated to be "in the best interest of the State of Maryland" and based upon the foregoing GP Sec. 2.18.

The express authority of the State to reject all bids and cancel or reissue a solicitation is extremely broad. Indeed, it has been said that such a decision may not be overturned unless it

is found to be "fraudulent or so arbitrary as to constitute a breach of trust." STG International, Inc., MSBCA 2755 (2011); Automated Health Systems, Inc., MSBCA 1263, 2 MSBCA ¶113 (1985). Such a determination may be legally justified based merely on a fairly founded conclusion that such action is "in the State's best interest." This is not to imply that a solicitation may be lawfully rescinded without cause, because bid cancellation should be avoided, especially after bid opening results in disclosure of competitors' pricing among those seeking a state contract. But the burden borne by an entity challenging the decision to reject all bids is very high. The Board's analysis, therefore, turns first to the basis upon which Brawner here implicitly claims that SHA's determination to re-bid this project is not "in the State's best interest."

The requisite contents of the initial bid protest to the agency are set forth in COMAR 21.10.02.04 and "include as a minimum...a statement of reasons for the protest." Here counsel for Brawner gave timely notice to SHA of its first bid protest on December 6, 2010, describing the reason for its objections as follows:

The basis of this protest is that the decision of the Maryland State Highway Administration to reject all bids is not in the fiscal interest of the State of Maryland. The work is needed, the project is fully funded in the amount of the bid, the Administration's engineer's estimate of the cost is higher than Brawner's bid and Brawner is a responsive and responsible bidder.

The required elements of an appeal to the Board are similar and are established by COMAR 21.10.07.02(c), namely, "a statement of the grounds of appeal." This is not an onerous obligation.

Brawner's notice of appeal to the Board in MSBCA 2770 contains no statement of grounds of appeal, but does include an attachment of its December 6, 2010 administrative protest to SHA, for which grounds are reflected as recited above. The sole basis of Brawner's first appeal to the Board, therefore, is Brawner's

assertion that the decision to reject all bids and reissue a corrected IFB is "not in the fiscal interest of the State of Maryland." Beyond the foregoing, appellant asserts no further factual basis or averment of any sort to support this claim. There simply is no allegation that the State was arbitrary, capricious, unlawful or otherwise improper in its actions and decision-making; and it is not adequate to state a successful appeal for an appellant to claim implicitly only that they disagree. As a result, the Board has no hesitation dismissing Brawner's first appeal docketed as MSBCA 2770. Appellant does not come close to stating sufficient grounds to sustain that appeal, particularly in light of the very high burden of proof required for an appellant to overturn the State's decision to reject all bids for the purpose of revising and thereafter reissuing a solicitation, which was done. There is not a hint in Brawner's allegations of fact or law that SHA was fraudulent or that its well-founded determination constitutes a breach of trust. That appeal therefore is dismissed for failure to state a claim upon which relief may be granted.

By contrast, the circumstances of Brawner's second appeal are somewhat different and more difficult to resolve than the first. Unfortunately, Brawner's notice of appeal in MSBCA 2771 also makes no allegation whatsoever of the grounds for its appeal, though attached to its notice of appeal is a copy of its March 18, 2011 bid protest to SHA which states as follows:

The basis of this protest is that applicable Maryland law requires the State Highway administration [sic] to award the contract to the lowest responsible and responsive bidder and Brawner is the low bidder. Neither COMAR 21.06.02.03 nor G.P [sic] 2.17 give the SHA the right to superimpose an edict over that law that an unbalanced bid is not responsive or responsible and, in fact, Brawner's bid is not imbalanced.

By correspondence to the Board dated May 24, 2011, Brawner seeks to amend and expand the grounds of its appeal by noting "that Brawner's bid was not unbalanced and that SHA does not have the power to reject unbalanced bids in view of State law requiring

award to the lowest responsive and responsible holder." This claim filed with the Board on May 26, 2011, more than a month after the filing of Brawner's second notice of appeal, apparently seeks to enlarge, embellish and clarify the allegations that should have been included in its notice of appeal on April 19, 2011 by arguing as a matter of fact that its bid is not unbalanced and as a matter of law that SHA is without the discretion or authority to disqualify a materially unbalanced bid.

Brawner seeks also at this late date to assert that variations in estimated quantities (VEQ) set forth in contract specifications are immaterial unless the estimate is off by more than 25% pursuant to COMAR 21.07.02.03. The latter argument must be disregarded by the Board because this basis of appeal was never raised in timely fashion for consideration by SHA, so it cannot now be properly brought before the Board. This Board reviews the decision-making of agency procurement officials to ascertain whether they are lawful, or by contrast, arbitrary or capricious. The Board does not evaluate agency procurement decisions *ab initio* without predicate consideration by the agency itself or timely notice of those issues which an appellant seeks to claim as a basis for appeal. Williamsport Cabinetry, LLC, MSBCA 2664, 2673 (2009); NumbersOnly-NuSource JV, MSBCA 2305, 5 MSBCA ¶521 (2002).

