

Docket No. 2114 Date of Decision: 8/7/00

Appeal Type: Bid Protest Contract Claim

Procurement Identification: Under University of Maryland
Baltimore County Request to Bid No. BC19635B Purchase Order
No. 602073-B

Appellant/Respondent: Adler Services Group, Inc.
University of Maryland Baltimore County

Decision Summary:

Contract Interpretation - Patent Ambiguity - In order for Government's interpretation not to prevail, a bidder has an obligation to bring a patent ambiguity to the attention of the procurement officer prior to bid opening.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of ADLER SERVICES)
GROUP, INC.)
)
Under University of Maryland) Docket No. MSBCA 2114
Baltimore County)
Request to Bid No. BC19635-B)
Purchase Order No. 602073-B)

APPEARANCE FOR APPELLANT: Robert Scarlett, Esq.
Scarlett & Croll P.A.
Baltimore, MD

APPEARANCE FOR RESPONDENT: Jennifer Forrence
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Appellant appealed the denial of its claim by Respondent's Procurement Officer dated November 23, 1998 to this Board on January 19, 1999.¹

Findings of Fact

1. During 1997, Appellant bid upon and was awarded and performed on an air conditioning/heating contract (the "Contract") issued by the Respondent.
2. At issue in this appeal is Respondent's interpretation of the Contract and, specifically, Respondent's determination that Appellant had to supply 15 additional McQuay type air conditioning units as maintenance stock.

¹ While there is a substantial issue concerning whether the Appellant's claim was timely filed, the Board has determined that Appellant's failure to make a pre-bid inquiry about the number of units required to be supplied under the Contract requires denial of its claim.

3. Bid opening occurred on Friday March 21, 1997.
4. Prior to bid opening, Respondent issued Addendum No. 2 dated March 7, 1997, wherein certain specifications were amended to provide in relevant part as follows:

DETAILED SPECIFICATIONS

- I. Scope
 - A. The contractor shall provide all labor, material, equipment, insurance, and services for the removal, supply, and installation of 89 wall-mounted heating/air conditioning units in Chesapeake and Patapsco Resident Halls at the University of Maryland Baltimore County Campus, Catonsville, Maryland 21250.
 - B. The contractor shall supply an additional (10) heating and cooling chassis and (5) additional slope enclosures for UMBC reserve replacement stock.
 - C. All work must be performed in a neat, workmanlike manner to the satisfaction of UMBC.

INTENT OF THE PROJECT

- I. Intent

* * *

- E. To provide (15) new McQuay type "K" or approved Equal Electric heater Section and Cooling Chassis to serve as maintenance stock for existing McQuay cabinet type (non sloped). Units shall have an SEER of 11.0 or greater.
5. Appellant supplied and installed 89 wall-mounted heating/air conditioning units. The dispute is over whether the specifications required the successful bidder to supply an additional 15 new McQuay type "K" or approved equal units in addition to the 89 wall-mounted heating/air conditioning units. Stated another way, were the McQuay units designated as "maintenance stock" in subsection E of the INTENT OF THE PROJECT section the same as the

request for 10 additional heating and cooling chassis and 5 additional slope enclosures for reserve replacement stock as set forth in the DETAILED SPECIFICATIONS?

6. Appellant asserts that the McQuay reference in subsection E of the INTENT OF THE PROJECT section was a quality rather than a quantity description and should be interpreted as requiring that 15 units of a total of 89 units be the high quality McQuay type or equal.
7. Respondent admits that the addition of the word "additional" in front of the word "McQuay" would have clarified that 15 McQuay type units in addition to the 89 units was intended. Nevertheless, Respondent asserts that the specifications as written alert a reasonable contractor that a total of 104 units were to be bid on, 15 of which were to be McQuay type or equal.
8. Appellant provided the 15 McQuay type units (with a lesser SEER rating due to other restrictions in the contract) and filed a claim related thereto with the Respondent on September 9, 1998.
9. The claim was denied by the Respondent's Procurement Officer by letter dated November 23, 1998. The basis for the denial was that Appellant was required by COMAR 21.10.02.03A to have filed a pre-bid protest objecting to any requirement to provide the 15 units in order for its claim to be considered.
10. On January 19, 1999, Appellant appealed to this Board.

Decision

The Respondent's Procurement Officer denied Appellant's claim based on Appellant's failure to file a pre-bid protest pursuant to COMAR 21.10.02.03A. The instant dispute, however, involves a dispute over a contract that has been entered into and is not a contract formation dispute or bid protest. Nevertheless, the failure of the Appellant to make pre-bid inquiry concerning the number of heating/air

conditioning units that were required to be supplied under the Contract specifications requires denial of the claim.

In a public procurement, pre-bid inquiry by a contractor concerning the meaning of the specifications it may bid upon is required before any ambiguity in the specifications that gives rise to a dispute may be construed against the government as drafter of the specifications, unless the ambiguity is latent or hidden. See Jackson R. Bell, Inc., MSBCA 1851, 5 MSBCA ¶392(1996) and cases cited therein at pp. 8-10. See also The Driggs Corporation, MSBCA 1235, 2 MSBCA ¶141(1987) and cases cited therein at p. 15.

The first issue that must be addressed therefore is whether the specifications here are ambiguous. This depends on whether there are two reasonable interpretations of the Contract concerning the number of units to be supplied. We believe that there are. The Appellant's interpretation of the McQuay provision is that it is a quality specification requiring 15 of the total of 89 units to be of a high quality. This interpretation is not unreasonable. The Respondent's interpretation is that the McQuay provision, while such provision could have been made clearer by the insertion of the word "additional" before the word McQuay, alerts a reasonable bidder that the Contract requires the installation of 89 units and the provision of an additional 15 McQuay units as a reserve stock. This interpretation is also not unreasonable. Thus, there are two reasonable interpretations concerning the meaning or intent of the specifications relative to the number of units to be supplied. Because there are two reasonable interpretations, we are confronted with a material ambiguity arising out of the specifications regarding the number of units to be supplied. Is it 89 or 104?

The next question the Board must ask is whether this ambiguity is latent, and thus requiring no pre-bid inquiry, or patent, and thus

requiring Appellant to have brought the ambiguity to the attention of the Respondent for clarification prior to bid opening in order to be entitled to its requested equitable adjustment. A patent ambiguity is glaring and obvious from the face of the document and exists where there are obvious discrepancies or conflicting provisions in the contract documents. Contractors are not expected to be clairvoyant. They may innocently construe in their favor a hidden ambiguity equally susceptible to another construction. They are, however, obligated to bring to the State's attention prior to bid opening obvious or patent discrepancies or errors or conflicting provisions in the contract specifications in order to prevail in a subsequent dispute arising out of such error, discrepancy or conflict. Jackson R. Bell, supra.

The ambiguity herein is obvious; i.e. patent. Are the 15 McQuay units referenced in the INTENT OF PROJECT in addition to the 89 units referenced in the DETAILED SPECIFICATIONS or are the 15 McQuay units included in the 89 units? Because the ambiguity is obvious, the failure to seek pre-bid clarification is fatal to Appellant's claim, requiring its denial.

Accordingly, it is hereby Ordered this day of that the appeal is denied.

Dated:

Robert B. Harrison III
Board Member

I concur:

Candida S. Steel
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 decision in MSBCA 2114, appeal of Adler Services Group, Inc. under University of Maryland Baltimore County Request to Bid No. BC19635-B, Purchase Order No. 602073-B.

Dated:

Mary F. Priscilla
Recorder