Appellant's Opposition to the State's Motion for Summary Disposition and Dismissal in MSBCA 2771 also addresses more fully the two points which should have been stated expressly in its notice of appeal to the Board but were at least referenced in its bid protest to SHA, namely, whether SHA reasonably concluded that Brawner's second bid was materially unbalanced and whether the State has the legal authority to reject a bid based on a determination that a bid is unbalanced. GP Section 2.17 prohibiting the submission of unbalanced bids is dispositive in this regard. It states as follows:

(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 nonresponsible. 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.

Thus, contrary to appellant's claim, SHA most certainly does have the right to reject an unbalanced bid. It is preposterous to suggest that the State must accept the lowest bid regardless of whether the bid is nonresponsible, and by extension, in the event that the determination of nonresponsibility is based on the finding that the bid is unbalanced. This analysis renders moot the first of appellant's five (5) points set forth in its Opposition to the State's Motion for Summary Disposition and Dismissal.

The last remaining question for the Board to address is the closest call for which this appeal compels an answer, and that is whether the Brawner bid on the second IFB is in fact unbalanced. In this regard appellant's contentions remain at best vague and unfocused. As just indicated, of the four (4) remaining of the total of five (5) points addressed in its Opposition, appellant's final argument pertaining to quantity estimate preemption by virtue of the COMAR provision on VEQ must be rejected because it is not timely raised. Brawner's arguments numbered its third and fourth points also pertain to objections over SHA's quantity estimates, which are not timely raised or pertinent to this appeal. Brawner's second opposition argument is simply that it committed no error or deficiency by submitting a unit or lump sum price of under \$2 for a great many of the items set forth on SHA's Schedule of Prices, 47 out of 51, to be exact.

In this regard appellant is correct, but evidently misunderstands the nature of SHA's critical questioning of Brawner's bid price itemization. It is not merely that the Brawner bid is very low on 47 out of 51 categories; it is that appellant submitted a bid that is also very high on the other four (4).

That is what renders its bid unbalanced, namely, submitting a price of twice as much as its competitors for the cost of latex modified concrete overlay, which may reasonably be expected not only to constitute a large portion of the final total charge to the State, but also to be subject to the potential of post-award increases in quantity needs at the contractor's sole control. What also renders the Brawner bid unbalanced is its attempt to charge a hundred times more for the cost of moving concrete barriers in comparison to its competitors, where again, the contractor rather than the State may seek to determine how many times barriers must be moved.

Moreover, in addition to failing to state any grounds for its second appeal as required by COMAR, Brawner's subsequent pleading also fails even to attempt to rebut the thorough and well-founded findings, conclusions, and argument of SHA counsel and the State's bridge engineering experts in SHA's uncontested analysis which is admitted into evidence as a part of the Agency Report. One may imagine that SHA could have employed a different pricing structure in this IFB to avoid the possibility that any contractor could artificially increase its ultimate price to the State by performing the required work in a fashion that would maximize certain overpriced job items not precisely or accurately reflected by the estimates included in the solicitation. But that is not to suggest that a contractor may submit a deliberately unbalanced bid and thereafter compel the State to accept it as the presumed low bid while recognizing in advance the likelihood or at least the possibility of severe cost overruns or contract dispute.

To sum, with respect to Brawner's first appeal, MSBCA 2770, the Board most assuredly cannot fairly conclude that the decision to reject all bids and reissue the IFB was fraudulent or a breach of public trust. That is the high standard required for that action to be reversed, and appellant plainly fails to state sufficient legal or factual grounds to support reversal. With respect to the second appeal, MSBCA 2771, the Board fully appreciates that the standard is much lower, making it far easier

for appellant to prevail in overturning the State's decision to reject only a single bid and thereby justify awarding a contract to an entity that may not be the first apparent low bidder. But SHA does have that authority and exercised it here for good cause when it determined Brawner's bid to be unbalanced and therefore nonresponsible. In addition, appellant in the second appeal fails to comply with minimum COMAR requirements in noting an appeal without stating any grounds at all. As a result, both MSBCA 2770 and 2771 must be DISMISSED.

For these reasons, the SHA determination to reject all bids and reissue this solicitation is affirmed and MSBCA 2770 must therefore be DISMISSED and the SHA determination to reject appellant's bid on the revised contract is also sustained so that MSBCA 2771 must also be DISMISSED.

Wherefore it is Ordered this _____ day of July, 2011 that the above-captioned appeals be and hereby are DISMISSED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
Board Member

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 cases.

Annotated Code of 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 10 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 decisions in MSBCA 2770 and 2771 appeals of Brawner Builders, Inc. under SHA Contract Nos. H04385180 and H04385180R.

Dated:

Michael L. Carnahan
Deputy Clerk